

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of Deepwater)
Distribution Company, Inc. for Exemption) DOCKET NO. 86-999-08
) REPORT AND ORDER
)

ISSUED: August 11, 2009

By The Commission:

This matter is before the Commission on Deepwater Distribution Company's (Company) application for exemption from regulation pursuant to Utah Admin. Code R746-331-

1. On or about January 13, 2009, the Company petitioned for an exemption. The Company serves three connections, but does not have a certificate of public convenience and necessity. It is a "water corporation" as defined in Utah Code Ann. § 54-2-1(29). It is also a non-profit corporation in good standing with the Division of Corporations.

Per the order of the Commission, the Division performed a review of the Company's Application and conducted an investigation of the Company and submitted its findings in its recommendation of July 14, 2009. The Division gave the following background on the Company:

In addition to reviewing the submitted application for exemption, the Division asked data requests, received correspondence, and spoke with a member of Deepwater's board and its attorney on the phone and in person.

In its application, Deepwater represented that it was serving three connections. Deepwater does not have a certificate of public convenience and necessity. Deepwater could not specify the number of connections it anticipated, but noted that there were approximately 220-450 residential connections possible. Commercial connections are also allowed by Deepwater's bylaws.

Deepwater's bylaws establish three classes of stock: development stock, use stock, and irrigation stock. Development stock and use stock have voting rights; irrigation stock does not have voting rights. Voting rights for development stock and use stock are proportional to water shares held. Directors, who cannot

number fewer than three, are elected by a simple majority of outstanding shares present, or by proxy, entitled to vote at the annual meeting. A quorum is determined by a simple majority of outstanding shares present to vote, in person or through proxy.

Currently Deepwater has issued 24 shares of stock. According to its application, lot ownership is as follows:

Robert/Tanya Powel - 6 lots (development and use shareholders)

Sean/Bridget Brown - 2 lots (development and use shareholders)

Brad/Annabelle Lewis - 2 lots (development shareholders)

Ingrid Nygaard/Charles Saltzman - 2 lots (development shareholders)

Furthermore, from the November 2009 board minute meeting minutes, it appears as if there are five irrigation shareholders. Deepwater's bylaws allow the following: 3,000 development shares may be issued - voting rights of one per share; 2,000 use shares may be issued - voting rights of one per share; and 5,000 irrigation shares may be issued, each of which is a non-voting share.

In its December 5, 2008 board of directors meeting, Deepwater voted not to allow the issuance of shares in excess of the Company's source capacity. To date Deepwater has issued 24 shares but did not specifically identify each stockowner along with classifications and numbers of shares owned or specify the assignment of shares to classes of stock,

Responsibility for cost incurrence differs between the classes of stock. Development stock is not generally assessable and bears no responsibility for operation and maintenance expenses or standby fees, and seemingly bears no responsibility for general administrative costs but only bears responsibility for "holding costs" and charges related directly to this class of stock. Use stock is fully assessable, and bears cost responsibility for operation and maintenance fees, standby fees, costs directly pertaining to its class of shares, and is subject to a water development fee. Irrigation shares are not subject to general assessments, but only to charges associated with the irrigation system and a proportionate share of administrative charges.

Division Recommendation, pp. 2-3.

After performing its review of the Company and its Application, the Division recommended that the Company should not be exempt from regulation, and that it should be required to obtain a certificate of public convenience and necessity (CPCN).

Rule 746-331-1 of the Utah Administrative Code details the conditions warranting a finding of exemption. It states, in relevant part:

C. If, on the basis of the information elicited, the 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 adequately controls the assets necessary to furnish culinary water service to its members, including water sources and plant; and that voting control of the entity is distributed in a way that each member enjoys a complete commonality of interest, as a consumer, such that rate regulation would be superfluous, then the Commission shall issue its finding that the entity is exempt from Commission jurisdiction, and the proceeding shall end.

Based on its findings, and the provisions of R746-331-1, the Division did not feel an exemption was appropriate because the evidence did not show “that voting control of the entity is distributed in a way that each member enjoys a complete commonality of interest, as a consumer, such that rate regulation would be superfluous...” It cited its main concerns as 1) lack of specificity regarding the number and types of future shareholders; 2) the various classes of shares with differing cost responsibilities and different voting rights attached to each class. First, it stated that the Company could not specify the number of connections it anticipated, but stated that there were approximately 220-450 residential connections possible, and the possibility of commercial connections as well. Given this lack of specificity, and without knowing more about the possible types of connections, the Division stated it could not find that there was sufficient commonality of interests. Second, the Division stated its concerns with the various classes of shares and their respective rights and responsibilities. It recognized that currently, all three board members were use shareholders. However, depending on the future development of the area, the board’s composition could change and the board could be comprised solely of holders of development shares. The Division

opined that this could occur because the Company's bylaws permit 3,000 development shares to be issued but only 2,000 use shares to be issued. The 5000 irrigation shares do not enjoy any voting rights. "Also, because the number of permitted development shares exceeds the number of permitted use shares, it is possible that under the applicable bylaws pertaining to establishing a quorum at a meeting, development shareholders could determine actions that would be paid for only by use shareholders." *Division Recommendation*, p.4. Ultimately, the Division did not find that there was a commonality of interest in consumers such that rate regulation would be superfluous. The Division also recommended the Commission order it to file a Motion for Order to Show Cause, per R746-331-1, to commence proceedings necessary to assert Commission jurisdiction.

ORDER

Therefore, based on the Division's recommendation, and finding that the voting control of the entity is not distributed in a way such that there is a complete "commonality of interest, as a consumer, such that rate regulation would be superfluous,"

1. the Commission denies the application for exemption;
2. the Division shall file a Motion for Order to Show Cause no later than 30 days from the entry of this Order, detailing why the Company should be required to obtain a CPCN;
3. pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing within 30 days

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after issuance of this Order by filing a written request with the Commission. 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 does not grant a request for review or rehearing within 20 days after the filing of the request, 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 requirement of Sections 63G-4-401 and 63G-4-403 of the Utah Code and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 11th day of August, 2009.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 11th day of August, 2009 as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

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