J. Craig Smith (4143)
Adam S. Long (14701)
SMITH HARTVIGSEN, PLLC
175 South Main St., Suite 300
Salt Lake City, Utah 84111
Phone: (801) 413-1600
Fax: (801) 413-1620

Attorneys for Hi-Country Estates Homeowners Association

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	**RESPONSE TO RODNEY DANSIE'S REQUEST FOR REHEARING AND RECONSIDERATION** Docket No. 13-2195-02

Pursuant to Utah Code Ann. §54-7-15 and Utah Administrative Code R746-100-11.F, Hi-Country Estates Homeowners Association ("**Hi-Country**" or the "**Company**"), by and through its undersigned counsel, Smith Hartvigsen, PLLC, hereby responds to the Request for Rehearing and Reconsideration (the "**Request**") made by Rodney Dansie as filed with the Public Service Commission (the "**Commission**") on June 4th, 2014.

INTRODUCTION

Hi-Country filed its initial Application to Approve Proposed Water Service Schedules and Rates (the "**Application**") with the Commission on July 10th, 2013 and Hi-Country, the Division of Public Utilities (the "**Division**"), the Commission, and Mr. Dansie have been actively involved in this Docket since that time. The Commission issued its Report and Order (the "**Order**") on May 5th, 2014, shortly before the 240-day deadline set forth in U.C.A. § 54-7-12(3)(a). Mr. Dansie's Request comes after approximately ten months of filings and hearings before the Commission during which he had plentiful time and numerous opportunities to present any arguments, facts, or testimony that may be relevant to the Commission; indeed, Mr. Dansie did provide written testimony on multiple occasions and was (and continues to be) represented by competent counsel throughout these proceedings.

ARGUMENT

Mr. Dansie's Request does nothing more than revisit issues that have been thoroughly heard by the Commission and regarding which Mr. Dansie had ample opportunity to present facts, testimony, and arguments. Hi-Country previously set forth its arguments as to the jurisdiction of the Commission and the impact of the 1977 Well Lease and Water Line Extension Agreement and the 1985 Amendment to Well Lease and Water Line Extension Agreement (together, the "**Well Lease**") on the public interest in its Motion for Summary Judgment and supporting Memorandum filed with the Commission on February 25th, 2014 and this Response draws heavily on those filings. Mr. Dansie's Request fails to raise issues or provide additional facts that were not already

presented to the Commission during the months of proceedings prior to the May 5th Order. As such, the Request serves no purpose other than delaying the ultimate resolution of the issues before the Commission and causing the Hi-Country ratepayers to incur additional expenses in responding to the Request; accordingly, Mr. Dansie's request should be denied by the Commission.

I. THE PUBLIC SERVICE COMMISSION CLEARLY HAS JURISDICTION TO MODIFY THE WELL LEASE

Pursuant to Section 54-4-1, the Commission is "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."[1] In interpreting this statute, the Utah Supreme Court has declared that the Commission has the statutory authority to exercise jurisdiction over contracts affecting the rates to be paid by ratepayers.[2] Indeed, "[t]here is no question that the [Commission] has the authority to investigate, interpret and even alter contracts. That question was settled in an early series of cases brought just after the enactment of Utah's Public Utility Act."[3]

While the Utah Court of Appeals ultimately upheld the validity of the Lease in the series of appeals stemming from the district court's opinion, the Court of Appeals expressly conditioned its opinion upon the absence of any action by the Commission. Indeed, the Court of Appeals

[1] Utah Code Ann. § 54-4-1.
[2] *Garkane Power Assoc. v. PSC*, 681 P.2d 1196, 1207 (Utah 1984).
[3] *Id*. at 1208 (Durham, J., dissenting)

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declared that, "so long as the [Commission] does not exercise jurisdiction over the water system, the rights of the parties are as set forth by the plain language of the [Lease]."[4] Accordingly, "going forward, [the Dansies are] entitled to their contractual rights to free water and free hook-ups unless the [Commission] intervenes and determines otherwise."[5]

The Commission did intervene and assert jurisdiction over Hi-Country and the Commission has now reaffirmed its prior determination regarding the unreasonableness of the Lease and held that the Lease is unenforceable as against Hi-Country and its ratepayers. Such a conclusion by the Commission did not necessitate that the Commission "overrule the court's holding" as claimed by Mr. Dansie.[6] The current situation is markedly different from the situation at the time of the various court orders in that Hi-Country is now subject to Commission jurisdiction. Indeed, the Court of Appeals explicitly contemplated the possibility that the Commission would assert jurisdiction and make its own ruling on the Well Lease.[7] Regardless of the conclusions reached by the courts as to the validity of the Well Lease when Hi-Country was not subject to Commission jurisdiction, the Commission now clearly has jurisdiction and authority to modify the Well Lease as the Well Lease involves Hi-Country as a public utility and inevitably affects the rates paid by ratepayers.

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[4] *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 2011 UT App 252 at ¶ 10.
[5] *Id*. at ¶ 14.
[6] Request at 9.
[7] *See Hi-Country*, 2011 UT App 252 at ¶ 10.

II. THE COMMISSION CORRECTLY CONCLUDED THAT THE WELL LEASE IS NOT IN THE PUBLIC INTEREST

Enforcement of the Lease is contrary to the public interest. As recognized by the Utah Supreme Court, the Commission "is to exercise supervisory control over certain aspects of the businesses of public utilities for the purpose of securing two essential objectives in the promotion of the public interest." [8] "First, the Commission must deal with those subject to its jurisdiction in such a manner as to assure their continued ability to be able to serve the customers who rely upon them for essential services and products."[9] "Second, the Commission performs the extremely delicate, and not uncontroversial but nonetheless essential, function of balancing the interest of having financially sound utilities that provide essential goods and services against the public interest of having goods and services made available without discrimination and on the basis of reasonable costs."[10]

Enforcement of the Lease against Hi-Country would be contrary to the two essential objectives governing the Commission's jurisdiction and supervision of public utilities. First, enforcement of the Lease against Hi-Country would jeopardize Hi-Country's financial stability and continued ability to serve its customers when the Lease requires Hi-Country to convey its assets for less than fair market value and imposes a restraint on alienation. Second, enforcement

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[8] *Garkane*, 681 P.2d at 1207.
[9] *Id.*
[10] *Id.*

of the Lease against Hi-Country would result in unreasonable rates that provide a preference to the Dansies at the expense of the remaining ratepayers.

In his Request, Mr. Dansie also seemingly threatens Hi-Country with litigation for compliance with the Commission's Order.[11] The threat of frivolous litigation is not a compelling reason to act in detriment to the public interest for the benefit of Mr. Dansie. Hi-Country will zealously oppose any such action by Mr. Dansie and believes that any such action would ultimately be unsuccessful. To the extent that Hi-Country ratepayers would bear the costs of such litigation, Hi-Country intends to seek payment of attorney fees and costs from Mr. Dansie incurred in any such unjustified litigation.

III. THE RATES AND FINANCES OF THE COMPANY WERE FULLY AND THOROUGHLY REVIEWED

Mr. Dansie's request makes various references to the rate of $3.85 per thousand gallons for water delivered under the Well Lease that was proposed by Hi-County as part of its initial Application. Mr. Dansie also implies that the $3.85 rate proposed by the Company somehow misled the Commission and thereby caused the Commission to invalidate the Well Lease.[12] Mr. Dansie fails to recognize that the Commission does not rely blindly on the recommendations of the Company when setting rates or making other decisions. Hi-Country's finances were thoroughly and independently reviewed by the Division of Public Utilities and that review was the

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[11] *See* request at 11-12.
[12] *See id.* at 4.

subject of a large portion of the prefiled and live testimony provided by Shauna Springer. Through that review and testimony, the Commission was provided with extensive information about the Company, its finances, and its costs for delivering water, thereby allowing the Commission to make its decisions based on independently-obtained information.

Mr. Dansie also makes various claims about the costs and supposed advantages to the Company of delivering water under the Well Lease.[13] Mr. Dansie did not, however, present any significant factual information to support these claims—either with his Request or during the many months between the Company's initial filing and the Commission's Order of May 5th. In fact, the Company, through multiple data requests to Mr. Dansie, explicitly requested information on the delivery of water under the Well Lease and the logistics of delivering water to the Hi-Country system from the Dansie Well. Mr. Dansie objected to all such requests and refused to provide much of the requested information. It is inequitable to Hi-Country to first present such claims in the current Request, after the Commission's Order and without substantiating factual data, particularly when the information was explicitly requested and the precise topic was discussed at length in prefiled testimony and at the Commission hearings.

IV. MR. DANSIE WAS NOT HARMED BY MISSING THE COMMISSION HEARINGS

The originally-scheduled hearing in this matter was calendared during the Commission's scheduling conference on September 20th, 2013, at which Mr. Dansie was present and represented

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[13] *See id*. at 12.

by counsel.[14] As Mr. Dansie was unfortunately unable to participate in the Commission's hearing as scheduled due to health problems, the hearing was rescheduled for a later date. At the rescheduled hearing on March 11th, 2014, Mr. Dansie was again absent. However, throughout these proceedings and at both hearings, Mr. Dansie was represented by competent counsel familiar with the facts and the issues before the Commission.

Counsel for Mr. Dansie was present throughout the hearings and availed himself of the opportunity to cross-examine various witnesses on behalf of his client, Mr. Dansie. As such, Mr. Dansie had the full benefit of participation in the hearings. Additionally, all parties were given the opportunity to file post-hearing briefs as each felt necessary to address any new issues brought up in the hearings that were not addressed in prefiled testimony.[15] This ability to file pleadings after the hearing was over provided Mr. Dansie with ample opportunity to address any real or perceived disadvantage he may have suffered by having his attorney present at the hearings without Mr. Dansie being there himself. Notably, Mr. Dansie did not take advantage of this opportunity and has instead waited until after the Commission issued its Order.

Hi-Country, on the other hand, was seriously disadvantaged by Mr. Dansie's absence from the hearings. Indeed, Hi-Country willingly rescheduled the hearing, at significant expense and difficulty, to attempt to accommodate Mr. Dansie. At the rescheduled hearing, Mr. Dansie was again absent and his attorney stated that Mr. Dansie would be unavailable for six weeks or more.[16]

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[14] Order at 3.
[15] *See* Transcript of Hearing held March 11, 2014, at 11, lines 22-25.
[16] *See id*. at 8, lines 10-11.

As Mr. Dansie was absent from the rescheduled hearing as well, Hi-Country was conclusively denied the opportunity to cross examine Mr. Dansie. Indeed, Mr. Dansie is the only witness in these proceedings that was not available to all parties for cross examination, despite the fact that Mr. Dansie provided lengthy prefiled testimony that was allowed to remain a part of the record of these proceedings.[17]

The Commission cannot grant Mr. Dansie's Request without denying Hi-Country the benefit of the 240-day time limit established by U.C.A. § 54-7-12(3)(a). As set forth in the statute, in the absence of a Commission decision within the 240-day window the rates proposed by Hi-Country would have automatically become effective, including the $3.85 Well Lease Rate so strenuously criticized in Mr. Dansie's Request. Indeed, delaying the hearing further would presumably have been viewed by Mr. Dansie as a great disadvantage as doing so would likely have obligated him to pay the rates proposed by the Company. As the Commission has protected Mr. Dansie's interests be holding the hearing in a timely manner, Mr. Dansie's request should not be granted on the basis that he was not personally present at the hearings.

V. THE COMMISSION PROPERLY DECLINED TO MODIFY HI-COUNTRY'S SERVICE AREA TO INCLUDE ADDITIONAL DANSIE PROPERTY

The service area approved by the Commission as it relates to Mr. Dansie's property is identical to the service area approved by the Commission in 1986.[18] The Order did not make any

[17] *See id*. at 24, lines 4-9.
[18] *See* Order at 20.

changes to the portion of Mr. Dansie's property included in Hi-Country's service area. Accordingly, the question of whether property should be added to the Hi-Country service area is not a proper basis for Mr. Dansie's Request.

CONCLUSION

Mr. Dansie's request serves no purpose other than delaying resolution of the issues before the Commission and causing the Hi-Country ratepayers to bear additional expenses in responding to the Request. The Commission clearly has jurisdiction over the Well Lease and the Commission correctly determined that the Well Lease is not in the public interest. Further, the supposed issues in Mr. Dansie's request regarding rates proposed by Hi-Country have been thoroughly addressed by the Division of Public Utilities and the Commission. Mr. Dansie was not disadvantaged by his absences from the hearings whereas Hi-Country was greatly disadvantaged by his absence and the lack of opportunity for cross examination. Finally, the issues of Hi-Country's service area raised by Mr. Dansie is not a proper basis for the Request as no changes were made to the service area. For the foregoing reasons, Hi-Country requests that the Commission deny Mr. Dansie's Request.

Dated this 19th day of June, 2014

/s/ Adam S. Long
J. Craig Smith
Adam S. Long
SMITH HARTVIGSEN, PLLC
Attorneys for Hi-Country Estates Homeowners Association

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2014, I served a true and correct copy of the foregoing **RESPONSE TO RODNEY DANSIE'S REQUEST FOR REHEARING AND RECONSIDERATION** 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
160 East 300 South, Fourth Floor
Salt Lake City, Utah 84111
psc@utah.gov

Via U.S. mail and email to:

John S. Flitton
FLITTON PLLC
1840 Sun Peak Drive, Suite B-102
Park City, UT 84098
johnflitton@me.com

William B. and Donna J. Coon
7876 W Canyon Rd
Herriman, UT 84096
wbotis@gmail.com

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Via email to:

Utah Division of Public Utilities
Chris Parker
chrisparker@utah.gov

William Duncan
wduncan@utah.gov

Dennis Miller
dennismiller@utah.gov

Attorney General's Office
Patricia Schmid
pschmid@utah.gov

/s/ Adam S. Long