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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Hi-Country Estates Homeowners Association's Request for Reassessment of the Commission's Jurisdiction	**Response of Hi-Country Estates HOA to Dansie's Request for Agency Review and Rehearing** Docket No. 11-2195-01 August 22, 2012

Hi-Country Estates Homeowners Association ("**Hi-Country**"), by and through its counsel of record, hereby submits the following Response of Hi-Country to Dansie's Request for Agency Review and Rehearing.

Introduction

The Commission's decision to cancel Hi-Country's Letter of Exemption and reinstate its Certificate of Public Convenience and Necessity ("**CPCN**") is correct and is consistent with recent Supreme Court precedent. Dansie's claim that additional inquiry is necessary ignores the undisputed and plain fact that Hi-Country serves nonmembers. This fact alone precludes an exemption from regulation. Additionally, the Well Lease Agreement removes Hi-Country's ability to control who its

customers are. Thus, the Commission has jurisdiction over Hi-Country, and Dansie's Request should be denied.

Background

On December 23, 2011, Hi-Country submitted a letter to the Public Service Commission (the "**Commission**" or "**PSC**") requesting that the Commission assess whether the exemption from regulation granted in the February 5, 1996 Report and Order in PSC Docket number 95-2195-03 should remain effective. A copy of Hi-Country's December 23, 2011 letter is attached as **Exhibit A**. As a result of the Hi-Country letter, the Commission ordered the Division of Public Utilities (the "**Division**" or "**DPU**") to investigate Hi-Country and make a recommendation to the PSC as to whether to cancel Hi-Country's letter of exemption. On May 17, 2012, the Division submitted a Memorandum to the Commission recommending that the Commission "revoke the Hi-Country . . . Letter of Exemption . . . and order [Hi-Country] to re-apply to reinstate the Certificate of Public Convenience of Necessity." The Division issued a Corrected Recommendation on June 15, 2012, with essentially the same recommendation.

On Friday, June 15, 2012, the Commission held a hearing for Hi-Country "to show cause, if any, why they should not have their Letter of Exemption revoked and Certificate of Public Convenience and Necessity reinstated." Hi-Country appeared and did not object to revocation of its Letter of Exemption. Hi-Country, the Division, and Mr. Rodney Dansie submitted evidence at the hearing, and the Commission issued its Report and Order on July 12, 2012, canceling Hi-Country's Letter of Exemption and reinstating its Certificate of Public Convenience and Necessity. Mr. Dansie filed his Request for Agency Review and Rehearing on August 7, 2012.

Analysis

Under the standard recently reaffirmed by the Utah Supreme Court, Hi-Country is a public

utility subject to the Commission's jurisdiction because it serves nonmembers and lacks control over who may receive water from its system. By statute, the Commission is "vested with the power and jurisdiction to supervise and regulate every public utility in the state . . . ." Utah Code Ann. § 54-4-1 (2010). Furthermore, a "[p]ublic utility includes every . . . water corporation . . . where the service is performed for, or the commodity delivered to, the public generally," *id.* § 54-2-1(16)(a) (internal quotation marks omitted), and a "[w]ater corporation includes every corporation and person . . . owning, controlling, operating, or managing any water system for public service within the state," *id.* § 54-2-1(29) (internal quotation marks omitted).

The Utah Supreme Court recently reaffirmed the standard for determining whether an entity should be exempt from Commission regulation or is a public utility subject to Commission jurisdiction. *Bear Hollow Restoration, LLC v. Public Service Commission of Utah*, 2012 UT 18, 274 P.3d 956.[1] Specifically, in order to fall outside the scope of Commission jurisdiction as a non-public utility, an entity must establish that "(1) there is 'mutuality of ownership among all users [that] is substituted for the conflicting interests that dominate the owner vendor–non owner vendee relationship,' (2) the 'cooperative serves only its owner-members,' and (3) the cooperative 'has the right to select those who become members.'" *Id* ¶ 21 (quoting *Garkane Power Co. v. Public Service Commission*, 100 P.2d 571, 572 (Utah 1940)) (alterations in original). As discussed below, none of these elements applies to Hi-Country, so the Commission was correct in concluding that Hi-Country is a public utility subject to Commission jurisdiction.

I. There Is No Mutuality of Interest Between Members and Nonmembers Served.

Based on Hi-Country's corporate documents and the distinction between rights as between

[1] Dansie's second argument suggests that the Commission improperly relied on Rule R746-331-1. The Report and Order did not rely in any respect on that rule because the rule was repealed by the Commission on June 30, 2010. Instead, the Commission's Report and Order relied solely on the statutory language as interpreted by the Utah Courts.

members and nonmembers, there is no mutuality of interest in Hi-Country such that customer interests are uniformly aligned. An exemption from Commission regulation is only warranted where there is a "mutuality of ownership among all users [that] is substituted for the conflicting interests that dominate the owner vendor–non owner vendee relationship." *Garkane Power Co.*, 100 P.2d at 572; *Bear Hollow Restoration, LLC*, 2012 UT 18, ¶ 21. Although Dansie claims that Hi-Country's governing documents require that it only serve its members, there is simply no such provision in Hi-Country's governing documents. Indeed, unlike the corporate charter in Garkane or the Articles and Bylaws of Summit Water Distribution Company, which both contained explicit requirements that they only serve members, Hi-Country's Certificate of Incorporation contains no similar language.

Because Hi-Country is authorized and, as further discussed in part II below, does serve water to nonmembers, there is simply no mutuality of interests among all of Hi-Country's customers. Indeed, by court order and agreement, the Beagleys and Olschewskis lack any voting rights to influence Hi-Country rates or other decisions. Specifically, **Exhibit B** contains a 1984 court order that affirms that the Beagleys and their successors "have no further membership with [Hi-Country], and are hereby ordered to refrain from the exercise of any future voting rights, either in person or by proxy, at any future meetings of, or conducted by, [Hi-Country]." Similarly, **Exhibit C** contains an agreement that further explains the relationship between the Beagleys and Olschewskis and Hi-Country. That Agreement further confirms that the Beagleys and Olschewskis have no voting rights in Hi-Country. Because nonmember customers of Hi-Country lack voting rights, and members have incentive to protect their interests but not necessarily nonmembers interests, there is no mutuality of interest between all customers of Hi-Country. Accordingly, the Commission correctly determined that Hi-Country is a public utility subject to Commission jurisdiction.

II. The Evidence Is Unequivocal That Hi-Country Serves Nonmembers

The evidence presented at the June 15, 2012 hearing and other evidence submitted to the Commission prior to its ruling firmly established that Hi-Country is serving members of the general public who are not members of Hi-Country. The *Bear Hollow Restoration* opinion confirms that a water corporation that serves nonmembers is not eligible for an exemption from Commission regulation. *See* 2012 UT 18, ¶ 21. Although Dansie repeatedly states that Hi-Country only serves its members, he failed to offer any credible evidence to support that assertion. In fact, all presented evidence conclusively establishes that Hi-Country serves the Beagleys, the Olschewskis, Mr. DeHaan, and the BLM, all of which are not members of Hi-Country.

Dansie's sole "evidence" that the Beagleys and Olschewskis are actually members is a recorded Right of Way grant and 1972 Agreement. But Dansies assertions regarding these documents are patently false. Specifically, Dansie continues to repeatedly claim that the conditions in the October 10, 1972 Agreement are somehow a part of, or referenced by the Right of Way. The Right of Way is two pages only and does not attach any water service or membership agreement. Additionally, on its face, the Right of Way contains the following language: "This right of way is granted in accordance with and subject to the covenants and agreements contained in that certain agreement entered into between the parties on the 15th day of February, 1973." (Emphasis added.) Thus, the repeated statements by Dansie that the Right of Way incorporates any requirements from the October 10, 1972 Agreement are, at best, disingenuous, and are actually blatant misrepresentations of fact. Furthermore, as discussed above, even assuming *arguendo* that Dansie's reading of the Right of Way were correct, that document has been superseded by court order and subsequent agreement. (See Exhibits B and C.) Thus, the evidence is overwhelming that Hi-Country serves nonmembers and is therefore not eligible for an exemption from regulation.

III. The Viability of the Well Lease Further Limits Hi-Country's Ability to Determine Who It Must Serve.

Finally, the Commission correctly canceled Hi-Country's exemption because Hi-Country cannot refuse service to members of the public within the scope of the Well Lease Agreement. The *Bear Hollow Restoration* opinion states that "[t]he test [for determining whether an entity is a public utility] is whether the public has a legal right to the use which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner," and "[t]he essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public." 2012 UT 18, ¶ 19 (quoting *Garkane Power Co.*, 100 P.2d at 573) (alterations in original). Thus, an entity is a public utility and an exemption is improper if it lacks ability to deny service to members of the public.

In this case, Hi-Country has received demands from Mr. Dansie for water service under a Well Lease Agreement that predates Hi-Country's Letter of Exemption and was not approved by the Commission. Mr. Dansie's demand seeks numerous connections without charge to nonmembers of Hi-Country and seeks delivery through Hi-Country's water system of millions of gallons of water annually at no charge. Such water service would constitute additional service of water to the public.

But Dansie makes the false claim that nothing has changed since 1996 when the exemption was originally granted. At the time Hi-Country received the exemption, its water system had, since 1994, been totally disconnected from the Dansie water system, and no water was being delivered to Dansie under the Well Lease Agreement. See *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, ¶ 5, 182 P.3d 417. The civil courts have determined that Hi-Country has some remaining duty under the Well Lease Agreement subject to the rulings of the Commission. *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2011 UT App 252, ¶ 14, 262 P.3d 1188. Provision of water under the Well Lease Agreement would require reconnection of the systems and

delivery of water to the Dansie Property, which is defined in the Well Lease Agreement. With the exception of Lot 51, the entirety of the Dansie Property is outside the areas approved for service at the time Hi-Country received its Letter of Exemption.[2] Furthermore, those receiving water in this area would not be members of Hi-Country, and Hi-Country would have no say as to whether they could connect. Accordingly, Dansie's statement that the people served would be the same as those served at the time of exemption is false and misleading. Ultimately, because Hi-Country lacks the ability to deny service to members of the public on the Dansie Property, it is not eligible for an exemption, and the Commission properly asserted jurisdiction over Hi-Country.

Conclusion

Because each of the three required elements for an exemption is lacking for Hi-Country, the Commission correctly canceled Hi-Country's Letter of Exemption and correctly reinstated Certificate of Convenience and Necessity 2737. The Commission should therefore deny Dansie's Request for Agency Review and Rehearing.

DATED this _____ day of August, 2012.

SMITH HARTVIGSEN, PLLC

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[2] Dansie also claims the right to preferential water on lot 43, which is within the Hi-Country service area, but the Well Lease applies only to the Dansie Property as defined in the lease itself, and that definition does not include lot 43.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Response of Hi-Country Estates HOA to Dansie's Request for Agency Review and Rehearing** was served on the following on August 22, 2012 as follows:

Via U.S. mail and email to:

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