- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint and Request for Agency Action of Bear Hollow Restoration, LLC against Leon H. Saunders; Landmark Plaza Associates; Parley's Creek, Ltd.; Parley's Lane, Ltd.; Parley's Park; Stuart A. Knowles; Trilogy Limited, L.P.; Trilogy Asset Management, Inc.; Land and Water Resources, Inc.; Lawrence R. Knowles Irrevocable Trust: Leon H. Saunders, Stuart A. Knowles and Trilogy Limited, L.P. d/b/a SK Resources, a Utah General Partnership and/or Joint Venture, Summit Water Distribution Company, a Utah Corporation.	DOCKET NO. 09-015-01 ORDER ON MOTIONS TO DISMISS

ISSUED: February 4, 2010

SUMMARY

This matter is before the Commission on two Motions to Dismiss applicant Bear Hollow Restoration, LLC's (Bear Hollow) Complaint and Request for Agency Action. The Commission has reviewed the moving and responding papers. It also held oral argument on the matter on December 8, 2009. John Flitton argued Summit's Motion and Brent Hatch argued the individual shareholders' Motion. Craig Smith argued Bear Hollows opposition to Summit's Motion, and Daniel McDonald argued Bear Hollows' opposition to the shareholders' Motion. For the reasons below, the Commission grants the Motions to Dismiss.

By The Commission:

There are two Motions to Dismiss before the Commission. One made by respondents Leon H. Saunders; Landmark Plaza Associates; Parley's Creek, Ltd.; Parley's Lane, Ltd.; Parley's Park; Stuart A. Knowles; Trilogy Limited, L.P.; Trilogy Asset Management, Inc.; Land and Water Resources, Inc.; Lawrence R. Knowles Irrevocable Trust: Leon H. Saunders, Stuart A. Knowles and Trilogy Limited, L.P. d/b/a SK Resources (collectively Shareholders) and

a second made by respondent Summit Water Distribution Company (Summit). The shareholders and Summit made their Motion pursuant to Rule 12(b)(1) ("lack of jurisdiction over the subject matter") and 12(b)(2) ("lack of jurisdiction over the person") of the Utah Rules of Civil Procedure. *Ut.R.Civ.P.* 12(b).

When considering the Motion to Dismiss and in ascertaining the facts needed to establish jurisdiction, the Commission must "'accept the factual allegations in the complaint as true and consider all reasonable inference to be drawn from those facts in a light most favorable to the plaintiff.'" *Ho v. Jim's Enters., 2001 UT 63, ¶ 6* (quoting *Prows v. State,* 822 P.2d 764,766 (Utah 1991)). However the sufficiency of the facts "must be determined by the facts pleaded rather than the conclusions stated." *Franco v. Church of Jesus Christ of Latter-day Saints,* 2001 UT 25, ¶ 26. *see Cf. Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009) (in a civil rights case, where Rule 8 of the Federal Rules of Civil Procedure was at issue, holding that courts are "'not bound to accept as true a legal conclusion couched as a factual allegation'")(internal citations omitted), *and Jackson v. Alexander,*465 F.2d 1389, 1390 (10th Cir. 1972) (in a matter involving fraud and Rule 9, holding that mere legal conclusions need not be accepted as true)[1].

The Commission's Jurisdiction

Utah Code Ann. § 54-4-1 states in relevant part that the Commission:

> is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction . . . .

[1] *See Lund v. Brown,* 2000 UT 75, ¶ 26 (holding that interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are "substantially similar" to the federal rules.)

A public utility "includes every water corporation . . . where the service is performed for, or the commodity delivered to, the public generally . . . ." *U.C.A. §* 54-2-1(16)(a). 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, ..." *U.C.A. §* 54-2-1(29). Water system

> includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, appointment, apportionment, or measurement of water for power, fire protection, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use.

U.C.A. § 54-2-1(30)(a). Water system "does not include private irrigation companies engaged in distributing water only to their stockholders." *U.C.A. §* 54-2-1(30)(b).

"The PSC has no inherent regulatory powers [and]. . . . 'any reasonable doubt of the existence of any power must be resolved against the exercise thereof.'" *Williams v. Public Serv. Comm'n.*, 754 P.2d 41, 50 (Utah 1988) (internal citations omitted).

The Shareholders' Motion

The shareholders moved to dismiss the Complaint filed with the Commission. The shareholders argued the Commission lacked jurisdiction over them, as they were not a "public utility" but merely held shares in an entity which Bear Hollow alleged was a public utility. The shareholders also argued that even if they individually owned or operated a water system, such operation was not for "the public generally."

The shareholders claim that Bear Hollow alleges the Commission has jurisdiction because the shareholders hold Class A shared in Summit. The shareholders argue that while they might have an interest *in Summit as a corporation*, they have no interest in or control over *the specific assets* of the corporation (i.e. the water system), and cite to *Dansie v. City of Herriman* 2006 UT 23, for support. The shareholders argue that mere interest in a water corporation is not enough to convey jurisdiction to the Commission.

Bear Hollow argues that Summit's reliance on "general corporate law is irrelevant." *Memo. in Opp. to Shareholders' Motion*, p.2. fn.4. It cites to *Salt Lake City Corp. v. Cahoon & Maxfield Irrigation Co.*, 879 P.2d 248, 251 (Utah 1994), for the proposition that stock in a water company "is really a certificate showing an undivided part ownership in a certain water supply . . . ." It then concludes that because Summit's Articles of Incorporation give shareholders "a proportionate share but specific interest in the corporation's domestic and culinary water", that then gives shareholders "an ownership interest in [Summit's] water system"—i.e. its assets. *Id.*

Regarding the shareholders, Bear Hollow asks, in part, the following relief of the Commission:

> 134. Based upon the foregoing, Bear Hollow respectfully requests that the Commission commence a Commission inquiry as to whether all the other Respondents, including, but not limited to, Saunders, Knowles, the Saunders and Knowles Entities, and SK Resources should be regulated as a public utility or qualify for exemption from Commission regulation pursuant to Utah Administrative Rule R746-331-1.
>
> 135. Bear Hollow requests an order from the Commission finding that the other Respondents, particularly SK Resources, are public utilities subject to Commission regulation because Respondents—particularly Saunders, Knowles, and SK

> Resources—are providing culinary water to consumers but none of the Respondents is operating as a non-profit corporation, in good standing with the Division of Corporations.

Bear Hollow Complaint and Request for Agency Action (Complaint), ¶¶ 134-135.

Bear Hollow's claims that the shareholders are subject to the Commission's jurisdiction are based, in part, on the following allegations:

- Leon Saunders is Summit's "largest Class A shareholder, its President, and a member of its board of directors, *Complaint* at ¶ 3;
- Landmark Plaza Associates is owned or controlled by Saunders and is a Class A shareholder of Summit, *Id.* at ¶ 4;
- Parley's Creek, Ltd. is owned or controlled by Saunders and is a Class A shareholder of Summit, *Id.* at ¶ 5;
- Parley's Lane is owned or controlled by Saunders and is a Class A shareholder of Summit, *Id.* at ¶ 6;
- Parley's Park is owned or controlled by Saunders and is a Class A shareholder of Summit, *Id.* at ¶ 7;
- Stuart Knowles is a "Class A shareholder and director of Summit and is an officer and or owns a controlling interest in Trilogy Limited, *Id.* at ¶ 9;
- Trilogy Limited is owned or controlled by Knowles, a Class A shareholder of Summit, *Id.* at ¶ 10;
- Trilogy Asset Management is owned or controlled by Knowles. It is the general partner of Trilogy Limited, *Id.* at ¶ 11;

- Land and Water Resources, Inc. is a Class A shareholder of Summit, owned or controlled by Knowles, and merged with Trilogy Limited in 2007, *Id.* at ¶ 12;
- Lawrence R. Knowles Irrevocable Trust is a Class A shareholder of Summit and controlled or managed by Knowles, *Id.* at ¶ 13.

A review of the allegations in the complaint show that Bear Hollow contends the Commission has jurisdiction to commence an investigation and ultimately issue an order finding that the shareholders are public utilities, because they own shares in Summit, which Bear Hollow claims is a public utility.

However, Bear Hollow's *jurisdictional* allegations regarding the shareholders as a "public utility", "water corporation," or "water system", are *legal conclusions* which the Commission is not required to accept as true for purposes of determining these Motions. *See Franco,* 2001 UT 25 at ¶ 26, *Ashcroft*, 129 S.Ct. at 1950, *and Jackson*, 465 F.2d at 1390. Even reviewing the allegations cited at the hearing (¶¶ 16, 18, 21, 22, 39, 40, 41, 44, *see Transcript of Hearing,* pp. 55-57) there is no *factual allegation* that any of them, individually or collectively, is a water company serving the public or that any—*individually or collectively*, own or control a water system serving the public. Even assuming the conclusions are true, they allege *only that the shareholders have shares in Summit*, which in turn is allegedly a "public utility", "water corporation," or "water system". "'Ordinarily a corporation is regarded as a separate and distinct legal entity from its stockholders. This is true whether the corporation has many stockholders or only one.'" *DeGrazio v. Legal Title Co.*, 2006 UT App 183, *1 (quoting *Colman v. Colman*, 743 P.2d 782 (Utah Ct. App. 1987)). The Court in *Dansie v. City of Herriman*, 2006 UT 23 (which

both parties cited), dealt with a similar situation. There, the Court clarified that the Herriman water company's articles of incorporation entitled shareholders "to use Company water but gave them no ownership interest in Company assets"—that "shareholders are promised equal participation not in the ownership, but rather in the *use* of Company assets." *Dansie*, 2006 UT 23, ¶¶ 2, 8 (emphasis in original). While the shareholders might have an interest in Summit as a corporation, that does not, by itself, give them an interest or control over specific assets . In fact as Bear Hollow has itself alleged "Class A development shares represent a proportionate but specific interest in the corporations' *domestic and culinary water*, including the contributed source site, source, and source capacity, *but no interest whatsoever in the corporation's water distribution works*, e.g. water diversion facilities, pipeline, water storage facilities, appurtenant works, etc. . . ." *Complaint*, ¶ 77 (emphasis added). The shareholders' mere interest in Summit is not enough to convey jurisdiction over them to the Commission, either to commence an investigation or to enter an order asserting jurisdiction sufficient to regulate them as public utilities.

Bear Hollow argues that it "does not assert that the Commission has jurisdiction over the Sanders/Knowles Respondents merely because they own shares in [Summit]." *Memo. in Opp. to Shareholders' Motion*, p. 3. Bear Hollow claims the Commission has jurisdiction because of a separate reason: "the Complaint clearly establishes that the Saunders/Knowles Respondents are named parties to this proceeding based on their ***control*** of [Summit], which thereby qualifies them as a 'water corporation' pursuant to Section 54-2-1." *Memo. in Opp. to Shareholders' Motion*, p. 3 (emphasis in original). Bear Hollow points to other allegations in its

Complaint to show that the shareholders "own or control" Summit." *Id.* For example, Bear Hollow alleges: "[Summit] is a non-profit in form only. In substance, Summit and [the Saunders/Knowles] Respondents operate a vast, for-profit enterprise ***controlled*** and orchestrated by Saunders and Knowles and/or the Saunders Entities and Knowles Entities." *Id.* at ¶ 25 (emphasis in original); together, Saunders and Knowles own and/or control 80.1% of all Class A shares and 51.9% of all outstanding shares", *Id.* at ¶ 26; [Summit] ... issued at least 2,819 more Class A shares to Saunders and Knowles and/or the Saunders and Knowles so that Saunders and Knowles and Knowles Entities could, once again, manipulate and dominate [Summit]" *Id.* at ¶ 44. Because "ordinarily a corporation is regarded as a separate and distinct legal entity from its stockholders," *DeGrazio*, 2006 UT App 183 at *1, Bear Hollow must establish that the shareholders, especially Saunders and Knowles, "control", "own", and "manipulate and dominate" Summit, i.e. establish a claim of alter ego[2,3] for the Commission to consider investigating them as a potential public utility and consider asserting jurisdiction over them. However, "the conditions under which the corporate entity may be disregarded [under the alter ego doctrine] vary . . . as the doctrine is essentially an equitable one and for that reason is particularly within the province of the *trial court*." *Shaw v. Bailey-McCune Co.*, 355 P.2d 321, 322 (Utah 1960) (emphasis added). The Commission, however, is not a court of equity, *see In*

[2] At the hearing, Bear Hollow's counsel stated: "Essentially what we're saying there is that they're an alter ego; they manipulate, dominate, and control the company . . . . That's basic corporate law, and that's a theory that's never been alleged . . . in this forum."

[3] *See Smith v. Grand Canyon Expeditions Co.*, 2003 UT 57, ¶ 36 (defining the alter ego theory as one where the corporate form is disregarded "when there is 'such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist.'" *internal citations omitted*).

the Matter of the Complaint of Union Telephone Co. v. Qwest Corporation, 2005 Utah PUC LEXIS 255, *3 (stating that "this Commission does not possess equitable powers."), and cannot grant the primary relief sought by Bear Hollow, which is to obtain regulation of the shareholders.

Relative to the exercise of its jurisdiction to regulate public utilities and the provision of water utility service, and in determining whether an entity should be exempt from Commission regulation, the Commission does consider "ownership and control of assets" and "ownership and voting control of the entity", *Utah Admin. Code.* R.746-331-1(B)(1)-(2). But the Commission looks at "control" affecting the reasonableness of price and service, and from the perspective of a water consumer. Issues of price and quality of service rendered to a water consumer are areas within Commission jurisdiction and which the Commission may remedy.

A review of the underlying nature of Bear Hollow's claims, however, show that Bear Hollow's claims regarding the shareholder's "control" of Summit is used to lead the Commission to intercede in issues involving corporate governance, shareholder disputes, contractual disputes, business torts, etc. Issues such as these (although they may have merit) which do not involve the provision of service affecting consumer interests, or other areas typically under Commission jurisdiction, are not within the Commission's jurisdiction to remedy. The Commission concludes, that Bear Hollow's substantive claims are outside the Commission's jurisdiction to remedy.

The parties should understand that the Commission's decision does not make a determination as to whether any or some of the shareholders do or do not "own, control, manipulate or dominate" Summit, i.e. whether Summit is the alter ego of some or all of the

shareholders. Nor does it make any finding as to underlying claims raised by Bear Hollow. It only determines the Commission is not the proper forum to remedy the substantive issues Bear Hollows raises in its Complaint, as those are properly addressed in a trial court.

Summit's Motion

Summit water also asked the Complaint be dismissed, arguing the Commission lacks subject matter jurisdiction and personal jurisdiction over Summit as no new facts been presented, because Summit does not provide water to the general public, and because Summit qualified for an exemption in any case, and any new investigation should be declined.

Bear Hollow argues that Summit is subject to Commission jurisdiction because it does serve the public generally, it markets its services to the general public, is not operating as a true non-profit, and changed circumstances merit a new investigation into Summit.

Some of the factual allegations regarding Summit deal with its status as a non-profit water corporation. Bear Hollow claims that although Summit is "organized and registered under the laws of Utah as a non-profit corporation", *Complaint,* ¶ 2, "it is a non-profit in form only" and "operates a vast, for-profit enterprise . . . ." *Id.* at ¶ 25. Additionally, Bear Hollow alleges that there are materially changed circumstances and/or newly discovered evidence involving alleged lack of control of assets, and alleged changes in share distribution that require renewed Commission investigation and, ultimately, regulation.

For purposes of this Motion, assuming as true the allegations that Summit is a "non-profit in form only" and allegations the changes in share distribution disrupt the commonality of interest requirement, the allegations must still show that Summit serves the

public generally. Service to the public is discussed in a line of opinions cited by the parties, e.g. *Garkane, Nelson,* etc. For purposes of this Order, however, the Commission finds the following language from *Garkane* useful: "If the business or concern is not public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission. . . ." *Garkane Power Co., Inc. v. Public Service Commission,* 100 P.2d 571, 572 (Utah 1940). "It is only by the presence of such factor or element that the commission has power or authority to regulate or control such business. Eliminating it, its power and jurisdiction are gone." *State ex rel Public Utilities Comm'n v. Nelson,* 238 P. 237 (Utah 1925). A review of the Complaint shows that although Bear Hollow makes several conclusory legal allegations, alleging Summit is serving the public, there is no factual allegation that Summit provides services directly to anyone other than shareholders.[4] For example, Paragraph 16 and 18 allege simply that Summit is a "public utility" and a "water corporation" and that the Commission has jurisdiction over Summit. Paragraph 21 does state that Summit "has provided or attempted to provide and fulfill the essential public use and purpose of providing water and water service for . . . uses in western Summit County, Utah." *Complaint,* at ¶ 21. The Commission is seemingly required to accept this factual allegation as true. A review of the remainder of the Complaint, however, reveals that this a legal conclusion. The thrust of the allegations in the Complaint is that Summit provides water "in western Summit County", by "selling their Class A shares . . . ." *See e.g. Complaint,*

[4] Bear Hollow makes several factual allegations regarding Summit's alleged service to the public in its responses to the Motions to Dismiss. However, those allegations are made outside of the pleadings, not in the Complaint. The Commission deals with those allegations below.

¶¶ 26-39, 41, 45, 59, 73, etc. There is no allegation that Summit delivers its water directly to non-shareholders, or any allegations that it directly serves non-shareholders. In fact, paragraph 26 of the Complaint points to Exhibit A in setting forth its allegation regarding ownership of shares. That list, however, is titled "Shareholder List." Absent any allegation that would factually allege that Summit serves those who are not shareholders, the Commission cannot assert jurisdiction—even for an investigation, and must dismiss.

Bear Hollow made several factual allegations outside of the pleadings arguing for Commission jurisdiction. First, Bear Hollow claimed that Summit provided water to "public facilities, including the Park City School District and the U.S. Post Office" *Memo in Opp. to Summit Water's Motion*, p.4., and that it "provides water service to apartment complexes . . . which offer[] apartments for rent to the general public in Park City, Utah, as well as time-share resorts . . . ." *Id.* It stated that consequently, "any member of the public visiting the public facilities serviced by [Summit] will receive the water services provided by [Summit], regardless of their lack of shares in [Summit]." *Id.* However, the term "pleading", as defined in our Rules of Civil Procedure, does not encompass a motion under Rule 12 nor a response to a Motion. *See Ut.R,Civ.P.* 7(a), (b)(1). Therefore those allegations cannot be properly considered as part of the Complaint's allegations.

Even if the Commission were to consider the allegations in the Memorandum, however, they would not be enough to require the Commission to deny the Motions and commence an investigation. The basis for Bear Hollow's claims of public service by Summit as cited above are based on the shareholder list attached to the Complaint as Exhibit A. The

shareholder list reveals the School District, Post Office, apartment complexes, and times shares mentioned show the entities receive their water as just that— shareholders, not as general members of the public. The Commission does not agree that because such shareholders in turn deliver water to general members of the public—i.e. customers, patrons, tenants, etc., Summit can then be considered a public utility, or that such allegations show it has established service to the public generally. None of these contentions allege that anyone other than shareholders directly receive service from Summit.

Second, Bear Hollow also claims another reason for the Commission to regulate Summit is because it cannot "reserve the power to approve or reject any application for membership in the Company." *Memo in Opp. to Summit Water's Motion,* p.3. Although Summit might not have the ability to control to whom a shareholder sells its interest, Summit does retain the power to reject anyone that is not willing to meet the requirements imposed on shareholders. As pointed out by Bear Hollow, Summit's "Bylaws provide that [Summit] must transfer the share of stock to the purchaser *so long as the purchaser* agrees to comply with [Summit's] articles and bylaws, pays a small transfer fee and resumption of use fee, and all past assessments have been paid." *Id.* p.3-4, fn.4. Even if the requirements are minimal, so long as Summit serves only its shareholders, it is not serving the public generally. *See Garkane,* 100 P.2d at 573 (holding that it does not matter that membership is easy to obtain "provided the arrangement is a bona fide cooperative or private service organization and is not a device prepared and operated to evade or circumvent the law.")

Third, Bear Hollow also claims Summit is subject to Commission jurisdiction because it markets its services to the general public and because "in some areas of Summit County served by [Summit], like Jeremy Ranch, [Summit] is the only water service provider." *Memo in Opp. to Summit Water's Motion,* p.4. The Commission does not believe these factors warrant Commission investigation in this matter at this time. The Court in *Garkane,* in delineating between "public use" and "private use", commented on the then-Commission's argument for jurisdiction over Garkane. The Commission argued that Garkane was a public utility in part because "membership in Garkane is easy to obtain and that actually the Corporation *solicits membership* and has apparently *accepted thus far all* who paid their fee and agreed to pay the monthly minimum." *Id.* at 573 (emphasis added). The Court stated that "this [did] not . . . change the character of the service to be rendered." *Id.* "So long as the cooperative serves only its owner-members and so long as it has the right to select those who become members, ordinarily it matters not that 5 or 1000 people are members or *that a few or all the people in a given area* are accorded membership . . . ." *Id.* Even if Summit markets its services, and even if it is the only provider in some areas it serves, there is no allegation that Summit serves anyone other than shareholders. It does not serve the public generally and absent that "essential feature [i.e. that it is] open to the indefinite public", *Garkane,* 100 P.2d at 573, the Commission does not have jurisdiction to commence an inquiry or otherwise assert jurisdiction at this time.

The allegations that Summit does not in fact operate as a non-profit corporation, raises some valid questions.[5] However, determining if Summit has violated the laws governing non-profit water corporations, despite Bear Hollow's own allegations that Summit is a "privately-owned mutual water service corporation organized and registered under the laws of Utah as a non-profit corporation" *Complaint*, ¶ 2, is a task for a trial court, not the Commission. *See Sierra Club*, 2006 UT 74 at ¶ 13. Although there may be merit to Bear Hollow's claims, the Commission lacks jurisdiction to make a determination regarding such claims and must grant the Motion.

Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and the Utah Rules of Appellate Procedure.

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[5] "Mutual irrigation corporations are not organized to make a profit for their shareholders but rather to allocate water to shareholders who already own the right to use that water." *Salt Lake City Corp.* 879 P.2d at 252.

DATED at Salt Lake City, Utah this 4th day of February, 2010

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 4th day of February, 2010 as the Order on Motions to Dismiss of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#65234