March 14, 2012

VIA HAND DELIVERY

Utah Public Service Commission
Attn: Gary Widerburg, Commission Secretary
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84114

RE: Formal Complaint against Mountain Sewer, Docket No. 11-097-01; Notice of Intent to Sell, Docket No.11-097-02; and Notice of Intent to File a General Rate Case, Docket No. 11-097-03

Pursuant to the directive issued at the February 23, 2012 status conference in the above-referenced dockets, the Division hereby files its position regarding the Commission's jurisdiction over the sale of 100% of the stock of Mountain Sewer Corporation (Mountain Sewer) to its current owner, Valley Utility Company, LLC (Valley Utility). Valley Utility is now the sole owner of Mountain Sewer Company. The Division believes that the Commission does have jurisdiction over the transaction, but believes that no further Commission action regarding the transaction is needed unless the Commission believes that Commission approval is required. If the Commission believes that approval of the transaction is required, the Division urges the Commission to grant such approval because the Division believes that the transaction is in the public interest. Importantly, the value of the assets and liabilities transferred and the

compliance of the transaction with applicable Commission statutes, rules, and orders are subject to investigation if a request for a rate increase is filed. Below please find a brief description of pertinent facts and a discussion concerning jurisdiction addressing both the 1985 order granting Mountain Sewer its certificate of public convenience and necessity and pertinent statutes and rules.

FACTS

A brief recitation of facts will add perspective to this case. On June 1, 1985 in Docket No. 84-097-01, Mountain Sewer Corporation was granted a certificate of public convenience and necessity (1985 Order). At that time, all the outstanding shares of Mountain Sewer were owned by Dr. Ronald J. Catanzaro or other corporations where Dr. Catanzaro owned all the shares. The cost of the system was funded in part by $457,000 loaned "by the sole shareholder of the corporation," repayable pursuant to a promissory note secured by a trust deed and a security interest in real property, personal property, and equipment owned by Mountain Sewer.[1] The 1985 Order stated:

> In the event Ronald J. Catanzaro, the sole shareholder of the Applicant, should desire to sell or assign the note due to him from the Applicant or any controlling interest in the Applicant, he shall first give thirty (30) days written notice of such intent to the Division of Public Utilities. In the event the Division of Public Utilities should petition this Commission prior to the expiration of said thirty (30) days, this Commission shall conduct a hearing for the purpose of determine whether to approve such a sale, conditionally approve such sale, or disapprove such sale.[2]

Since its certificate was issued, there has been little call for Commission involvement with the rates charged or the nature of the public utility service provided by Mountain Sewer. In 1991, in Docket No. 91-097-01, the Commission granted Mountain

[1] 1985 Order at p.3.
[2] Id. at p. 6.

Sewer's request for an expanded service territory. Mountain Sewer has not filed a request for a rate increase since its certification. On May 3, 2011, a formal customer complaint was filed against Mountain Sewer.[3]

Shortly thereafter, the Commission began receiving information concerning a potential change in the ownership in Mountain Sewer. In a letter dated May 18, 2011 filed with the Commission, Dr. Catanzaro stated, "As the president and 100% owner of these corporations [Mountain Sewer Corporation and Lakeview Water Corporation] I am hereby giving notice of my intent to sell them to Brett LaSorrella in the near future." The Division reviewed the letter from Dr. Catanzaro, and did not request that a hearing be held.

On August 18, 2011, a notice of ownership transfer was filed with the Commission. The notice stated that, "Mountain Sewer Corporation ("Mountain Sewer") and Lakeview Water Corporation ("Lakeview Water") hereby notify the Public Service Commission that Ronald J. Catanzaro has transferred all of his ownership interest in Mountain Sewer and Lakeview Water to Valley Utility Company, LLC ("Valley Utility")." The notice represented that "By this ownership transfer, no assets owned by Mountain Sewer or Lakeview Water were sold or transferred to Valley Utility or any other entity. Mountain Sewer and Lakeview Water have retained ownership of all assets, equipment, and infrastructure and continue to operate and provide utility service to their customers."

[3] See In the Matter of: The Formal Complaint of James and Dawn Martell; Robert Kimball; Frank and Pat Cumberland; Larry and Sharon Zini; David and Marsha Smith, et al. vs. Mountain Sewer Corporation, Docket No. 11-097-01.

Finally, the notice stated, “In addition, Valley Utility is not a public utility regulated by the Commission, and does not itself provide any utility service.” Based upon the representations in this notice and other information provided to the Division, it is the Division’s understanding that the transfer technically was consummated by the sale and purchase of 100% of Mountain Sewer’s stock, not the sale and purchase of assets.

COMMISSION JURISDICTION

1985 Order

The Division did not request a hearing to “approve, approve with conditions or disapprove an anticipated change of ownership” within 30 days after the filing of the May 18, 2011 notice of intent to sell. Because the Division did not request a hearing within the 30 day period as set forth in the 1985 Order, the condition precedent to commencing a Commission hearing pursuant to the 1985 Order’s terms order was not satisfied. Thus, no Commission hearing was required solely by the terms of the 1985 Order. However, whether the May 18, 2011 notice of intent to sell provided sufficient notice under the 1985 Order such to allow inclusion of the promissory note in a rate case if recovery thereof was sought and the status of the note’s repayment would be examined during rate case proceedings.

Statutes

The discussion of the 1985 Order aside, an inquiry into the broader question of whether the Commission has jurisdiction over the Mountain Sewer sale should begin

with an analysis of the statute granting the Commission its power and jurisdiction. Utah Code Ann. § 54-4-1 states:

> The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction; provided, however, that the Department of Transportation shall have jurisdiction over those safety functions transferred to it by the Department of Transportation Act.[4]

The Commission's jurisdiction is, however, limited to what statute expressly grants or clearly implies.[5] Consequently, the Commission's authority is not plenary.

The Mountain Sewer sale involved the sale of 100% of the stock in the company, and it was represented that there was no transfer of assets. An analysis of the Commission's jurisdiction over a sale involving 100% of a public utility's stock seems to require two steps: (1) determine whether the sale is in the ordinary course of business and thus outside the Commission's jurisdiction and (2) determine whether the sale of 100% of the public utility's stock is the equivalent of an asset transfer making the transaction more clearly subject to Commission jurisdiction.

Without addressing the issue concerning the consummation of the sale through purchase of 100% of the corporation's stock, it seems that the sale of an entire public

[4] Utah Code Ann. § 54-4-1.
[5] See, e.g., Mountain States Telephone and Telegraph Company v. Public Service Commission, 754 P.2d 928, 930 (Utah 1988). See also Hi-Country Estates Homeowners Association v. Bagley & Company, 901 P.2d 1017, 1021 (Utah 1995).

company is an uncommon activity which falls outside the usual course of business for a public utility, making such a sale subject to Commission jurisdiction. The sale goes to the continuation, ownership, and management of the public utility's function. and can be distinguished from routine business transactions, such as contracts with vendors. Thus, it seems that the Mountain Sewer transaction is subject to Commission jurisdiction.

Less certain, though, is whether the sale of 100% of Mountain Sewer's stock is the equivalent of an asset sale, or some other sale, over which the Commission has jurisdiction. Other jurisdictions have characterized a sale of 100% of a public utility's stock as a jurisdictional or non-jurisdictional activity.[6] Also, an admittedly less than comprehensive review of Utah law shows that sometimes a sale of 100% of a company's stock has been construed as a sale of real property instead of a sale of personal property.[7] Analyzing the substance of the Mountain Sewer transaction rather than its form leads to the conclusion that the sale is subject to Commission jurisdiction because the raison de etat for the transaction is (1) the termination of Dr. Catanzaro's obligation via his status as sole shareholder of Mountain Sewer to provide sewer service and (2) the undertaking by another entity of the obligation to provide that service.

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[6] See, e.g., Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission, 715 N.E.2d 351 (Ind. 1999) and "Jurisdiction of the Federal Energy Regulatory Commission over Utility Company Reorganizations and Sales of Utility Stock as Dispositions of Jurisdictional Facilities," 9 Energy L.J. 389 (1988). Dansie v. City of Herriman, 134 P.3d 1139 (Utah 2006).addressed shareholder complaints, and a derivative action, concerning the nonprofit's sale of corporate assets [not 100% of corporate stock] to the controlling shareholder. In Dansie, the Utah Supreme Court characterized the shareholders' interests as being not ownership of the company's assets but a right in the use of the company assets.

[7] See Sachs v. Lesser, 207 P.3d 1215 (Utah 2008) (discussing whether the sale of a company triggered an obligation to pay a finder's fee under the Utah Real Estate Broker's Act).

Other Commission statutes also address acquisition of a public utility, but seem inapplicable here .[8] Utah Code Ann. § 54-4-28 states:

> No public utility shall combine, merge nor consolidate with another public utility engaged in the same general line of business in this state, without the consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and finding that such proposed merger, consolidation or combination is in the public interest.

Utah Code Ann. §54-5-29 states:

> Hereafter no public utility shall purchase or acquire any of the voting securities or the secured obligations of any other public utility engaged in the same general line of business without the consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and finding that such purchase and acquisition of such securities, or obligations, will be in the public interest.

Utah Code Ann. §54-5-30 states:

> Hereafter no public utility shall acquire by lease, purchase or otherwise the plants, facilities, equipment or properties of any other public utility engaged in the same general line of business in this state, without the consent and approval of the Public Service Commission. Such consent shall be given only after investigation and hearing and finding that said purchase, lease or acquisition of said plants, equipment, facilities and properties will be in the public interest.

[8] In addition, a Commission rule requires reporting of disposition of utility assets by a public utility. R746-401 requires reporting at least 30 days prior to the transaction's consummation of "a report of the sale, transfer or other disposition by that utility of utility assets having a book cost allocated to Utah in excess of the lesser of ten million dollars or five percent" of gross plant devoted to Utah service. The required report is quite detailed, and must include certain specified information, including the purpose of the transaction and date of asset transfer. The Division does not believe that such a report was filed concerning the Mountain Sewer sale.

It is arguable whether Valley Utility (in its capacity as sole owner of Mountain Sewer) was a public utility at the time it acquired Mountain Sewer Corporation. Only at the time of transfer did the "new" Mountain Sewer commence providing sewer service. Utah Code Ann. § 54-4-28 speaks of a "public utility" providing service, and does not address a company which wishes to provide, but is not yet providing, public utility service. Thus, it seems that Utah Code Ann. § 54-4-28 does not confer jurisdiction over the sale. Similarly, it seems that Utah Code Ann. § 54-4-29 does not confer jurisdiction because it addresses the purchase or acquisition of the voting securities or secured obligations of one public utility by another public utility. Finally, Utah Code Ann. § 54-4-28 addresses the acquisition of "plants, facilities, equipment or properties of any other public utility engaged in the same general line of business in this state" without the Commission's consent and approval. Here too, Valley Utility (in its capacity as sole owner of Mountain Sewer) was not acting as a utility at the time it acquired Mountain Sewer Corporation. Thus, it seems that the Commission does not have jurisdiction over Valley Utility (in its capacity as sole owner of Mountain Sewer) under these statutes.

It is important to recognize that the Commission does have jurisdiction over the activities, including but not limited to rates and conditions of service, of Mountain Sewer as it now acts as a public utility providing sewer service.

Conclusion

As evidenced by the complaint filed in Docket No. 11-097-01, there was dissatisfaction expressed over the operation of Mountain Sewer when it was owned by Dr. Catanzaro. From comments expressed at the February 2012 status conference, it seems that sewer service has improved since the sale of Mountain Sewer to Valley Utility.

Relatedly, at this time costs associated with the purchase and sale are not being recovered through rates, but are being borne solely by Valley Utility. As noted above, Mountain Sewer has not requested a rate increase since it received its certificate, but it is believed that such as request will be forthcoming. On June 23, 2011, the Company filed notice with the Commission of intent to file a rate case. Also, during the February status conference, Mountain Sewer Company indicated that it anticipated filing a rate case on or before April 1, 2012. Because the rate case has not been filed, it is unknown whether recovery of costs associated with the purchase and sale will be requested in the rate case. Large amounts of information are presented concurrently with a rate case filing, and the rate case process provides for further discovery. Once a rate case is filed, the Division will have, and will take, the opportunity to scrutinize items for which rate recovery is sought. The Division then will make specific recommendations to the Commission regarding just and reasonable rates.

Thus, the Division believes that the Commission has jurisdiction over the sale of Mountain Sewer, and that the sale of Mountain Sewer to Valley Utility was, and is, in the public interest.

Respectfully submitted,

Patricia E. Schmid
Attorney for the Division of Public Utilities

cc: Attach Certificate of Service

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing letter was sent by U.S. Mail, postage prepaid, to the following on March 14, 2012:

Ray & Peggy Bowden
Mountain Sewer Corporation
c/o Valley Utility Company, LLC
5393 E 6850 N
Eden, UT 84310

James and Dawn Martell
6739 E. Via Cortina
Huntsville, UT 84317

Frank and Pat Cumberland
6563 East 1100 South
Huntsville, UT 84317

Larry and Sharon Zini
6618 Via Cortina
Huntsville, UT 84317

David and Marsha Smith
6711 Via Cortina
Huntsville, UT 84317

Robert Kimball
4801 Hickory Lane
Metamora, MI 48455

J. Craig Smith
Bryan C, Bryner
Smith Hartvigsen, PLLC
175 South Main Street, Ste 300
Salt Lake City, UT 84111

Melvin E. Smith
Smith Knowles P.C.
4723 Harrison Blvd, Ste 200
Ogden, UT 84403

Office of Consumer Services
Cheryl Murray
160 East 300 South – 2ND Flr
P.O. Box 146782
Salt Lake City, UT 84114-6782

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Legal Secretary