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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	DOCKET NO. 11-2195-01 REQUEST FOR AGENCY REVIEW AND REHEARING

Pursuant to Utah Code Ann. §§ 54-7-15 and 63G-4-301, J. Rodney Dansie hereby respectfully requests Agency Review and Rehearing of the Matter of Hi-Country Estates Homeowners Association's Request for Reassessment of the Commission's Jurisdiction

1.

INTRODUCTION

J. RODNEY DANIE seeks review of, and rehearing on, the report and order of the public service commission (the "order") dated July 12, 2012 Revoking letter of exemption and reinstating certificate of public convenience and necessity No 2737. The grounds for the request are (1) that the Public Service Commission (PSC) order fails to apply the correct test for determining whether Hi-Country /Hi-country water is a public utility and subject to PSC jurisdiction;

(2) That the commonality of interest rule relied upon by the PSC in claiming jurisdiction exceeds the commission's statutory authority as applied in this case; and (3) even accepting the application of commonality of interest rule, Hi-Country/Hi-Country water meets all of the requirements of exemption from PSC regulation. Accordingly, the PSC'S Order should be vacated and Hi-Country/Hi-Country water application for Exemption should be approved as it was in 1996 by the PSC and the Exemption should remain in place.

II.
ARGUMENT

A. The Order of the Public Service Commission Ignores the Crucial Step of Determining Whether the Commission has Jurisdiction to Assert Regulatory Authority over Hi-Country/Hi-Country water.

The boundaries of PSC jurisdiction are well defined in the enabling statute and through case law addressing and interpreting that statute. Utah Code Ann. Section 54-4-1 vests the PSC "with power and jurisdiction to supervise and regulate every **public utility** in this state ..." (emphasis added). Accordingly, the threshold question presented in this case is whether Hi-Country is a "public utility" as defined in Utah Code Ann. Section 54-2-1(16)(a). *See also Garkane Power Co. Inc., v. Public Service Commission*, 98 Utah 466, 100 P.2d 571, 571-2 (1940). Section 54-2-1(16)(a) provides:

> "Public Utility" includes every railroad corporation, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer not described in Subsection (16)(d), **where the service is performed for, or the commodity delivered to, the public generally**, or in the case of a gas corporation or electrical

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corporation where the gas or electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use.

(Emphasis added).[1] According to the express statutory language, the key factor in defining an entity as a "public utility" turns on the question of whether or not the goods or services are provided to the public generally as distinguished from mere private service. *See Garkane* at 572.

The distinction between private and public service has been dispositive in at least six cases before the Utah Supreme Court where the Court found the PSC had no jurisdiction under its enabling statute.[2] The controlling principle in each of these cases was the distinction made by the Court that the services rendered were not to an indefinite public, but to a restrictive group or limited class. As held in *State of Utah ex. rel. Public Service Commission v. Nelson*, 65 Utah 457, 238 P. 237, 239 (1925), "if the business or concern is not public service, where the public has 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* and subsequent jurisdictional cases reaffirm that, "the test ... 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." *Garkane* at 573 (quoting *Farmers' Market Co., v. R.R. Co.*, 142 Pa. 580, 21 A. 902, 989, 990 (date). The *Garkane* court further distilled the test: "The essential feature of a public use is that it is not confined to privileged individuals but is open to the indefinite public.

[1] *See also* Utah Code Ann. Section 54-2-1(29) (incorporating the same standard of providing a public service in defining a "water corporation").

[2] *State of Utah ex. rel. Public Utilities Commission v. Nelson*, 65 Utah 457, 238 P.237 (1925); *Garkane Power Co. Inc. v. Public Service Commission*, 98 Utah 466, 100 P.2d 571 (1940); *San Miguel Power Ass'n. v. Public Service Commission*, 4 Utah 2d 252, 292 P.2d 511 (1956); *Medic-Call, Inc., et al. v. Public Service Commission of Utah*, 24 Utah 2d, 273, 470 P.2d 258 (1970); *Cottonwood Mall Shopping Center Inc. v. Public Service Commission of Utah, et al.*, 558 P.2d 1331 (Utah 1977); *Holmgren et al. v. Utah-Idaho Sugar Co.*, 582 P.2d 856 (1978).

Hi-Country/Hi-Country water has the right to select those who become members, ordinarily it matters not that 5 or 1,000 people are members or that a few or all the people in a given are members. In Hi-Country/ HiCountry waters case the uses in Beagley acres subdivision are owners and members based on the recorded documents, and agreements with Hi-Country in February 15, 1972 and the PSC order in 1996 that service could be provided to Beagley Subdivision provided they became members and they did become and were members of the Hi-Country Water Company operated by Hi-Country Estates HOA and paid fees both as water users and lot owners to both the Water Company and the HOA as per there agreements. In Hi-Country water/ Hi-Country HOA the membership requirements were limited by the 1972 recorded right of way agreement and agreement to provide 5 water conccections to the water system and to live by the rules and bylaws of Hi-country water company. Membership in Hi-Country water is confined to a limited number of individuals who own land in Beagley Subdivision and pay hook fees and water fees and install and dedicate the water lines and facilities and right of ways to Hi-Country/HiCountry Water co. No Water is allowed to be provided to the public in general , but only to the members of Hi-Country water that have signed agreements that were recorded and ran with there lots.

Because Hi-Country/Hi-Country Water is a non-profit corporation whose service is limited to its members, the PSC lacks authority to assert jurisdiction over the company or its members. The PSC made this very order when it exempted Hi-Country/Hi-Country water from it jurisdiction in 1996. (See 1996 PSC. Order granting exemption to Hi-Country. Nothing has changed.

B. The PSC Improperly Substitutes its Commonality of Interest Rule for Decades of Judicial Precedent.

Both the PSC Order and DPU Recommendation asserting authority based solely upon an administrative rule that is in direct conflict with the enabling statute. See R746-331. As clearly defined in the cases cited above, an entity that does not provide service to the public generally is exempt from PSC jurisdiction. *See Nelson* at 239. Contrary to that controlling precedent, the PSC has implemented and applied an administrative rule that improperly narrows the class of entities exempt from PSC jurisdiction. This unlawful constriction is achieved by imposing a commonality of interest standard as the sole test for regulation.

By contradicting the language of the statute and Supreme Court precedent, the PSC rule violates fundamental principles of administrative law. *See, e.g. In the Matter of 47 Ave. B. East, Inc., v. New York State Liquor Authority*, No. 4880, slip op. at 6 (N.Y. App. Div. May 21, 2009) ("It is a fundamental principle of administrative law that an administrative agency has no

authority to create rules and regulations without a statutory predicate. ... When the [administrative agency] has acted ultra vires by exercising impermissible substantive rule making, the courts have declared those rules null and void."); *District of Columbia v. Jones*, 287 A.2d 816, ¶ 15 (D.C. 1972) ("It is well established that the rule-making power of administrative officers and agencies 'is not the power to make law ... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."); *see also id.* at ¶ 24 ("One must bear in mind that the rule-making power is not a power to legislate It is not a power to add to a statute. ... The rule-making power is merely power to fill in details within the limitations of the statute.").

The *Nelson* court preemptively rejected this very type of attempted administrative expansion of jurisdiction and state regulation. "In other words, the State may not ... by regulating orders of a commission, convert mere private contracts or mere private business into public utility ..." *Nelson* at 239 (citations omitted). As applied, the commonality of interest rule abandons the jurisdictional standards and has the practical effect of allowing the PSC to unlawfully assert control over entities specifically excluded from regulation by the legislature.

C. Even Assuming the Commonality of Interest Rule Should Apply, Hi-Country/Hi-country Water Clearly Qualifies for Exemption from PSC Regulation.

The administrative rule prescribing conditions for exemption from PSC regulation allows exemption where:

> [T]he Commission finds that the entity is an existing non-profit corporation, in good standing with the Division of Corporations; that the entity owns or otherwise

Controls the assets necessary to provide service it is not subject to PSC regulation.

An organization to be considered a utility and subject to psc regulation must be providing service to the public generally and have no restrictions , limitations as to who it provides service to and have

indefiniteness or unrestricted quality that gives it its public character." *Thayer v. California Dev. Bd.*, 164 Cal. 117, 127, 128 P. 21, 25 (1912).

The fundamental flaw in the PSC's order is that it assumes away the jurisdictional analysis mandated by the courts as a prerequisite to further inquiry. In *Nelson*, the Court held that: "It is only by the presence of such factor or element [public service] that the commission has power or authority to regulate or control such business. Eliminating it, its power and jurisdiction are gone." *Nelson* at 239.

Neither the Division of Public Utilities Recommendation nor the PSC Order contains any Accurate Facts demonstrating that Hi-Country Water provides water service to the public generally. In fact, it appears undisputed that water delivery provided by Hi-Country Water Co. is restricted only to Owners/Members of the corporation. The corporate documents of Hi-Country Water specifically limit water service to company owner/shareholders. No water service has been or can be provided to the public generally. Consistent with Supreme Court precedent, the fact that Hi-Country Water Co. does not provide water to the general public but to a discreet group of owner/shareholders, removes it from PSC jurisdiction.

The Supreme Court has consistently rebuffed the PSC's attempts to assert jurisdiction over entities with service restrictions similar to those contained in Hi-Country Water Co. charter documents. For example, in *Garkane* the PSC argued that membership in Garkane Power Company "is easy to obtain and actually the corporation solicits membership and has apparently accepted thus far all who paid their fee and agree to pay the monthly minimum." *Garkane* at 573. In dismissing that argument, the Court found that "so long as [the non profit corporation]

commonality of interest rule. This issue was already disposed of by the Court in *Garkane*. *Garkane* at 573 ("So long as a 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..."). There are numerous exempt non-profit mutual water companies that have both more shareholders and more classes of stock than provided for in Hi-Country/Hi-Country water co's documents.

The DPU has not made a proper analysis of the fact that service to Hi-Country Phase 1, South Oquirh subdivision and Beagley acres are all owners of the water system and tanks and facilities and have paid for them and service can not be granted to the public in general, since the PSC limited the service area to these three areas based on ownership of the lines, tanks, water rights and facitlities in its 1994 order when it said service can continue to these areas (provided they become members of the water company) see (Hi-country Estates Water Company Records and profit and loss and customer list submitted toDUP as requested documents) also see (1994 PSC order) The Bagleys and Beagley Subdivision are owner/members based the February 15, 1972 Recorded Right of Way agreement and its reference to the Water connections and water service to the Beagley acres from HI-Country Estates Developers and Hi-Country Estates Homeowners Association. (Copys of agreements in Exhitit A — 41 Page

The Articles of Incorporation of HIC see (HC497) This association is also formed to promote the health, safety and welfare of the residents within Hi-Country Estates and any additions thereto as may hereafter be brought within the jurisdiction of this association. (See Hi-Country Water Co.)

The core issue is ownership, payment of fees and expenses to operate the water system and non-profit and the right to receive service and pay the fees The Beagleys and Oshikies pay the fees in both cases and follow the rules and are owners of the lines, tanks and water rights and facilities and received service and are charged the same fees as all other water users and lot owners. (The water service is not provided to the public in general but is limited to the same service areas as approved by the PSC in 1996 and the same as the developers agreed to provide service when the association was incorporated. (See Recorded agreement for (Right of Way) and 1972 agreement for water service to Beagley Sublivision).

Hi-Country/Hi-Country water has the right to select those who become members, ordinarily it matters not that 5 or 1,000 people are members or that a few or all the people in a given are members. In Hi-Country/ HiCountry water case the uses in Beagley acres subdivision are owners and members based on the recorded documents, and agreements with Hi-Country in February 15, 1973 and the PSC order in 1996 that service could be provided to Beagley Subdivision provided they became members and they did become and were members of the Hi-Country Water Company operated by Hi-Country Estates HOA and paid fees both as water users and lot owners to both the Water Company and the HOA as per there agreements. In Hi-Country water/ Hi-Country HOA the membership requirements were limited by the 1973 recorded right of way agreement and agreement to provide 5 water conccections to the water system and to live by the rules and bylaws of Hi-country water company. Membership in Hi-Country water is confined to a limited number of individuals who own land in Beagley Subdivision and pay hook fees and water fees and install and dedicate the water lines and facilities and right of ways to HI-Country/HiCountry Water co. See certificated and recorded copy of the right of way agreement and the Agreement for water service (hc000549 thur 551) Copy attached in Exhibit -A-

No Water is allowed to be provided to the public in general , but only to the members of Hi-Country water that have signed agreements that were recorded and ran with there lots.

Because Hi-Country/Hi-Country Water is a non-profit corporation whose service is limited to its members, the PSC lacks authority to assert jurisdiction over the company or its members. The PSC made this very order when it exempted Hi-Country/Hi-Country water from it jurisdiction in 1996. (See 1996 PSC. Order granting exemption to Hi-Country. Nothing has changed. The customers are the same and the Beagleys and Olschewskis who say they are not members and have no voting rights are in error based on the documents that are recorded and the agreements to become members of Hi-Country water are members and owners of the water company and system and pay the same rates and fees as all 123 other members of Hi-Country/Hi-country water company. (See bills and files under the name of Hi-country water in records provided to the the DUP. The mutual ownership among Hi-Country Phase I and Beagley Acres Subdivision and South Oquirh Subdivision is sufficient to give rise to a true cooperative that does not serve the public generally and is properly exempt from public regulation because Hi-Country/Hi-Country water co structure and and agreements as to who has been served and can be served presents no risk of monopolistic coercion . Hi-Country/HiCountry water co serves only its Owner-Members and does Not provide service to the General Public (see exhibit -C- DeLRoy Taylor statement and response for water service from Hi-Country water.) A true Cooperative (Hi-Country WaterCo.) only extends benefits to a limited class of Owner-Members (The Hi-Country Water system was paid for by its members including Beagly Acres and South Oquirh subdivision in connection fees and title was quieted to this group of members and this was recognized by the PS C in 1996 when they were DE-Certified as excempt from regulation due to mutual ownership and the requirement that all receiving service be a member of the Hi-Country water Co. and sign over and deed over there water lines and right of ways to Hi-Country Water Co. Thus the commission incorrectly found that Hi-Country was serving members and non- members because all of the existing owners of the water system were members of the Water Company and paid full association fees and charges to obtain ownership of the water right, tanks, lines and water facilities.(See Quite Title orders that include Beagley Subdivision and

South Oquirh Subdivision) lines facilities and right of ways and the rights to receive service in P. S. C. order of 1996 if they become members of Hi-Country Water as they were are owners of the water system as per the orders of the District court and court of appeals on ownership the water system and lines and easements that were built by the Beagles and South oquirh Subdivision lot owners.

HI-Contry/Hi-Country water always has retained the right to select its owner-members based on the agreements of the Developers and Hi-Country Hoa and recorded agreements running with the lots.

See exhibit B Explanation of each of the people said to be non -members receiving service that really are members of Hi-Country Water Co. with all the rights that go with ownership interests of the water right, tanks, and lines, pumps and facilities . The rates for water service for all 130 users of water and standby customers are the same and each are treated the same eliminating the need for regulation as a public that serves the general public.

THE UTAH SUPREME COURT HELD:

> The theory of public utility regulation is based on a recognition that most public utilities are monopolistic, that their services are necessary or convenient to the residents of the area, and that because of the conflict of interest between the utility and its customers or consumers there is likely to arise situations where rates are so high as to deny service to many, or so low as to deny a fair return on its investment to the utility and its stockholders which in turn would tend to result in inadequate service. Therefore, regulation is desirable to harmonize and balance these interests. The services of Garkane may tend to be monopolistic in the area served because there is no other adequate utility to serve the residents there and its services will be convenient and useful if not vital to those residents, but the third element is totally lacking. **There is no conflict of consumer and producer interests – they are one and the same.** If rates are too high the surplus collected is returned to the consumers pro rata. If rates are too low the consumers must accept curtailed service or provide financial contribution to the Corporation. If service is not satisfactory the consumer-members have it in their power to elect other directors and demand certain changes. Resort to equity, as in the case of all mutuals, may be had if one group of members seeks to over-reach the others. **The function of the Commission in approving rates, capital structure, etc., is unneeded by Garkane, its members, or the communities which it will serve.**

Garkane at 573 (emphasis added).

Assuming that Beagley subdivision lots have waived there voting rights in the Association but not in Hi-country water company and pay full fees and charges in both organizations and all 132 owners of the water system pay the same fees and charges there is no loss in control or chance for unequal treatment of any of the owners since all of the owners/members pay the same amount of money and get the same service and the Beagley lot owners have a vote on what happens in the water company.

Hi-Country/ HiCountry water's corporate structure satisfies the Garkane commonality standard by eliminating any potential consumer-producer conflict and preserving the rights of the shareholders to govern the corporation. Accordingly, as repeatedly held by the Utah Supreme Court, PSC regulation would be superfluous.

Based on the Documents and exhibits provided all 132 customer connections all would have voting rights in Hi-Country Water Co. unless they are exempt and served by PSC approved agreements. (See exhibit A list of people claiming not to have voting rights). but yet have voting rights in the HI-country Water Company by agreement and ownership of the water system and orders of the district court and the 1996 PSC order allowing service if they become members of the Water Company. Just because someone says they are not members and don't have voting rights does not meet the true test as is discussed in the above referenced exhibit. These same customers pay both water fees and HOA fees and have paid both since 1973 and signed certified, recorded documents and agreements providing membership and signed and followed the rules of Hi-Country water co since 1996. The Date that Utah PSC granted a letter of exemption to the water Company/HOA .

The DPU is in error in recommending that the PSC revoke the companys letter of exemption and reinstate its CPCN . A full analysis shows that the HI-Country/Hi-Country water is serving only members with the exception of the BLM and Greg Dehan/Bob Hymans property which were approved for service by P. S. C. since they were not owners of the water system and tanks and water rights and facilities and right of ways. The Divisions conclusion that the company is offering service to the general public is in error.

PSC has the right to decide weather to assert Jurisdiction over the company However, it must follow the title 54 and court cases in doing so. In this case it is in error based on an incomplete hearing and investigation of the facts regarding ownership/membership in Hi-Country Water the real Company providing water service.

The Declarants and there statements entered into evidences were objected to by J. Rodney Dansie and the Administrative LAW JUDGE WOULD NOT ALLOW Mr. Dansie to speak even though he attempted to and raised his hand in objection. Those documents were objected to

and the objection was not recognized by the A. L. J. conducting the hearing. Mr. Cranes testimony and evidence showing that is serving members and non-members is in

Error as has been explained in the documents referenced above and in the attached exhibits . There was presented evidence that the public in general is not being served and service to the public is unavailable (See testimony of DelRoy Taylor) submitted to the P. S. C. and DUP.

The HOA/ HI-Country Water has never provided water service to the public generally and the record shows that.

Mr. Crane desires P. S. C. jurisdiction only to try to circumvent Hi-Country's obligations under the well lease by coming before the commission . There has never been a vote or any imput by the lot owners and some were not allowed to speak at the hearing regarding the ownership/member issues noticed to be discussed in the hearing of May 15, 2012.

CONCLUSION AND REQUEST FOR RELIEF

Based on the glaring absence of jurisdictional and member ship analysis mandated by controlling case law, a rehearing on the P. S. C. order dated July 12.2012 Revoking letter of Exemption and reinstating certificate of Public Convenience and Necessity NO. 2737 is clearly warranted . As issued, the Order is devoid of he necessary facts or analysis to support PSC regulation of Hi-Country HOA or Hi-Country Water.

Accordingly, J. Rodney Dansie respectfully requests that the PSC review its administrative action and grant J. R. Dansie the opportunity to be heard at a rehearing . Furthermore, the decision of the PSC should be vacated and a Exemption should be granted to Hi-Country/Hi-Country water.

J. Rodney Dansie J. Rodney Dansie August 3, 2012

CERTIFICATE OF MAILING

I hereby certify that on this 7th Day of August , 2012 I transmitted by U. S. Mail, postage prepaid a copy of J. Rodney Dansie's request for agency review and rehearing to the following :

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Signed J. Rodney Dansie 8/7/12

CERTIFICATE OF SERVICE

I hereby certify that on this 7th Day of August , 2012 I transmitted by U. S. Mail, postage prepaid a copy of J. Rodney Dansie's request for agency review and rehearing to the following :

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