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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Hi-Country Estates Homeowners Association for Approval of Its Proposed Water Rate Schedules and Water Service Regulation	**REPLY OF HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION IN SUPPORT OF HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT** Docket No. 13-2195-02

Pursuant to Utah Administrative Code R746-100-3.K, Hi-Country Estates Homeowners Association ("**Hi-Country**"), by and through its undersigned counsel, Smith Hartvigsen, PLLC, hereby replies to the Response of the Utah Division of Public Utilities in Opposition to Hi-Country Estates Homeowners Association's Motion for Summary Judgment ("**DPU Response**") as filed

with the Public Service Commission (the "**Commission**") by the Division of Public Utilities (the "**Division**") on March 12, 2014.[1]

INTRODUCTION

The DPU Response opposes Hi-Country's Motion for Summary Judgment (the "**Motion**") and its supporting Memorandum (the "**Memorandum**") alleging that disputed material facts exist regarding the 1977 Well Lease and Water Line Extension Agreement and the 1985 Amendment to Well Lease and Water Line Extension Agreement (attached to Hi-Country's supporting Memorandum as exhibits C and D respectively; together, the "**Well Lease**"). The Division identifies three areas in which disputed material facts allegedly exist, as follows: (1) Mr. Dansie's obligation to pay for water, (2) the cost of water under the Well Lease, and (3) recovery of [Hi-Country's] expenses if Mr. Dansie is to receive "free water".[2]

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[1] Intervenor Rodney Dansie did not file any opposition to Hi-Country's Motion for Summary Judgment. This Reply only addresses the Response by the Division.

[2] The Division's claim of disputed facts is also mooted by the hearing the Commission has conducted in this matter. All of the facts relied upon by Hi-Country to support its Motion were established at the hearing. The testimony of Mr. Dansie consists of his legal conclusions that he is entitled to "free water." Legal conclusions, particularly by a lay witness, are inadmissible as explained in Hi-Country's Motion to Exclude Inadmissible Portions of Direct Testimony of Rodney Dansie as filed with the Commission on February 20, 2014.

The Division's testimony criticizing the $3.82 per thousand gallon rate proposed by Hi-Country for water delivered under the Well Lease fails to take into account the Order of the Third District Court establishing the pro rata cost of providing water under the Well Lease to be $3.19 per thousand gallons, which has been adjusted for inflation since the date of the 2005 Order using the Consumer Price Index. *See Hi-Country Estates Homeowners Association v. Bagely & Company, et al.*, case no. 020107452, included with Hi-Country's filing with the Commission on September 9, 2013 as Exhibit F. The Division's testimony in its rebuttal filing is also based on an apparent misunderstanding that the $3.82 per thousand gallon rate included in the proposed tariff would be applied to all ratepayers. *See* DPU Exhibit 2.0 REBUTTAL at 5.

ARGUMENT

The three areas of allegedly disputed material facts identified by the Division are either not actually disputed facts or are irrelevant to the question of summary judgment as requested by Hi-Country's Motion.

Mr. Dansie's Obligation To Pay For Water And Enforceability Of The Well Lease

In the case of Mr. Dansie's obligation to pay for water delivered pursuant to the Well Lease, no facts are in dispute. The Division points out that the Well Lease and other issues between Hi-Country and Mr. Dansie have been litigated for decades. (DPU Response at 2.) The Division fails, however, to note that the Commission has previously ruled on precisely the same issues in Hi-Country's Motion—the enforceability of the Well Lease and the obligation of Mr. Dansie to pay for water received from Hi-Country. The Commission, in 1986, ruled that the Well Lease was "grossly unreasonable" and that the Commission would be abrogating its statutory duty if it were to force the Hi-Country ratepayers to bear the costs of the Well Lease. (Memorandum at 2.)

A few years later, the Commission *again* addressed the issue of the Well Lease and *again* declared that Hi-Country customers must not bear the costs of the Well Lease. (*Id*. at 3.)

The Division argues that the Commission's determination that the ratepayers should not bear the costs of the Well Lease does not address whether Hi-Country, itself, should bear the costs. However, the Commission specifically addressed this issue and declared that Dansie, not Hi-

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As was clarified at the hearing the $3.82 per thousand gallons rate would only be applied to Mr. Dansie should he ever take water under the Well Lease.

Country, should pay the costs of the Well Lease and that Dansie should seek recovery of those costs from Bagley. (*See id*. at 2).[3]

As laid out in the Motion and supporting Memorandum, the Commission acted fully within its authority over contracts affecting utility rates. (*Id*. at 4.) The Commission also addressed the various court opinions upholding the validity of the Well Lease "unless the [Commission] intervenes and determines otherwise." (*Id*.)

The Commission has repeatedly and conclusively addressed the Well Lease and the facts surrounding it and found it to be unreasonable and unenforceable. (*Id*.) The Commission should follow its prior orders and declare the Well Lease unreasonable and unenforceable.

Hi-Country's Motion and supporting Memorandum also clearly set out—based on undisputed facts, which are now part of the record—how the Well Lease is against public policy. Indeed, the argument showing that the Well Lease is clearly against public policy relies precisely on Mr. Dansie's interpretation of the Well Lease—the interpretation most favorable to him. As the Division points out in its response, Mr. Dansie believes that Hi-Country is obligated to provide him with water at no cost and that Hi-Country (and, by definition, the Hi-Country customers) are to bear the responsibility and costs of providing that water. (DPU Response at 3.) That exact scenario shows that the Well Lease is against public policy as it would jeopardize Hi-Country's

[3] This is consistent with the Commission's ruling that the ratepayers should not be compelled to pay the costs of the Well Lease. Indeed, because Hi-Country is a non-profit company, it has no resources other than the assessments paid by its members to pay for the costs of the Well Lease in the absence of the requested Well Lease Rate.

financial stability and provide preferential rates to Mr. Dansie as explained in the Memorandum. (*See* Memorandum at 5.) Such a conclusion relies solely on facts already established and is thus a proper subject for summary judgment.

Cost Of Water Delivered And Recovery of Expenses

In the case of both the cost of water under the Well Lease and the recovery of expenses if Mr. Dansie is to receive free water, any facts that may be in dispute are irrelevant to Hi-Country's Motion. As the Division pointed out, Hi-Country and Mr. Dansie disagree on the cost of water delivered under the Well Lease and the recovery of expenses incurred in delivering that water. (DPU Response at 3-5.) Hi-Country's Motion does not seek nor require a ruling on those issues and the facts surrounding those questions are not at issue in Hi-Country's Motion. Indeed, those very questions are irrelevant if the Commission follows its own prior orders and declares the Well Lease unenforceable as requested in the Motion. If the Well Lease is unenforceable, all questions regarding delivery of water under an unenforceable agreement are completely moot. If, on the other hand, the Commission deviates from its prior orders and, in denying the Motion, finds the Well Lease to be enforceable, the questions of the cost of water delivered under the Well Lease and the obligations of various parties to bear those costs are properly before the Commission as part of this rate case, and the proposed Well Lease Rate allows Hi-Country to recover the cost of transporting Mr. Dansie's water.

CONCLUSION

As set forth in this reply and in Hi-Country's Motion and supporting Memorandum, the Well Lease is unenforceable as against Hi-County because it is undisputed that (1) the Commission has previously determined that the Lease should not be enforced against Hi-Country; and (2) the enforcement of the Lease is contrary to public policy.

Dated this 24th day of March, 2014

/s/ Adam S. Long

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2014, I served a true and correct copy of the foregoing **REPLY OF HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION IN SUPPORT OF HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT** by causing the same to be delivered to the following:

Via hand delivery and email to:

UTAH PUBLIC SERVICE COMMISSION
c/o Gary Widerburg, Commission Secretary
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Salt Lake City, Utah 84111
psc@utah.gov

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/s/ Adam S. Long