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Utah Public Service Commission
Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84114

Re: Mountain Sewer Corporation, Docket No. 11-097-02

Dear Commissioners:

At the status conference held on February 23, 2012, in the above-referenced docket, the Commission requested that counsel for Mountain Sewer Corporation ("Mountain Sewer") and the Division of Public Utilities (the "Division") each submit a letter addressing their position on whether the Commission has jurisdiction to approve, reject, or modify the transfer of Mountain Sewer stock from Ronald J. Catanzaro to Valley Utility Company. For the reasons set forth below, Mountain Sewer asserts that the Commission does not have jurisdiction over the transfer under either (i) the Commission's Report and Order, Certificate No. 2163, Case No. 84-097-01 (the "1985 Order") approving Mountain Sewer's CPCN and Tariff, or (ii) applicable state law and Commission regulations.

A. The Commission's 1985 Order does not confer jurisdiction over the transfer.

While the Order did authorize the Commission to assert jurisdiction over a transfer, it could only assert jurisdiction if the Division petitioned for a hearing within thirty days of written notice of an intent to transfer. Specifically, the Order provides:

> In the event Ronald J. Catanzaro, the sole shareholder of the Applicant, should desire to sell or assign . . . 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 determining whether to approve such sale, conditionally approve such sale, or disapprove such sale.

See 1985 Order, paragraph c (a copy of which is attached as Exhibit A).

On August 18, 2011, Mountain Sewer filed with the Commission its Notice of Ownership Transfer of all stock held by Dr. Catanzaro to Valley Utility Company. (A copy of the Notice is attached as Exhibit B.) More than six months have passed since the Notice was given, but the

Division has not petitioned for a hearing. During that time, the Division has conducted extensive discovery regarding Mountain Sewer and the transfer, and Mountain Sewer has responded to all data requests served by the Division. Mountain Sewer has also willingly cooperated with the Division's review of Mountain Sewer's books and financial statements. That review was completed on about January 30, 2012. In short, Mountain Sewer has willingly cooperated with the Division over the course of several months to investigate and determine if the ownership transfer needs to be addressed by the Commission, but the Division has elected not to pursue the matter any further. At the latest status conference, the Division explained what all parties believe: that the "transfer has been in the public interest and the public is served by having the transfer consummated." Because more than thirty days have passed since the August 18, 2011, Notice of Ownership Transfer, and the Division has not petitioned for a hearing on the transfer, the time for the Commission to assert jurisdiction over the transfer pursuant to the 1985 Order has expired.

B. Utah law and Commission regulations do not confer jurisdiction over the transfer.

Second, the Commission does not have jurisdiction over the stock transfer by Dr. Ron Catanzaro to Valley Utility Company, LLC ("Valley Utility") under Utah law or Commission regulations. While ownership and control of Mountain Sewer did change, such change in ownership and control of Mountain Sewer is outside of Commission jurisdiction. Utah Code Ann. section 54-4-29 provides that a "public utility" must obtain Commission approval before acquiring a controlling interest in another regulated utility, but Valley Utility is not a "public utility" for purposes of section 29. Section 29 provides:

> 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.

See Utah Code Ann. § 54-4-29 (2001) (emphasis added). A "public utility" is defined as "every . . . sewerage corporation . . . where the service is performed for . . . the public generally[.]" *See* Utah Code Ann. § 54-2-1. While Mountain Sewer is certainly a public utility and thus subject to Commission jurisdiction, Valley Utility is only a holding company and not a "public utility," let alone a public utility "engaged in the same general line of business" as Mountain Sewer. Valley Utility does not own any sewerage system, plants, facilities, equipment, or properties. Such are owned exclusively by Mountain Sewer. Because Valley Utility is not a "public utility," section 29 does not apply and does not authorize the Commission to exercise jurisdiction over the transfer of Dr. Catanzaro's stock to Valley Utility.

Utah Code Ann. section 54-4-30, which requires Commission approval for a regulated public utility's acquisition of another public utility's *physical* assets, also does not apply. Section 30 provides:

> 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.

See Utah Code Ann. § 54-4-30 (2001) (emphasis added). Again, Valley Utility is not a "public utility" for purposes of section 30. In addition, section 30 is limited to acquisitions of another public utility's *physical* assets: the "plants, equipment, facilities and properties." This is evidenced by reading section 30 in light of section 29: if the description of assets in section 30 encompassed intangible assets, such as stock or voting ownership, then section 29 would be superfluous and meaningless.

Courts in other jurisdictions have reached the same conclusion. For example, in *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 715 N.E.2d 351 (Ind. 1999), the Indiana Supreme Court held that the Indiana Utility Regulatory Commission did not have jurisdiction under a statute similar to Utah Code Ann. section 54-4-30[1] over the transfer of shares in a public utility by its parent holding company. The court held that a holding company is not a "public utility" as defined by statute, and thus is not subject to the commission's jurisdiction. *Id.* at 355 ("[F]inding holding companies to be public utilities would effect a major change in relatively settled doctrine."). The court also held that a transfer of outstanding shares of stock in a public utility did not qualify as a transfer of the utility's assets, i.e. the utility's "franchise, works, or system," and therefore was not within the commission's jurisdiction. *See id.* at 355–56. "[T]ransactions by a public utility's shareholders do not require Commission approval." *Id.* at 356.

Finally, Utah Admin. Rule R746-401-3.B requires reporting to the Commission of the sale or transfer of utility *assets* meeting certain criteria (e.g. "assets having a book cost allocated to Utah in excess of the lesser of ten million dollars or five percent of gross investment in utility plant devoted to Utah service at the latest balance sheet date"). However, Dr. Catanzaro's transfer of his Mountain Sewer stock to Valley Utility did not involve the transfer or sale of any of the assets of Mountain Sewer, nor did it meet the required value criteria. Therefore, Rule 746-401-3.B. does not apply.

C. Conclusion

The Commission does not have jurisdiction to review, approve, reject, or modify Valley Utility's acquisition of Dr. Catanzaro's stock in Mountain Sewer. The Division chose not to avail itself of the limited jurisdiction authorized by the Commission's 1985 Order, instead determining from its investigation that the transfer of stock to Valley Utility was in the public interest. Additionally, the provisions of the public utility code and Commission regulations that require

[1] Like Utah Code Ann. § 54-4-30, the Indiana statute provided that "no public utility, as defined in section 1 of this chapter, shall sell, assign, transfer, lease or encumber its franchise, works, or system . . . without approval of the commission." *See* Indiana Code § 8-1-2-83(a).

Commission approval do not apply because Valley Utility, as a holding company, is not a public utility and there was no transfer of Mountain Sewer's physical assets. For these reasons, Mountain Sewer respectfully requests that the Commission decline to exercise or assert any further jurisdiction over the transfer of the stock to Valley Utility, other than to issue an order disclaiming any jurisdiction.

Sincerely,
Smith Hartvigsen, PLLC

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Encl.

Cc: David Clark, Administrative Law Judge
Patricia E. Schmid, Attorney for the Division
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