

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of)
Edwin and Shirley Rahrer against Wolf) DOCKET NO. 06-071-02
Creek Water Company, Inc. and Wolf)
Creek Water Conservancy, Inc.) DOCKET NO. 06-2417-01
) REPORT AND ORDER

ISSUED: November 6, 2006

SYNOPSIS

Having determined Wolf Creek Water, Inc., has violated no provision of statute, regulation, or tariff in charging Complainants the Commission-approved standby fee for its culinary water service, the Commission dismissed that portion of the complaint. However, having received additional evidence regarding the level of customer support for the expansion of the Wolf Creek Water Conservancy, Inc. (“Wolf Creek Conservancy”) secondary water system, the Commission reconsidered its prior decision approving a standby fee for all residents of the Wolf Creek Conservancy service territory and ordered Wolf Creek Conservancy to charge the standby fee only to those who have explicitly committed by contract or other written agreement to pay a fee pending connection to the secondary water system. The Commission therefore ordered Wolf Creek Conservancy to refund to Complainants all standby fees for secondary water service collected from them since December 13, 2005.

By The Commission:

PROCEDURAL HISTORY

On May 5, 2006, Complainants Edwin and Shirley Rahrer filed a formal complaint against Respondent Wolf Creek Water Company, Inc. (“Wolf Creek Water”) and Wolf Creek Water Conservancy, Inc. (“Wolf Creek Conservancy”) (hereinafter jointly referred

to as the “Companies”¹ in which they complain about having to pay monthly standby fees for culinary and secondary water service which they do not use.

On July 6, 2006, the Division of Public Utilities (“Division”) filed a memorandum recommending the Commission dismiss the complaint based on its conclusion that the Companies’ actions had violated no provision of statute, rule, or tariff.

This matter came on for hearing before the Administrative Law Judge on August 24, 2006. Complainants represented themselves and provided sworn testimony. Several other customers of Wolf Creek Water were also present and provided sworn testimony in support of Complainants. Representatives of the Companies failed to appear. However, at hearing, the Administrative Law Judge determined the Companies had not been provided adequate notice of the hearing and so informed Complainants that additional hearing would be held to provide the Companies fair opportunity to present their case and question Complainants.

On September 13, 2006, indicating that they had not previously been aware of the complaint, the Companies filed a response to said complaint.

The evidentiary hearing continued before the Administrative Law Judge on September 27, 2006, in the Community Room of the Weber County Library, Ogden Valley Branch, Huntsville, Utah. Krystal Chapman, Financial Analyst, and Steven Roberts, President, appeared and testified on behalf of the Companies. Complainants were present and again

¹The complaint actually names Wolf Creek Water and Sewer Company (“WCWS”). However, by Order dated May 25, 2006, in Docket No. 06-071-01, the Commission granted the request of WCWS to change its name to Wolf Creek Water Company, Inc. in recognition of the fact that it no longer provides sanitary sewer service. Although Complainants name only one company in their formal complaint, the complaint challenges the propriety of the standby fees charged by both Wolf Creek Water and Wolf Creek Conservancy and we enter our findings and decision accordingly.

provided sworn testimony on their own behalf. Numerous residents of the Wolf Creek Conservancy service territory were also present and provided sworn testimony in support of Complainants' challenge to the secondary water standby fee.

At hearing on September 27, 2006, the Companies offered numerous documents into evidence. As Complainants had not yet had the opportunity to completely review these documents, the Administrative Law Judge admitted them into evidence subject to Complainants' post-hearing objection. Complainants were given until October 4, 2006, to file any comments on or objections to this evidence. The Companies were given one week following said filing to file any response. On October 3, 2006, Complainants filed a list of questions and points of fact for Commission consideration, but offered no objection to admission of the evidence previously admitted. On October 10, 2006, the Companies filed their Response.

BACKGROUND, DISCUSSION, FINDINGS, AND CONCLUSIONS

The Eden Hills, Patio Springs, Eagle Ridge, and Snowflake development areas of the Wolf Creek Conservancy service territory were not originally developed with a secondary water system. Between 2003 and 2005, Wolf Creek Conservancy completed an expansion of its secondary water system into these areas.² Complainants own adjacent lots in the Eden Hills subdivision. They reside on one of these lots and maintain culinary water service to that lot. They have not connected their residential lot to Wolf Creek Conservancy's secondary water system, nor have they connected their second lot to either the secondary water system or to Wolf

²Certification of Wolf Creek Water and Wolf Creek Conservancy, as well as approval of reasonable rates for the Companies, has occupied this Commission for the past several years, primarily in Docket Nos. 03-2417-01, 05-2417-T01, 03-071-T01, and 05-071-T01. We hereby take administrative notice of the evidentiary record compiled in said dockets and note that some facts cited herein are drawn from said record.

Creek Water's culinary water system. There is no dispute that the Companies have charged Complainants the Commission-approved standby fees for secondary water on both lots and for culinary water service on Complainants' second lot. However, Complainants challenge the legality or fairness of these fees and, alternatively, request to be "grandfathered" from paying the fees since they have owned their lots for many years, long before the secondary water system was built and the current standby fees approved.

We first address Complainants' challenge to payment of Wolf Creek Water's culinary water standby fee and start with the general observation that, in order to fulfill their regulatory obligations, culinary water utilities must build and maintain water distribution systems that are prepared to serve any resident upon demand. Standby fees have long been approved for culinary water utilities to provide an adequate revenue stream to these typically small utilities which would otherwise garner no revenue from property not connected to its system even though the system is in place and ready to serve that property. The utility incurs some expense in maintaining the ability to serve unconnected property on demand; a reasonable standby fee is permitted in recognition of this expense.

We approved the culinary water standby fee complained of in this docket because Wolf Creek Water has a regulatory obligation to size and maintain its culinary water system to serve every potential customer—that is, every lot—within its service territory.³ Complainants have presented no evidence in the instant case to convince us that Complainants should not have

³See Report and Order, dated December 1, 2005, in Docket Nos. 03-071-T01 and 05-071-T01.

to pay this fee simply because they choose not to connect their second lot to the culinary water system. We therefore find in favor of Wolf Creek Water on this issue.

However, while the question of a standby fee for a culinary water system is well-settled, the propriety of a standby fee for a secondary water system was a matter of first impression before this Commission in Docket No. 03-2417-01 and its later companion Docket No. 05-2417-T01. At hearing in Docket No. 03-2417-01 on June 16, 2004, the Division opposed approval of the standby fee requested by Wolf Creek Conservancy, noting that, unlike culinary water utilities, secondary water providers have no regulatory obligation to size and maintain their systems in order to serve all potential customers within their service territory. As a result, the Commission, by Order dated June 22, 2004, adopted interim rates that did not include the requested standby fee.

On June 27, 2004, Wolf Creek Conservancy filed a letter with the Commission seeking adjustment to these interim rates, including approval of a standby fee for those customers who had explicitly committed, through purchase contract, to pay said fee. Following an August 31, 2004, hearing on this request, the Commission, by Order dated September 7, 2004, approved an interim \$15.00 per month standby fee to be charged only to those individuals who entered into written, signed agreements obligating them to pay those fees. The Division supported approval of the interim standby fee under these limited circumstances.

Finally, an evidentiary hearing and public witness hearing were held on November 30, 2005, in Docket Nos. 03-2417-01 and 05-2417-T01 to consider proposed final rates, including a \$15.00 per month standby fee for all residents of the Wolf Creek Conservancy

service territory. At the evidentiary hearing, the Division recommended approval of the standby fee, arguing Wolf Creek Conservancy had expended the funds to provide a ready-to-serve system so charging a standby fee to all residents would be appropriate. Wolf Creek Conservancy testified that customer complaints during prior culinary water rate proceedings regarding the unavailability of a secondary water system prompted it to consider expansion of its secondary water system to the Patio Springs, Eden Hills, and Eagle Ridge subdivisions. Wolf Creek Conservancy thereafter held several public meetings to discuss the possibility of expanding its secondary water system to these subdivisions. Based on these meetings and the fact that customers were asking Wolf Creek to “put secondary [water] everywhere”, Wolf Creek Conservancy decided to build the system to serve all remaining areas of its service territory.

At the public witness hearing in Docket Nos. 03-2417-01 and 05-2417-T01, three customers provided sworn testimony and a fourth provided an unsworn statement. None of these individuals addressed the propriety of the proposed standby fee. Based on the Division’s recommendation and the evidence gathered during the November 30, 2005, hearings, the Commission issued its Report and Order dated December 13, 2005, approving a monthly standby fee of \$15 for all residents of the Wolf Creek Conservancy service territory, noting

we have previously been concerned about the propriety of approving a standby fee for a residential irrigation water system which, unlike its culinary water counterpart, need not necessarily be designed and built to provide service upon demand. Therefore, in Docket No. 03-2417-01, we concurred with the Division’s recommendation and approved a standby fee only for those customers who had specifically entered into written, signed agreements obligating them to pay those fees. However, having further evaluated this fee in the context of the rates proposed in Docket No. 05-2417-T01, the Division now supports the standby

fee. We note also Wolf Creek Conservancy's unrefuted testimony that customers throughout the [Wolf Creek Water] service territory have repeatedly requested secondary water over a period of many years, resulting in the establishment of Wolf Creek Conservancy and its construction of a ready-to-serve system. Under these circumstances, we conclude approval of the proposed standby fee is reasonable.

However, Complainants and the eleven fellow residents who testified on their behalf in the instant complaint now provide testimony indicating the clamor of residents for a secondary water system was not so universal as the Commission was led to believe in these prior proceedings. These residents variously testified they were never asked whether they wanted access to secondary water, never requested construction of the secondary water system, and never agreed to pay the standby fee for secondary water. Residents of the Snowflake development testified they knew nothing about the construction of a secondary water system until earth moving equipment showed up in their front yards to install the system.

Wolf Creek Conservancy responds that it has always sought public input and, having determined that an acceptable number of customers were in favor of the project and were willing to connect to the new system, subscription agreements were sent to all residents of these developments. Wolf Creek Conservancy thereafter received eighty executed agreements from residents and now has approximately one hundred customers connected in these developments. Wolf Creek Conservancy acknowledges the Snowflake development was not a part of the original secondary water system expansion plan and was not included in the public meeting held to discuss the proposed expansion in April 2003. However, Snowflake was added to that plan because Wolf Creek Conservancy believed it had an obligation to serve all residents within its

service territory.⁴ In support of its position that a large portion of residents desired secondary water and that Complainants and their supporters represent a fraction of area residents, Wolf Creek Conservancy notes that, prior to the instant complaint, it had received only thirteen complaints regarding secondary water standby fees.

However, numbers supplied by Wolf Creek Conservancy do not support its position. Wolf Creek Conservancy's total potential customer base numbers 780, of whom only 344 are connected to secondary water and 436 are purely standby customers. Thus, only 44% of potential customers have actually connected to the system. Restricting our analysis to only those subdivisions comprising the 2003-2005 system expansion, we find that in Eden Hills, Eagle Ridge, Patio Springs, and Snowflake, the percentage of eligible residents who have connected to the secondary water system is only 54%, 24%, 61%, and 12%, respectively. In total, only 44% of residents in these four developments have opted to connect. These numbers hardly evince the widespread support which this Commission was led to believe existed for expansion of the secondary system and on which we relied in approving Wolf Creek Conservancy's request for a system-wide secondary water standby fee in Docket Nos. 03-2417-01 and 05-2417-T01.

⁴Wolf Creek Conservancy appears to believe that, as a certificated secondary water utility, it had an obligation to provide a ready-to-serve system similar to that required of a culinary system. However, as we have previously indicated, a secondary water utility, unlike its culinary water counterpart, has no obligation to build a ready-to-serve system. We have made no prior finding nor rendered any decision that would confer upon a secondary water utility such an obligation. Instead, in Docket Nos. 03-2417-01 and 05-2417-T01, we raised but did not answer the question of whether an irrigation utility has such an obligation. Our ultimate approval of the standby fee in those dockets was based, not on a determination that Wolf Creek Conservancy had an obligation to provide a ready-to-serve system, but on the evidence then before us that Wolf Creek Conservancy had in fact built a ready-to-serve system based on the widespread requests of potential customers.

Moreover, testimony received in the instant docket indicates that several residents of the Snowflake development may have been advised by the President of Wolf Creek Conservancy during a meeting in October 2005 that they need not attend the hearings of November 30, 2005, because the proceedings would have no impact on their water bill. Another witness testified he contacted Wolf Creek Conservancy prior to the November 30, 2005, hearings and was told he would not have to pay the proposed secondary water standby fee. Although he attended the hearings and testified in favor of the proposed rates because of their emphasis on water conservation, he did so believing the standby fee would not apply to him.

Wolf Creek Conservancy acknowledges that a discussion took place with Snowflake residents in October 2005 relating to the issue of water pressure in Snowflake but denies any conversation regarding the public hearing scheduled for November 30, 2005, or, alternatively, that anything was said by Wolf Creek Conservancy to dissuade any resident from attending the public hearings. Wolf Creek Conservancy does not deny that its personnel may have erroneously advised a resident that the proposed standby fee would not apply to him, but states that any such advice was not provided with the intent to deceive.

Confronted with this new evidence, we conclude that our system-wide approval of the Wolf Creek Conservancy standby fee was based on a basic misunderstanding of the weight of public support that resulted in Wolf Creek Conservancy's construction of a ready-to-serve secondary water system. Said approval rested explicitly on the fact that Wolf Creek Conservancy had built a ready-to-serve system and that it had done so based on the widespread encouragement of potential secondary water customers. However, we now find that numerous

residents, including those whose residence pre-dates construction of the secondary water system, were never specifically asked whether they wanted a secondary water system and never indicated a desire to have the system expanded to serve their property. Instead, following a system expansion that these residents did not request and that Wolf Creek Conservancy was not required to undertake, the residents began receiving bills charging them standby fees for a service they had never promised to use and had no intention of using. Moreover, it appears that we did not learn of some residents' discomfort with and unwillingness to connect to the secondary water system during the public witness hearing on November 30, 2005, at least in part, because they understood from conversations with Wolf Creek Conservancy personnel that said hearing would not affect their water rates and that the standby fee would not apply to them.

Therefore, having considered the totality of the evidence now before us, we find and conclude that it is not reasonable for Wolf Creek Conservancy to charge its approved standby fee to residents who choose not to connect to the secondary water system. Instead, as we determined on an interim basis in Docket No. 03-2417-01, we conclude this fee can reasonably be applied only to those residents who by virtue of a purchase contract or other written instrument have explicitly agreed to pay a fee pending connection to the secondary water system.

Because Complainants have never agreed to connect to the secondary water system or to pay the standby fee, we further conclude that the secondary water standby fee charged to and paid by Complainants since December 2005 is unreasonable. As such, in accordance with *Utah Code Annotated* 54-7-20, we order Wolf Creek Conservancy to refund to

Complainants all secondary water service standby fees paid by Complainants since our Order of December 13, 2005.

The Commission's decision announced herein restricts charging the approved secondary water standby fee to only those residents who have obligated themselves to pay such a fee by purchase contract or other written agreement. However, we recognize that some binding agreements do not take written form. If Wolf Creek Conservancy believes it should be permitted to charge the standby fee to certain residents based on some non-written agreement between Wolf Creek Conservancy and said residents, it should give notice to those residents of its intent to charge them the fee and notify the Commission so that proceedings may be scheduled to determine whether it is reasonable, based on the claimed non-written agreement, for Wolf Creek Conservancy to charge the standby fee to said residents. In no case may Wolf Creek Conservancy charge said fee to said residents until it has received Commission approval to do so.⁵

Wherefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters the following proposed

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. That portion of the complaint of Edwin and Shirley Rahrer pertaining to the standby fee charged by Wolf Creek Water Company, Inc., is dismissed.

⁵We also recognize that our decision announced herein will likely have some impact on the revenues of Wolf Creek Conservancy. We simply remind Wolf Creek Conservancy that, in accordance with *Utah Code Annotated* § 54-7-12, it may at any time petition the Commission for an adjustment of rates to address any claimed revenue deficiency.

2. Wolf Creek Water Conservancy, Inc., may charge the standby fee previously approved in Docket Nos. 03-2417-01 and 05-2417-T01 only to those residents of its service territory who have obligated themselves by purchase contract or other written agreement to pay a fee pending connection to the secondary water system.

3. Wolf Creek Water Conservancy, Inc., shall refund to Edwin and Shirley Rahrer all secondary water service standby fees collected from them since December 13, 2005.

Pursuant to *Utah Code Annotated* §§ 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of *Utah Code Annotated* §§ 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 6th day of November, 2006.

/s/ Steven F. Goodwill
Administrative Law Judge

DOCKET NOS. 06-071-02 & 06-2417-01

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Approved and Confirmed this 6th day of November, 2006, as the Report and
Order of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

G#51151 Docket No. 06-071-02
G#51165 Docket No. 06-2417-01