- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition for and Order to Show Cause Regarding Exemption from Commission Regulation of Boulder King Ranch Estates Water Company	)))))	DOCKET NO. 02-2254-01 AMENDED REPORT AND ORDER

ISSUED: October 16, 2002

By the Commission:

On application of the Division of Public Utilities, this Commission issued an Order to Show Cause why the letter of Exemption granted to Boulder King Ranch Estates Water Company ("Boulder King" of the "Company") should not be revoked and its rates and conditions of service be subject to the Orders and Administrative Rules adopted by this Commission. Hearings were held in Boulder, Utah. The Division of Public Utilities, through Wes Huntsman, offered testimony and examined witnesses. Boulder King, represented by Barry E. Clarkson, also offered testimony and examined witnesses. Numerous customers of the Company also offered sworn testimony. The Company and the Division also filed post-hearing briefs. Being fully advised, we enter the following:

FINDINGS AND DISCUSSION

1. Boulder King Ranch Estates is a subdivision currently comprised of 61 lots. It was created in 1966. In the early 1980's Mr. Dale Clarkson purchased and assumed control of the subdivision development. Title to the unsold lots was transferred to a retirement trust for Mr.

Clarkson. Over the years some of the original lots have been sold, some with the promise of culinary water and some with no promise of water ("dry lots").

2. Beginning in 1989, Dale Clarkson began assessing dry lot owners $2,000 for an "Improvement Package" which included provisioning water and power service to the lots. In 1994, Mr. Clarkson increased the cost of the Improvement Package to $2,500. Some owners of dry lots paid for the Improvement Package. Many dry lot owners had not requested water or power hookups and refused to pay for the Improvement Package. Mr. Clarkson, on behalf of the Company, also began accruing interest on unpaid assessments for the Improvement Package.

3. Boulder King Ranch Estates Water Company was formed in 1993. Dale Clarkson, his son Larry Clarkson, and Keith Gailey were appointed to the board of the Company. At the time, Larry Clarkson did not own a lot in the subdivision. He was later given a lot in exchange for work done installing parts of the water system. Mr. Clarkson provided or promised to provide shares in the Company to lot owners that had purchased lots with a promise of water rights, or had paid for the Improvement Package. Mr. Clarkson, on behalf of the Company, began charging a $5 per month standby fee for lots not hooked up to the system, and $15 per month for water usage to lots where hookups had occurred. Mr. Clarkson, on behalf of the Company, also began accruing interest at the rate of 18% on unpaid improvement packages, standby, and monthly usage fee balances. Further "improvements" were done in 2000 and 2001 by Mr. Clarkson without prior approval of the lot owners, water company members, or the Company board. Mr. Clarkson, on behalf of the Company, began billing some lot owners $3,900 or $5,900 for this second "Improvement Package" that included the cost of installing telephone

lines to the lots, widening, grading and graveling roads in the subdivision, improving paths and trails, and fencing the subdivision. Mr. Clarkson also began accruing interest on these assessments at the rate of 18%. Several lot owners objected to paying for the improvements that they claim were never asked for, authorized, or wanted.

4. In 1994 the Company was notified by the Utah Department of Environmental Quality that it was not in compliance with applicable rules regarding its water system. Other administrative actions were taken by the DEQ against the Company, including issuance of an order in 1996 finding the water system unapproved. After further administrative actions, the Division of Drinking Water ("DDW") approved plans for expansion of the system and an operating permit for the well serving the system in September 2001. On May 1, 2002, as a result of failure to comply with monitoring and testing requirements, the DDW downgraded the Boulder King water system to "Not Approved." On May 29, 2002, the DDW changed the classification of the Boulder King system to "non-public" for monitoring, quality, reporting, and operator certification requirements. The change was due to the number of connections currently being served. The "Not Approved" rating was also removed, and the system is now unrated.

5. In May 1998, the Division of Public Utilities filed a Petition for an Order to Show Cause against Dale Clarkson and Boulder King for operating a public utility without proper authority. Boulder King resisted regulation. The Division agreed to recommend that the Company be issued a Letter of Exemption. On April 19, 1999, a Letter of Exemption was issued to Boulder King.

6. Following complaints from numerous customers of Boulder King, the Division again investigated the Company and started this proceeding with a Petition for an Order to Show Cause as to why the letter of exemption should not be revoked.

Boulder King challenges the ability of this Commission to exercise its regulatory powers over the Company. Boulder King recognizes this Commission's ability to regulate public utilities, but claims that it is not a public utility. *Utah Code Ann*. § 54-2-1(15)(a) defines a public utility as:

> "Public utility" includes every railroad corporation, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer not described in Subsection (15)(d), where the service is performed for, or the commodity delivered to, the public generally . . .

Subsection 27 of that same section defines the term "water corporation" as follows:

> "Water corporation" includes every corporation and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any water system for public service within this state. It does not include private irrigation companies engaged in distributing water only to their stockholders, or towns, cities, counties, water conservancy districts, improvement districts, or other governmental units created or organized under any general or special law of this state.

Utah Code Ann. § 54-2-1(27).

The term "water system" is defined in section 54-2-28(a). Then section 54-2-28(b) states:

> "Water system" does not include private irrigation companies engaged in distributing water only to their stockholders.

Boulder King claims that because it is a nonprofit corporation which serves only its owning members with each lot having one vote, that it is not a "public utility." We disagree.

Boulder King falls within the definition of a public utility. It is a water corporation that owns, controls, operates, or manages a water system for public service within this state. The fact that it is a nonprofit corporation owned by the owners of lots in the Boulder Kings Ranch Estates subdivision does not cause it to be exempt from regulation. The statutes set forth above that define "water corporation" and "water system" do exempt from regulation systems engaged in distribution of *irrigation* water to their stockholders. There is no similar exemption for culinary systems.

Boulder King further claims that it does not serve the public as required by statute. Boulder King relies on Garkane Power Co. v. Public Serv. Comm., 98 Utah 466, 100 P.2d 571 (1940). That reliance is misplaced. The Garkane court held that Garkane Power was not a public utility because it only served its members, and it was able to choose who would be a member. It therefore did not serve the general public. The court's reasoning in coming to that conclusion is applicable to this case. The Garkane court said:

> The distinction between a public service corporation and a cooperative is a qualitative one. In a cooperative the principle of mutuality of ownership among all users is substituted for the conflicting interests that dominate the owner vendor--non owner vendee relationship. In a cooperative all sell to each. The owner is both seller and buyer. So long as a cooperative serves only its owner-members and so long as it has the right to select those who become members, ordinarily it matters not that 5 or 1000 people are members or that a few or all the people in a given area are accorded membership, provided the arrangement is a bona fide cooperative or private service organization and is not a device prepared and operated to evade or circumvent the law. The courts will always scrutinize closely to determine whether or not a certain organization or method of conduct has for its purpose evasion of the law, and where it finds such evasion will declare such organization to be what it truly is.

Id. at 573. The court further stated:

> It is conceded that "the public" does not mean all of the people in the state or in any county or town. "The public" is a term used to designate individuals in general without restriction or selection. A service organization which holds itself out to serve all who wish to avail themselves of its services might be a public utility even though only one or two people actually receive service.

Id. at 574.

At the hearing on this matter representatives of Boulder King agreed that it did not have the ability to choose its members. Lot owners in the subdivision are, by virtue of their lot ownership, members. Boulder King representatives further stated that every person or entity that purchases a lot is entitled service from the Company. Boulder King cannot choose its members as required by the Garkane decision, and is obligated to serve the public within its service area.[1]

The reasoning of the Garkane decision is incorporated into Commission rule R746-331, Determination of Exemption of Mutual Water Corporations. Boulder King fails to meet at least two of the requirements of that rule.

For exemption from regulation, Rule 331 requires inquiry into the ownership or control of assets necessary to furnish culinary water service. The Division testified that it had been unable to verify that sufficient water rights had been transferred to the Company, or that the well, pump, tank, and distribution line facilities were owned by the Company. The Company did not offer evidence contradicting the Division's findings, and this issue remains unresolved.

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[1] As stated above, some of the lots in Boulder King Ranch Estates were sold as "dry lots" with no promise of water. The Company has, however, sent bills to the dry lot owners. By its actions the Company has shown that it considers those lots within its service territory and obligation.

More troubling in this case is the required inquiry into ownership and voting control of the entity. The facts in this matter clearly show that the developer, Dale Clarkson, has maintained control over this entity, to the detriment of customers, and possibly the Company itself.

The letter of exemption previously granted to Boulder King was based on the representation that Mr. Clarkson would not and could not exercise control over the Company. Prior to issuance of the Letter of Exemption, the By-Laws of Boulder King were amended to state: "The Developer shall be limited to one (1) vote for control purposes as it relates to policy making and managing the affairs of the company." The Company, and Mr. Clarkson, further represented to the Commission that title to the unsold lots in the subdivision had been transferred to an IRA Trust Account. Based on those representations the Division recommended that the Company be granted a Letter of Exemption, and a Letter of Exemption was granted.

The representations upon which that letter was granted, however, were false. Boulder King customers testified that at least two meetings of the Company Mr. Clarkson stated that he was prepared to vote proxy votes for the shares held in the IRA Trust Account. Those votes together with the one vote for the lot titled in Mr. Clarkson's name were enough to allow Mr. Clarkson to control the Company.[2] Mr. Clarkson admitted that the trustees of the IRA Trust

[2] The Company's brief discusses whether Mr. Clarkson had control over his son, and therefore his vote in company affairs. Because Mr. Clarkson's voting the Trust shares itself constitutes a violation of the basis of the granting of the letter of exemption, and the fact that Mr. Clarkson's voting block is large enough for him to have effective control of the company, we do not need to address that issue. We do find it significant with respect to Mr. Clarkson's control of the Company that it was Mr. Clarkson's son that installed some or all of the water system in exchange for a lot from Mr. Clarkson.

Account have a fiduciary responsibility to him, and that he directs the disposition of the proceeds from the sale of lots. The Division testified, and we so find, that Mr. Clarkson continues to have control over the voting of the shares held by the IRA Trust Account. Contrary to his representation that he would have only one vote, Mr. Clarkson has continued to exercise control over the votes for the lots held in the Trust, and has exercised effective control over the Company.

Recently an amendment to the Company By-Laws was placed for a vote of the shareholders. The amendment would take away the voting right of any customer that is not current on all bills and assessments. A vote was cast for each of the lots held in the IRA Trust Account and the proposed amendment passed 35 to 6. This provision further eliminates any commonality of interest of the customers. That this provision disenfranchises customers that have not paid for improper assessments, as discussed below, is particularly troublesome.

Mr. Clarkson's control has engendered numerous problems with the Company that must be addressed. He recently took out a loan in the amount of $50,977.10 in the name of Boulder King Ranch Estates Water Company without authorization from the Company. Customers of the company have also been mistreated. In response to a request for information Mr. Clarkson told one customer that if he wanted the information he would have to pay $2 per page for copies of the relevant documents. Mr. Clarkson also sent letters to other utilities encouraging them not to serve residents of Boulder King Ranch Estates until those customers had paid all billings from Mr. Clarkson. And in what must be seen as scare tactics, Mr. Clarkson also

sent letters to Boulder King customers stating that if the Company were regulated by this Commission, rates would be as high as $150 per month.

Most serious, however, is Mr. Clarkson's attempt to use the water company to collect "Improvement Packages." In 1989, Mr. Clarkson assessed dry lot owners $2,000 which included placing water and power to the subdivision lots. In July 2000, Mr. Clarkson, on behalf of the Company, began billing lot owners either $5,900 or $3,900 (depending on whether the owner had previously obtained a water right) for another "Improvement Package" that included installing telephone lines to the lots in the subdivision; widening, grading and graveling roads; improving paths and trails, and fencing the subdivision. These packages were nothing more than an attempt by Mr. Clarkson to pass development costs onto current lot owners through his control of the water company. At the hearing, the Company's attorney conceded that the Company lacked the legal authority to make such assessments, both as a water corporation and under its Articles of Incorporation. The Company also agreed, during the hearing, to refrain from attempting to collect on any such assessments until this matter is resolved.

Unfortunately Mr. Clarkson was successful in collecting assessments from some customers. The issue of whether, and if so how, refunds should be made to such customers will need to be addressed. We will order the Company to provide all information regarding payments for assessments made by customers to the Commission and the Division of Public Utilities. All parties are also directed to address this issue in their testimony and recommendations for the hearings set below.

The history of this company demonstrates a serious failure of the officers to properly manage the company, and to protect the interests of customers. The Company, Mr. Clarkson in particular, has exhibited a pattern of withholding information, using the company for private gain, making improper and groundless statements to customers and other utilities, and in general showing little concern for the interests of customers. The facts of this matter show that regulation is not superfluous. On the contrary, the facts indicate the absolute necessity of regulating this particular water corporation.

CONCLUSIONS OF LAW

1. The Letter of Exemption previously granted to Boulder King was granted based upon false premises and must be rescinded.

2. The Company does not qualify for exemption from regulation by this Commission. Regulation by this Commission is not only proper, but necessary.

3. Further proceedings are necessary to set rates and conditions of service, and to address the possible refund of previously paid improper assessments.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. The Letter of Exemption granted to Boulder King Ranch Estates Water Company is rescinded, and the Company is subject to the regulatory jurisdiction of this Commission.

2. Boulder King may not collect assessments for any Improvement Packages, or interest thereon. All other rates and charges of the Company are to remain the same pending the further proceedings set herein.

3. Boulder King is to provide to the Division of Public Utilities and this Commission all information it has regarding customers that have paid assessments, including the dates of each payment, and any interest accrued and/or paid by each customer.

4. Further proceedings will be held to set the rates and conditions of service for Boulder King. The schedule for those proceedings is as follows:

a. On November 22, 2002, the Division of Public Utilities shall file testimony and exhibits updating its previous testimony in this matter, and proposing rates and conditions of service for the Company.

b. On December 20, 2002, Boulder King will file its testimony and exhibits regarding the rates and conditions of service of the Company.

c. If the Division wishes to file responsive testimony, it will do so by January 3, 2002.

d. Hearings will be conducted by the Administrative Law Judge of the Public Service Commission of Utah on Tuesday, January 7, 2003, beginning at 9:00 a.m., in the Fourth Floor Hearing Room #451, Heber M. Wells State Office building, 160 East 300 South, Salt Lake City, Utah. All parties have the right to be represented by legal counsel. Failure to bring legal counsel will constitute a waiver of the right to representation.

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this hearing should notify Julie Orchard, Commission Secretary, at 160 East 300 South, Salt Lake City, Utah, 84111, (801) 530-6713, at least three working days prior to the hearing.

DATED at Salt Lake City, Utah, this 16th day of October, 2002.

/s/ Douglas C. Tingey
Administrative Law Judge

Approved and Confirmed this 16th day of October, 2002, as the Report and Order of the Public Service Commission of Utah.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#31256