

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint
of JACKIE CLEMENTS, vs.)
BOULDER KING RANCH)
ESTATES WATER)

DOCKET NO. 04-2254-01

In the Matter of the Formal Complaint)
of BRADLEY and STEPHANIE)
TIMOTHY vs. BOULDER KING)
RANCH ESTATES WATER)

DOCKET NO. 04-2254-02

REPORT AND ORDER

ISSUED: March 3, 2005

By the Commission:

Procedural History

On November 8, 2004, Ms. Jackie Clements (Ms. Clements) filed a formal complaint against Boulder King Ranch Estates Water Company (BKRE) alleging that BKRE was forcing her to pay a water connection fee for a connection which she had not requested and that BKRE was billing her in advance on a quarterly basis. Ms. Clements seeks Commission order requiring BKRE to (1) apply the connection fee previously paid to the lot on which she currently resides and (2) henceforth bill on a monthly basis after service has been rendered.

On November 15, 2004, Bradley and Stephanie Timothy (Timothies) filed a formal complaint against BKRE alleging that BKRE had refused to accept their transfer of a .20 acre foot water share to BKRE in lieu of payment of \$600.00 toward their water service connection fee. The Timothies also alleged that BKRE issues its bills three months in advance for service not yet provided and charges interest on said bill immediately following the end of each quarterly billing period. The Timothies seek Commission order requiring BKRE to credit their account \$600.00 in recognition of the water share they have transferred to BKRE and to henceforth bill on a monthly basis after service has been rendered.

On December 8, 2004, BKRE submitted its response to the Clements complaint stating its belief that its actions regarding Ms. Clements's account are in accordance with its tariff and Commissions orders. On December 15, 2004, BKRE submitted its response to the Timothy complaint stating that it rejects the tender of the .20 acre foot water

share as having “no monetary value”. BKRE also claims that the Timothies missed the deadline mandated by the Commission for transfer of such shares to BKRE. BKRE admitted to billing three months in advance and argued that this practice helps to keep the company’s overhead costs down while giving customers three months to pay their water bill.

On December 27, 2004, the Division of Public Utilities (DPU) filed its analysis of the Clements and Timothy complaints, recommending that the Commission recognize Ms. Clements as having one fully paid connection fee for the lot on which she resides and requiring BKRE to cease its efforts to collect an additional connection fee from Ms. Clements until such time as she requests a connection for the second lot she owns in BKRE’s service territory. The DPU also recommended that the Commission order BKRE to credit the Timothy account \$600.00 toward their connection fee and reverse any interest charges applied on said \$600.00 since July 2004. The DPU also noted that it supports BKRE’s quarterly billing practices, but not in advance of service.

Also on December 28, 2004, the Commission issued a Notice of Hearing, setting a January 12, 2005, hearing before the Administrative Law Judge. On January 6, 2005, due to scheduling conflicts, the Commission issued an Amended Notice of Hearing, moving the hearing date to February 4, 2005.

Hearing in these matters commenced on February 4, 2005, before the Administrative Law Judge. Because hearings for these two dockets had been scheduled consecutively, both involved BKRE as Respondent, and both sought change to BKRE’s advance quarterly billing practice, the separately scheduled hearings for Docket Nos. 04-2254-01 and 04-2254-02 were combined into one with the consent of all parties. Jackie Clements and Stephanie Timothy appeared and represented themselves. Mr. Jim Arnold, President of BKRE’s Board of Trustees, appeared for BKRE. Patricia Schmid, Assistant Attorney General, State of Utah, appeared on behalf of the DPU. Mr. Wes Huntsman, manager of the telecommunications section, and past water section manager, testified for the Division.

Background

By Order issued July 3, 2003, in Docket No. 02-2254-01, following extensive negotiations between the parties resulting in a proposed Settlement Agreement and tariff, the Commission granted BKRE a certificate to serve

and approved the proposed Settlement Agreement and tariff. Ms. Clements and the Timothies were among the few BKRE customers who appeared in opposition to the terms of the Settlement Agreement.

Among the terms of the Settlement Agreement and attendant tariff approved by the Commission was a flat \$35.00 per month charge for water service to be billed on a monthly basis. On July 22, 2003, Mr. Gary Sackett, on behalf of BKRE, filed substitute tariff sheets providing for, among other things, quarterly rather than monthly billing. The DPU was aware of and supported this change as the parties had agreed to quarterly billing during negotiations but had neglected to change the proposed tariff to reflect this. The Commission took no action regarding submission of these substitute sheets and BKRE has been billing its customers on a quarterly basis ever since.

Because BKRE had for some time been providing water service to its customers without Commission regulation and oversight, our Order in Docket No. 02-2254-01 also addressed the differing connection fees and rules to be applied to the dissimilarly situated lots within BKRE's service territory. In accordance with the terms of the Settlement Agreement, "dry lots", i.e., those purchased without any entitlement to water supply or water service, were to be assessed a connection fee only if and when the owner requested connection to the BKRE system. Lots currently receiving water service were assessed connection fees in accordance with fee amounts and calculations agreed to by the DPU and the BKRE. The total agreed connection fee per lot included the cost of obtaining the required .45 acre foot of water right per lot which BKRE is required to maintain pursuant to Division of Drinking Water standards. Our Order also acknowledged and approved the parties' agreement that BKRE customers "may deed water rights to [BKRE] in lieu of paying the water right costs" as part of their connection fee, stating that "the amounts due from customers will be due within one year of the date of this order." The Settlement Agreement provides additional detail regarding transfer of water rights in lieu of cash payment of the connection fee:

Individual lot owners may elect to obtain their own water rights and deed such water rights to [BKRE] in lieu of paying the water rights costs of \$1,350 . . . to [BKRE], which amount reflects the price of the .45 acre-feet of water included in the allocated costs used to compute connection fees. An individual lot owner having .25 acre feet of water can purchase an additional .20 acre feet of water and deed that water to the Company in lieu of paying \$600 of the stated connection fee.

DISCUSSION AND FINDINGS

Docket No. 04-2254-01

Ms. Clements testified that she owns two adjacent lots, Lots 6 and 7, in BKRE's service territory. In 1990, she purchased Lot 6 with a water share. In 1993, she purchased Lot 7 as a dry lot with no water service connection and no entitlement to water. Lots 6 and 7 are roughly bisected by a water utility access road maintained by BKRE pursuant to an easement granted by Ms. Clements and her late husband. Ms. Clements has at all relevant times resided on Lot 7. Since approximately 1993, Ms. Clements has maintained a water connection supplying Lot 7 from a connection point on the "Lot 7 side" of the utility access road supplied by a water line running the length of that road (rather than from main water supply line at the front of Lot 7, as would normally be the case with the lots in BKRE's service territory). Ms. Clements testified that this connection was made with the full knowledge and approval of Mr. Dale Clarkson, the developer of the lots in BKRE's service territory who founded and controlled BKRE until recently. Because of the understanding she believes she reached with Mr. Clarkson concerning permission to connect Lot 7 to the water utility in 1993, Ms. Clements has always regarded Lot 6 as her "dry" lot; she has never used water on Lot 6, nor has she sought a water connection for that lot from BKRE.

Pursuant to our Order in Docket No. 02-2254-01, Ms. Clements paid approximately \$2,700 to BKRE to completely pay for one water connection to her property. On October 22, 2004, Ms. Clements received a notice from BKRE stating that the culinary water connection fee for Lot 7 is due and that her water service would be shut off in sixty days if the connection fee is not paid. This notice is apparently the fruit of a longstanding dispute between Ms. Clements and BKRE concerning which of her two lots is properly connected to BKRE's system and to which of her two lots the connection fee she has previously paid should be applied. There is no dispute that Ms. Clements has paid one full connection fee to BKRE. However, while Ms. Clements desires and believes this fee should be applied to Lot 7, BKRE has applied this paid connection fee to Lot 6 and seeks payment of the connection fee for Lot 7 since she maintains a water connection on Lot 7.

Ms. Clements points to an August 4, 1993, letter from Mr. Clarkson which she interprets as BKRE giving her permission to transfer the connection fee for Lot 6 to Lot 7. Relevant portions of this letter are as follows:

Water and power have been paid for on Lot 6 and power was installed on Lot 7 . . . Water service is all that needs to be paid for on Lot 7, and I have enclosed an agreement for this service. It would be very

helpful for you to go ahead and pay for the water on Lot 7, but you could do so over the next several months. You may go ahead and install water to Lot 7 even though it is not fully paid for at this time.

* * *

On second thought about the monthly charge and water membership fee, I think you deserve some special consideration. Let me know if you think we should waive the \$5 monthly fee on Lot 6 until you build on that lot or if you want to delay the \$1,000 membership fee on Lot 7 until both Lot 6 and 7 are used.

Ms. Clements claims that after she and her husband received this letter Mr. Clarkson was actually present in 1993 when they connected to BKRE's water line to service Lot 7. Although she never formally replied to Mr. Clarkson's letter, she has believed since that time that BKRE approved of her connection, recognized it as a connection for Lot 7, and delayed payment of any further connection fee until she decided to build on Lot 6.

BKRE, on the other hand, sees nothing in this letter authorizing a transfer of water connection fees from Lot 6 to Lot 7 and claims that it actually supports its position that Ms. Clements is required to pay the connection fee for Lot 7. In a letter to Ms. Clements dated February 20, 2004, Mr. Arnold stated as much and further indicated BKRE's belief that "[t]he PSC has ruled that Lot 7 is a dry lot, and must be treated as such. . . . Please recognize that we are in a tough spot on this issue. Because of the PSC order, we are mandated to charge Lot 7 as a dry lot."

Mr. Arnold claims BKRE's application of the paid connection fee to Lot 6 is in accordance with the status of Ms. Clements's two lots as adjudicated in Docket No. 02-2254-01. DPU Exhibit 1 in Docket No. 02-2254-01 is a spreadsheet listing each lot in the BKRE service territory, identifying, among other things, the lot number, owner, water rights status (e.g., dry lot or .25 acre ft included in purchase), total connection fee for that lot, and any credits to be deducted from that amount. Lot 7 is listed in DPU Exhibit 1 as a "dry lot" for which a \$4,870 connection fee is payable upon connection. Lot 6 is listed as a previously connected lot with a \$2,540 connection fee due. Based on this spreadsheet and approved tariff, BKRE has applied Ms. Clements's recent connection fee payments to the balance owing on Lot 6 and now seeks payment of the outstanding connection fee for Lot 7 as a dry lot now connected to its system.

Mr. Huntsman testified for the DPU that he prepared DPU Exhibit 1 in Docket No. 02-2254-01 based on records provided by BKRE that indicated water fees were being billed on Lot 6 and that Lot 7 had no existing water

connection. Mr. Huntsman now believes these records were incorrect since Ms. Clements has been connected and receiving water service on Lot 7 since 1993. Mr. Huntsman further testified that he sees no detriment to BKRE resulting from the DPU's recommendation in this docket that the connection fees Ms. Clements has paid be applied to Lot 7 and that Ms. Clements not be required to pay a connection fee for Lot 6 until she requests a connection to that lot. According to Mr. Huntsman, this "fee swapping" in recognition of the fact that Ms. Clements has resided on and used water on Lot 7 for over ten years results in the same amount of money ultimately accruing to the company. Mr. Arnold challenged this assertion, noting that BKRE has already received the required connection fee for Lot 6 and that it will receive additional funds from Ms. Clements's payment of the connection fee for Lot 7, as well as monthly standby fees for Lot 6. BKRE further notes that such payment is required because Ms. Clements is using water on Lot 7 even though she originally purchased the lot from a third party as a dry lot. In essence, BKRE perceives no mistake in DPU Exhibit 1 since Ms. Clements bought Lot 7 as a dry lot and that is the way it is listed in the Exhibit.

Mr. Huntsman supported and reiterated in his testimony the DPU's recommendation, contained in December 28, 2004, memorandum, that the connection fee paid by Ms. Clements and currently applied to Lot 6 should instead be applied to Lot 7. The DPU notes that Ms. Clements has been credited as having paid a connection fee for Lot 6 but no connection for Lot 6 has ever been established. Ms. Clements is, however, connected to the water system at Lot 7 and has received water on that lot since 1993. The DPU has reviewed the August 4, 1993, Clarkson letter on which Ms. Clements relies but believes that it does not explicitly give Ms. Clements permission to apply Lot 6 connection fees to Lot 7. The DPU notes that Ms. Clements connected to the water system more than ten years ago with full knowledge of the water company but that nothing has been done between then and now to recognize this fact in the water company's records. Because these records erroneously ignored the reality of Ms. Clements's connection on Lot 7, Mr. Huntsman's summary contained in DPU Exhibit 1 on which the Commission relied simply restated this error.

Based upon the evidence of record in this docket, we find that Ms. Clements owns two adjacent lots, Lots 6 and 7, in BKRE's service territory. These lots are separated only by a BKRE utility access road placed pursuant to easement granted by Ms. Clements. Ms. Clements has resided on Lot 7, and enjoyed BKRE water service on Lot 7,

since 1993. Water service to Lot 7 is provided via connection to a BKRE water line running the length of Lot 7 that connects to a water tank situated on Lot 6. Ms. Clements believes the connection to this water line is on the “Lot 7 side” of the utility access road separating Lots 6 and 7. Ms. Clements’s unrefuted testimony establishes that Mr. Clarkson, founder and long-time owner of BKRE, was aware of, present for, and approved of Ms. Clements’s connection to Lot 7 at its inception. Ms. Clements has never requested a water service connection for Lot 6. BKRE has applied connection fees previously paid by Ms. Clements to Lot 6 instead of Lot 7. Through credits and payments previously applied to Lot 6, Ms. Clements has paid one full connection fee.

BKRE believes that the characterization of Lot 7 as a dry lot in Docket No. 02-2254-02 is dispositive of Ms. Clements’s complaint. We disagree. The issue before us is not whether Lots 6 and 7 should continue to be characterized as “wet” or “dry” lots, but is instead how these lots should reasonably be treated under the BKRE tariff. This tariff was adopted in order to provide BKRE a certain revenue stream with which to conduct its operations. The record in Docket No. 02-2254-01 makes clear that the Division, in computing BKRE’s revenue stream, assumed that Ms. Clements would be required to pay a connection fee and monthly usage fees for one lot and pay nothing on her second lot until such time as she sold or developed the lot. Ms. Clements has provided this revenue to BKRE in the form of her connection fee and monthly usage payments. However, BKRE would essentially have us increase its revenue in contravention of our prior Order and the Settlement Agreement by requiring Ms. Clements to pay a second connection fee for a connection she does not want. We decline to do so.

The fact is that it is Lot 7, not Lot 6, which has enjoyed BKRE water service since 1993. Therefore, despite the misleading description applied to Lot 7 in Docket No. 02-2254-01, it is for Lot 7, not Lot 6, that the tariff requires payment of a connection fee and monthly usage fees. Lot 6 is not served by the water system, has no connection to that system and is essentially a dry lot. It is therefore reasonable to require BKRE to apply to Lot 7 all payments and credits heretofore applied to Lot 6. Lot 7 will then be treated as having a fully paid connection fee with continuing monthly water service while Lot 6 is reasonably treated under the tariff as a dry lot for which Ms. Clements bears no present responsibility for connection or standby fees. As such, BKRE is not entitled to collect connection or

standby fees for Lot 6 until such time as Ms. Clements develops or transfers the lot.

Our decision today does not alter the financial or rate structure approved in Docket No. 02-2254-01. It simply acknowledges that reasonable application of the tariff to Lots 6 and 7 requires a recognition of the water service conditions that have continued to exist on these two lots since 1993 but which BKRE failed to make known to us in the prior docket.

At hearing, Mr. Arnold stressed that such an outcome would concern BKRE because it would “lose” the monthly standby fee it would otherwise collect from Lot 6. However, the Settlement Agreement in Docket No. 02-2254-01 clearly intended to require Ms. Clements to pay one connection fee for her then-existing water service while deferring until a later date any requirement that she pay a connection fee and monthly standby fee for her second lot. Our decision today reaffirms this intent and merely reverses her obligations with respect to Lots 6 and 7 in order to conform those responsibilities to the reality that has existed on those lots for the past twelve years. In accordance with our Order and the Settlement Agreement, BKRE remains free to accrue standby fees on Lot 6 commencing July 2003 and to collect those fees along with the applicable connection fee when Lot 6 is developed or transferred.

Docket 04-2254-02

Stephanie Timothy testified that she and her husband Bradley own Lot 8 in BKRE’s service territory and acquired a .25 acre-foot water share with their lot upon purchase. On August 6, 2003, the State Engineer of the State of Utah issued a Memorandum Decision In the Matter of Application to Appropriate Water Number 97-2263 (A74475) approving the Timothy’s application to appropriate 1.506 acre-feet of water from BKRE’s existing well to be used for domestic purposes on their lot. As provided for in the Settlement Agreement and Order in Docket No. 02-2254-02, the Timothies granted .20 acre-foot of this water right to BKRE in lieu of payment of \$600.00 owing on their water service connection fee. Stephanie Timothy testified that this grant was made by Quit-Claim Deed, that it was executed and mailed no later than July 1, 2004, and that BKRE thereafter refused to credit her account the required \$600.00.

Mr. Arnold testified that the Timothies have not obtained a water right but merely executed a water filing that must still be proved. Therefore, the water right that they attempt to grant to BKRE by Quit-Claim Deed has no

monetary value to BKRE. Mr. Arnold also stated his belief that the State Engineer's Memorandum Decision on the Timothies' application did not in fact approve the water appropriation because it placed conditions on that appropriation, namely, that the "water uses claimed under this application are not duplicative of uses which are sustained under water rights vested in" BKRE. In other words, since the Timothies sought a water right from BKRE's own well and intend to transfer it back to BKRE for use in BKRE's water system that already maintains its own sufficient water rights, the Timothies' appropriation is duplicative and therefore not effective. Mr. Arnold also argues that the Timothies did not transfer the water right to BKRE within the time period established in our previous Order.

Mr. Huntsman testified for the DPU that the Settlement Agreement and Commission Order in Docket No. 02-2254-01 clearly provide that BKRE "customers may deed water rights to [BKRE] in lieu of paying the water right costs" of their connection fee. Mr. Huntsman pointed out that, while BKRE attempts to paint the Timothies' water right as not perfected because it had not yet been proved, Mr. Clarkson used the same Quit-Claim Deed procedure to transfer 15.4 acre-feet of unproven water rights to BKRE in 1997. Mr. Arnold confirmed as much and testified that BKRE had accepted that water right and subsequently taken necessary action to prove it by showing beneficial use. Mr. Huntsman recommended that the Commission order BKRE to credit the Timothies \$600.00 in recognition of the transfer of .20 acre-foot of water to BKRE and to remove from the Timothy account all interest charges accruing since July 1, 2004, on this \$600.00 unpaid connection fee balance.

We find nothing deficient in the Timothy's transfer of the .20 acre-foot water right to BKRE. Our prior Order provided that "amounts due . . . will be due within one year of the date of this order." The Order was dated July 3, 2003. Stephanie Timothy testified that she mailed the Quit-Claim Deed to BKRE no later than July 1, 2004. We therefore conclude that transfer of the water right was timely. We also conclude that use of the Quit-Claim Deed to transfer the appropriated right duly approved by the State Engineer is sufficient under the terms of our Order and the Settlement Agreement to require BKRE to credit \$600.00 to the Timothy's account in lieu of actual cash payment. We find nothing in the approved appropriation, Deed, Settlement Agreement, or Order that would require the Timothies to first prove their water right prior to transfer. The Timothies employed the same method of transfer used previously by

Mr. Clarkson. BKRE accepted that transfer and bore the costs of proving that water right. It is just and reasonable that BKRE should do so for the Timothies.

Docket Nos. 04-2254-01 and 04-2254-02

Regarding BKRE billing practices, at hearing, Mr. Arnold agreed on behalf of BKRE to discontinue its practice of billing in advance and to instead send bills at the end of the quarter for service rendered during the preceding three months. BKRE also agreed to provide a 20-day payment period following the billing date such that no interest, late fee or penalty would be applied to any account if the bill was paid during that 20-day period. Ms. Clements, Stephanie Timothy, and the DPU concurred with this proposal.

Due to the added costs of more frequent billing and the negative impact these costs can have on small water companies, we have previously permitted water utilities to bill on a quarterly basis and find that it is reasonable in this case to permit BKRE to continue doing so, except that billing may not occur in advance and must provide for a 20-day payment due period after the billing date. This decision strikes a reasonable balance between BKRE's interest in limiting postage and billing costs and the public interest in billing for service only after service has been rendered.

The Administrative Law Judge, having been fully advised in the premises, now recommends and the Commission enters the following

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

- BOULDER KING RANCH ESTATES WATER COMPANY shall, effective the date of this Order, cease billing its customers in advance for water service. Henceforth, BKRE shall not send bills to its customers for the preceding quarter's water service until the last business day of the quarter and shall provide customers a twenty (20) day period following said billing date in which to pay their bills with no late fee, penalty, or interest.
- BKRE shall remove from customers' accounts all charges for interest applied under its previous advance billing procedure, except that interest charges accruing after 20 days following the end of the quarter for which service was provided may continue.

- BKRE shall file a tariff consistent with this Report and Order within 30 days of the date of this Order.

The Division of Public Utilities shall review the revised tariff sheets for compliance with this Report and Order.

- BKRE shall amend its billing and other records to reflect one fully paid connection fee for Lot 7,

recognize that Ms. Clements maintains one water service connection on Lot 7, and henceforth bill Ms. Clements for water use on Lot 7.

- BKRE shall treat Lot 6 as a dry lot in accordance with its approved tariff.

- BKRE shall accept the .20 acre-foot water share granted by the Timothies and credit \$600.00 to the

Timothies' account in accordance with our Order and the Settlement Agreement approved in Docket No. 02-2254-01.

BKRE shall reverse any interest accrued on said \$600.00 commencing July 1, 2004.

- Any person aggrieved by this Order may petition the Commission for review/rehearing pursuant to the

Utah Administrative Procedures Act, Utah Code Ann. §63-46b-1 et seq. Failure so to do will preclude judicial review of

the grounds not identified for review. *Utah Code Ann. §54-7-15.*

DATED at Salt Lake City, Utah, this 3rd day of March, 2005.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 3rd day of March, 2005, as the Report and Order of the Public Service
Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

G#43084