

involving the operations of Dammeron Valley Water Works (“DVW”).¹

In the Complaint, Petitioners alleged that they were significantly overcharged for water service for the months of May through October 2006 relative to prior billing statements and are subject to future overcharges. In addition, Petitioners had good cause to believe that DVW improperly manipulated previous billings to some customers in a way that (a) is in violation of DVW’s filed tariff provisions, (b) is discriminatory, (c) has improperly encouraged Petitioners to use quantities of water significantly beyond levels they would otherwise have used, (d) may establish that DVW’s current rates are not just and reasonable, and (e) may establish that DVW’s current rates were improperly established in Docket No. 04-2025-01.

A complaint filed with the Commission is a formal complaint under the Utah Administrative Procedures Act unless the Commission, by rule, provides for informal complaint treatment under Utah Code Ann. §§ 63-46b-4 and -5. The Commission’s only rule in this regard is Utah Administrative Code § R746-100-1.B concerning customer complaints, under which the Commission *may* convert a customer complaint to an informal proceeding. Although the Commission apparently referred the matter to the Utah Division of Public Utilities (“Division”) for a recommendation, it issued no order pursuant to R746-100-1.B. Accordingly, Complainants are unclear under which portions of the Utah Administrative Code and the Commission’s Rules of Procedure that this

¹Damerron Valley Water Works is a DBA registered with the Utah Department of Commerce. Brooks Pace was the applicant and is the registered agent for DVW.

matter is being treated.

On March 6, 2007, in a Memorandum to the Commission, the Division recommended that the Complaint be dismissed. Whether the Complaint is to be treated as formal or informal, however, Complainants vigorously oppose the Division's recommendation that the Complaint be dismissed and ask the Commission to grant Complainants' request that the Division be required, pursuant to Utah Code Ann. § 54-4-1.5(3), to conduct an audit and investigation of DVW's books, record-keeping and billing practices insofar as the DVW has not complied with applicable law and filed tariff provisions.

ARGUMENT

The Division's Memorandum purports to be a "Complaint Analysis." It analyzes nothing. Rather, in 2½ pages the Memorandum only:

- a. Summarizes without comment the positions and supporting evidence set forth in the Complaint and accompanying Exhibits A-E;
- b. Summarizes without comment DVW's Answer, dated January 25, 2007.

Notably, the Answer is limited solely to DVW's various admissions and denials and a variety of factual allegations and claims set forth by counsel, with *no* supporting documentation;²

²The importance of this is that the Division appears to have treated DVW's Answer as though it were a Motion for Summary Disposition, upon which a dismissal of the Complaint could be based. This is not possible in any administrative adjudicatory proceeding—formal or informal—if there is no evidentiary support for the dismissal. DVW's counsel's mere denials and unsupported factual assertions do not provide any such foundation.

c. Concludes without explanation or analysis that “Petitioners have provided no proof to back their claim” in Complaint paragraphs numbered 1, 3, 4 and 8. The Division provides *no* analysis of the claims in these paragraphs, much less any discussion of the Complainants’ claims set forth in the 10 Complaint paragraphs numbered 2, 5, 6, 7 and 9-14;

d. States it “did not find any evidence” that DVW had violated any statute, rule or tariff.

Such a response is wholly unwarranted. Complainants have raised serious issues concerning the discriminatory application of its Commission-approved tariff—with sufficient support in the exhibits attached to the Complaint to make out a *prima facie* case that DVW has engaged in improper actions that are within the jurisdiction of the Commission. The Division’s recommendation is tantamount to concluding that, because the respondent DVW has filed a formal Answer denying all of the claims, the Complaint should be denied.

The Division’s Memorandum provides no analysis and gives no indication that it investigated any of the factual claims that are in dispute. For example, the Complaint establishes, and DVW essentially concedes, that DVW did not charge its stated tariff rate for certain overages to the Complainants’ predecessor owners of the property in question.³ Yet, the Division’s Memorandum does not explain how it reaches the

³DVW claims that it was justified in doing so because of certain drought conditions. Nothing in its tariff permits such arbitrary deviation from its filed rates. In addition, this

conclusion that no tariff or statute had been violated. Complainants note that Utah Code Ann. § 54-3-8 and its predecessor code provisions have, since at least 1917, prohibited utilities from granting preferential rates and charges or special advantages to some of its customers. But, that is exactly what DVW did in allowing one or more of its customers to pay for extensive water use at an overage rate not stated in DVW's tariff.

For example, paragraph 8 of the Complaint: "Apparently, in order to encourage extensive water use by the Bradleys and others who owned shares in DVW, DVW agreed to bill the Bradley's \$0.25 per thousand gallons of use regardless of whether they were into the 'overage block' of the tariff rate specified at \$2.00 per thousand gallons." Admittedly, Complainants have not "proved" this claim. It, of course, has no ability nor the resources to directly access the books and records of the utility. That, presumably, is why Utah Code Ann. § 54-4-1.5 gives the Commission the authority to have the Division meaningfully investigate utility actions and behavior.

The Division's Memorandum implies that Complainants have the full burden to prove that Respondent has violated statutes or tariff provisions. Such a position is untenable and inconsistent with the regulatory framework under which public utilities operate. It is the function of the Commission and of the Division to protect customers of utilities under the jurisdiction of the Commission. These agencies are not neutral arbiters in the style of the state and federal courts.

rationalization is a recent construct, appearing for the first time in DVW's Answer. At no time during the various communications between Complainants and DVW—either directly or through counsel—was this "excuse" ever articulated.

Utility regulation recognizes that organizations such as DVW with “natural” monopoly powers and similar superior bargaining and economic power require some level of government supervision. Utility law does not require that an aggrieved customer prove, with its own resources in the manner of civil litigation, that its requested relief should be granted. The single customer has no ability to singularly investigate and sort out the possible wrongdoing of its utility supplier.

Serious matters concerning DVW’s preferential treatment and violation of its tariff have been raised. Complainants having made out a *prima facie* case that the utility has engaged in one or more acts that are not in compliance with its tariff and state statute, the burden necessarily shifts to the utility. The Commission should undertake to require that the utility provide sufficient *evidence*—not mere denials by counsel of the Complainants’ assertions—to establish that it is wrongly accused. An admit-and-deny Answer, augmented only by unsupported factual allegations that are not verified or accompanied by appropriate affidavits or other cognizable evidence, does not satisfy the regulatory structure that has been established by the Legislature and the Commission’s own rules.

For the Commission to dismiss Complainants’ claim on no more than the Division’s perfunctory Memorandum would be arbitrary, capricious and an abuse of the Commission’s considerable discretion.

WHEREFORE, Petitioners respectfully renew their original request that:

1. The Commission, pursuant to Utah Code Ann. § 54-4-1.5(3), require the

Division of Public Utilities to conduct a *complete and thorough audit* of DVW's books, record-keeping and billing practices and to determine the extent to which:

- (a) DVW has violated its filed tariff,
- (b) DVW has engaged in discriminatory treatment of its customers,
- (c) DVW has taken actions that have improperly induced customers to use

excess water because of below-tariff billings, and

(d) DVW has presented information and data to establish its current rates in Docket No. 04-2025-01 that did not accurately reflect known and expected conditions on its system.

2. The Commission order such refunds to Petitioners and other DVW customers as it deems just and reasonable upon completion of its investigation into the operations of DVW.

DATED this ____ day of March 2007.

Respectfully submitted,

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

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CERTIFICATE OF SERVICE

I certify that on March 27, 2007, I caused a correct copy of the RESPONSE TO RECOMMENDATION OF DIVISION OF PUBLIC UTILITIES ON COMPLAINT AND REQUEST FOR INVESTIGATION to be mailed via US Mail to:

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