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Deepwater Distribution Company

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In The Matter of the Application of)	DOCKET NO. 86-999-08
Deepwater Deepwater Distribution)	
Company, Inc. for Exemption)	REPLY IN SUPPORT OF
)	APPLICANT'S REQUEST FOR
)	AGENCY REVIEW AND
)	REHEARING

Deepwater Distribution Company ("Deepwater") hereby respectfully submits this reply in support of its request for agency review and rehearing by the Utah Public Service Commission (the "Commission").

On September 24, 2009, counsel for the Division of Public Utilities ("Division") filed a response opposing Deepwater's request for agency review and rehearing; this reply memorandum addresses some of the inaccuracies in the Division's response, and reaffirms

Deepwater's request for review and rehearing ("Request").¹ Deepwater's Request should be considered as a timely request for review of a final agency order, according to the applicable laws and the appeal process laid out in the Commission's August 11, 2009 Order ("Order") (attached hereto as Exhibit 1). Moreover, Deepwater requests that, if the Commission grants a rehearing, it should proceed with the review of Deepwater's request for exemption separate from and prior to the pending Order to Show Cause proceedings. As further explained below, consolidation of the two proceedings would be inappropriate, inefficient, and contrary to Deepwater's right to appeal.

ARGUMENT

I. DEEPWATER'S REQUEST FOR REVIEW IS A TIMELY AND APPROPRIATE.

Deepwater's Request is an appropriate application for rehearing of the Commission's Order, as provided for by the Order itself and the relevant statutes. In fact, the Division's own description of the Order acknowledges the Order's final nature. The Division properly describes the Order as "denying Deepwater's application for exemption from Commission regulation," and stated that it "generated an *additional* proceeding, an Order to Show Cause proceeding." Division's Response ("Div. Resp.") at 1, 2 (emphasis added); *see also* Order at 4, ¶ 1 ("the Commission denies the application for exemption"), ¶ 2 ("the Division shall file a Motion for Order to Show Cause no later than 30 days from the entry of this Order, detailing why the Company should be required to obtain a CPCN"). Clearly, the Order issued a final decision on

¹ Deepwater is filing this reply memorandum as quickly as reasonably possible in order to facilitate the Commission's decision on its request for rehearing within 20 days, as required by statute. *See* Utah Code Ann. § 54-7-15(2)(c) (2009).

the pending request for exemption, and ordered the Division to initiate a new, “additional” proceeding to evaluate whether Deepwater should be obligated to obtain a certificate of public convenience and necessity. The Order itself anticipates that the Order to Show Cause is a separate proceeding, not a continuation of the issue before it at that time – which the Commission identified solely as Deepwater’s application for exemption from regulation. Order at 1.

The Order also gave notice of Deepwater’s right to request a review or rehearing within 30 days, which Deepwater did. *See* Order at 4-5, ¶ 3. Oddly, the Division’s response to this clear agency guidance is to assert that this provision “cannot change the nature of the Order from a nonfinal [sic] order to a final order.” Div. Resp. at n.2. The Division’s stance not only denies the Commission’s ability to recognize the finality of its own decisions and set procedures for appeals accordingly, but also ignores the applicable law.² Although the statute cited by the Division limits agency review to final agency actions, the preceding section provides that a party may request a review “ of an order” “if a statute or the agency’s rules permit.” Utah Code Ann. § 63G-4-301(1)(a). The applicable statute governing rehearings by the Commission permits an application for rehearing “after **any order or decision** has been made by the commission.” *Id.* at § 54-7-15(2)(a).³ The statutory authority clearly supports the Commission’s guidance to Deepwater to request a rehearing within 30 days of its Order.

² *See, e.g. Ameritemps, Inc. v. Labor Comm.*, 2005 UT App 491, ¶ 20 128 P.3d 31 (identifying the presence of a “Notice of Appeal Rights” section in an agency’s order as indicative of finality).

³ It is also notable that this statute refutes the Division’s assertion that review is not appropriate if the proceedings were not “formal.” Div. Resp. at 5. Whether the proceeding was formal or informal (and unless the Commission explicitly states otherwise, it is formal), the applicant has a right to request rehearing and a right to judicial review of a final decision. *See* R746-100-2(H)-(I)

Moreover, the Order was a final decision. As noted in *Union Pac. Railroad Co. v. State Tax Comm.*, 2000 UT 40, 999 P.2d 17 (also cited by the Division):

Because of the nature of agency proceedings, final actions often take place seriatim, disposing completely of discrete issues in one order while leaving other issues for later orders. ***Such order will be final as to any issue fully decided by that order***

Id. at ¶ 13 (quoting *Barker vv. Utah Public Service Comm.*, 970 P.2d 702, 706) (emphasis added by *Union Pac.* Court). In the instant case, the Order addressed the “discrete issue” of Deepwater’s application for exemption by denying that application and asserting jurisdiction over Deepwater. The fact that the Order then instructed the Division to initiate the Order to Show Cause proceeding is consistent with “leaving other issues for later orders,” but does not affect the finality of the Order regarding Deepwater’s application for exemption.

The Commission’s Order fully satisfies the three-part test in *Union Pac.* for finality of an agency decision. *See id.* at ¶16. First, review of the Order would not “disrupt the orderly process of adjudication” as there is no further process in place for considering Deepwater’s request for exemption. *Id.* That decision was made final by the express terms of the Commission’s own Order. Second, Deepwater’s legal “rights and obligations [have] been determined” in the sense that Deepwater is now subject to the Order to Show Cause proceedings and the Commission has effectively asserted jurisdiction over Deepwater. *Id.* Notably, the Division only contests the third *Union Pac.* element, that the agency action may not be “preliminary, preparatory, procedural or intermediate with regard to subsequent agency action.” *See Div. Resp.* at 4. As explained above, the Order resolves the independent, “discrete issue” of

(Commission proceedings are formal unless designated as informal); Utah Code Ann. § 63G-4-202 (same); § 54-7-15(2)(a)(right of rehearing for “any decision”); § 63G-402(1)(a) (right of judicial review for informal adjudicative proceedings).

Deepwater's application for exemption, through issuing a final denial of that application. Although the Order anticipates that the Division will now initiate a new, additional proceeding regarding the Order to Show Cause, the Order to Show Cause proceedings will not address the question of Deepwater's request for exemption, as that was resolved by the Order. This demonstrates that the Order was not merely preliminary or intermediate with respect to the request for exemption.⁴ Accordingly, Deepwater's request for review was a timely and authorized response to a final agency decision.

II. THE COMMISSION SHOULD NOT CONSOLIDATE ANY REHEARING OF DEEPWATER'S DENIED REQUEST FOR EXEMPTION WITH THE DIVISION'S ORDER TO SHOW CAUSE PROCEEDINGS.

The Division suggests that, if the Commission grants a rehearing, it should consolidate that proceeding with the Order to Show Cause. This proffered solution should be rejected as it compromises Deepwater's rights to final resolution of the application for exemption and ignores the logical priority of the jurisdiction issue. First, if the Commission reverses its Order on rehearing, there will be no authority for the Order to Show Cause proceedings at all. The latter presupposes the Commission's final decision denying the exemption. Without any basis for asserting jurisdiction (currently, the Commission's Order), the Division cannot proceed with its Order to Show Cause. Accordingly, a rehearing on the application for exemption should be

⁴ The Division's response mischaracterizes the nature of the supplemental proceedings arguing that the Commission will reexamine the jurisdictional question disposed of by the denial of Deepwater's Application for Exemptions. Clearly, this is not the case. The Division's own Order to Show Cause relies upon the previous finding that Deepwater does not meet the conditions for exemption and depends on the assumption of jurisdiction predicated upon the Commission's Order. Without the denial of the Application for Exemption, the Commission would not have authority to assert jurisdiction in the supplemental proceedings to establish a Certificate of Public Convenience and Necessity.

completed before the Order to Show Cause can proceed. Given this dependency of the latter on the former, Deepwater is filing a Motion to Stay the Order to Show Cause proceedings pending rehearing of its request for exemption.

Moreover, if the Commission grants a rehearing, its new decision is subject to the statutory timeframe for affirmation or denial. *See* Utah Code Ann. §54-7-15(d) (requiring a decision on rehearing within 20 days). As a practical matter, that timeframe would be difficult to keep with the additional burden and wider scope of the Order to Show Cause proceedings. Further, Deepwater also had the right to direct judicial review of the Commission's Order denying its application for an exemption. Although Deepwater opted to try and resolve the jurisdictional question within the Commission, it would be inequitable to require it to wait through an entire rate case within the Order to Show Cause proceedings in order to have the option of judicial review again.

The Division's arguments on this point largely consist of conclusory assertions regarding the merits of Deepwater's application for exemption. To the extent that these claims have any import, they could more appropriately be heard at rehearing of the Commission's Order. The Division's assertions do not offer any basis for consolidating its Order to Show Cause proceeding with any rehearing on the application for exemption, and that option should be rejected.⁵

⁵ Specifically, the Division cites *Garkane Power Co., Inc. v Public Service Comm.*, 100 P.2d 571 (Utah 1940) in its response to Deepwater's jurisdictional arguments but fails to provide any facts or analysis to support the naked assertion that *Garkane* and its progeny are distinguishable in any meaningful way from this case.

CONCLUSION

For all the foregoing reasons, Deepwater's request for review and rehearing of the Commission's Order should be granted, and allowed to proceed prior to, and independent of, the Order to Show Cause proceedings.

DATED this 25th day of September, 2009.

FLITTON & SWENSEN

John S. Flitton
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Attorneys for Deepwater Distribution Company

CERTIFICATE OF SERVICE

I hereby certify that on the 25th of September, 2009, I did cause to be sent, by electronic mail and by U.S. Mail, postage prepaid, a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF APPLICANT'S REQUEST FOR REVIEW AND REHEARING to the following:

Patricia Schmid
Assistant Attorney General
Division of Public Utilities
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