

John S. Flitton (#7200)
Lara A. Swensen (#8493)
FLITTON & SWENSEN
1840 Sun Peak Drive, Suite B-102
Park City, Utah 84098
Telephone: (435) 940-0842
Facsimile: (435) 940-0852

Attorneys for Summit Water Distribution Company

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

BEAR HOLLOW RESTORATION, LLC,

Applicant/Complainant,

v.

LEON H. SAUNDERS; LANDMARK
PLAZA ASSOCIATES; PARLEY'S
CREEK, LTD.; PARLEY'S LANE, LTD.;
PARLEY'S PARK; STUART A.
KNOWLES; TRILOGY LIMITED, L.P.;
TRILOGY ASSET MAANGEMENT, INC.;
LAND & WATER RESOURCES, INC.;
LAWRENCE R. KNOWLES
IRREVOCABLE TRUST; LEON H.
SAUNDERS, STUART A. KNOWLES and
TRILOGY LIMITED, L.P. dba SK
RESOURCES, a Utah general partnership
and/or joint venture; SUMMIT WATER
DISTRIBUTION COMPANY, a Utah
corporation,

Respondents.

**MEMORANDUM IN SUPPORT OF
RESPONDENT SUMMIT WATER
DISTIRBUTION COMPANY'S
MOTION TO DISMISS BEAR
HOLLOW'S COMPLAINT AND
REQUEST FOR AGENCY ACTION**

Docket No. 09-015-01

Pursuant to Utah Rules of Civil Procedure 12(b)(1) and (2), Summit Water Distribution Company (individually, “SWDC”)¹ hereby respectfully submits this memorandum in support of its Motion to Dismiss the Complaint and Request for Agency Action brought by Bear Hollow Restoration, LLC. (“Bear Hollow”).

INTRODUCTION

The Public Service Commission (“PSC”) has examined Summit Water Distribution Company’s (“SWDC’s”) status as an exempt, non-profit mutual water company four times, and each time the PSC has properly concluded that regulation of SWDC is unnecessary and unjustified under the statutory requirements. The Complaint and Request for Agency Action was brought by Bear Hollow, a Class A shareholder in SWDC. Bear Hollow acquired its shares through bankruptcy proceedings when the previous owner was financially unable to complete the development of property to which Class A shares in SWDC attached. Bear Hollow acquired the development out of bankruptcy, and assumed the rights and obligations of the original Development Agreement with SWDC governing water service to the project. Following acquisition of the project, Bear Hollow changed the development plan, resulting in different water requirements. After making those unilateral changes, Bear Hollow requested that SWDC amend the original Development Agreement to allow Bear Hollow to strip the water shares originally dedicated to the development from the homeowner’s association for sale

¹ The remaining respondents have notified Summit Water Distribution Company that although they have filed a separate response on procedural grounds, they join in this motion as well. As a result, we refer to all respondents as “Respondents” herein.

elsewhere in the Snyderville Basin. The SWDC Board of Directors carefully considered the request to amend the contract but ultimately denied the request based on the company's long-standing appurtenancy requirement, as reflected in the corporate charter documents.

Now, Bear Hollow, in an effort to strengthen its negotiating position with SWDC and avoid dealing with the contract issues head-on, brings this largely unrelated and baseless Complaint. By asking the PSC to revisit its previous rulings that SWDC is not subject to PSC regulation and to supersede the Board of Directors' carefully considered decision that Bear Hollow cannot unilaterally negate its contractual obligations, Bear Hollow attempts to improperly involve the PSC in a private contract dispute that is wholly unrelated to the PSC's statutory mission.

Even taking the allegations of the Complaint at face value, Bear Hollow has not presented a single change in SWDC's corporate structure, voting rights, or organizational composition since 2003 (the date the PSC last considered investigating SWDC's exemption) that warrants a new investigation into the exemption, nor have there been any material changes that would affect the PSC's previous findings. In fact, SWDC remains exempt from PSC jurisdiction because it is a non-profit mutual water company that does not provide water service to the general public, and has an extensive history of providing safe and adequate culinary water service to its members at a reasonable price. Accordingly, the PSC should dismiss Bear Hollow's Complaint and Request for Agency Action.

LEGAL STANDARD

In this case, Bear Hollow's Complaint is more accurately viewed as a procedurally flawed motion to reconsider the PSC's prior determinations that it does not have jurisdiction over SWDC. The PSC's authority to make substantive changes in its orders is limited to situations where there are "changed circumstances or later-discovered facts." Utah Admin. Code R746-331-1(C) (2009); *see also North Salt Lake v. St. Joseph Water & Irr. Co.*, 223 P.2d 577, 614 (Utah 1950) (PSC's earlier finding regarding available water could not be overturned "except by a showing before the commission of a change of circumstances subsequent to the finding").² Were this standard not applicable, the PSC could face infinite requests for reconsideration based on the same set of unaltered circumstances, a concern anticipated by Supreme Court Justice Pratt:

Of what use to a protestant is a rehearing, or a favorable decision on appeal, if the applicant may file a new application covering the same set of circumstances and obtain what the Commission originally denied him? ***How many times may the applicant force the protestant through such useless red-tape?*** Common sense tells us that decisions of the Commission, when ***once they become final should not be changed but upon a showing of a change of circumstances.***

...Now the Commission is reversing itself upon the same set of circumstances. If that is permitted, how long will they adhere to this later decision? Is this to continue until one side or the other falls with exhaustion?

² This standard is consistent with Rule 60(b)(2)'s requirement that a court offering relief from a final judgment must have "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Utah R. Civ. P. 60(b)(2).

Mulcahy v. Public Serv. Comm., 117 P.2d 298, 273 (emphasis added) (J. Pratt, dissenting) (noting majority opinion’s failure to address the situation where there was no change in circumstances).

Respondents bring their Joint Motion to Dismiss based on the PSC’s lack of jurisdiction over both the subject matter of the action (given the absence of changed circumstances that might warrant revisiting the PSC’s prior decisions), and over Respondents as a public utility. *See* Utah R. Civ. P. 12(b)(1), (2). Accordingly, the PSC must determine whether there is jurisdiction based on Bear Hollow’s Complaint and Request for Agency Action (“Complaint”) alone, accepting the factual allegations therein as true. *Ho v Jim’s Enters., Inc.*, 2001 UT 63, 29 P.2d 633.

ARGUMENT

I. THERE IS NO JUSTIFICATION FOR REEXAMINATION OF SWDC'S EXEMPTION AT THIS TIME.

Bear Hollow's Complaint fails to identify a single material change in the facts relevant to the PSC's repeated approval of SWDC's exemption. As noted by Bear Hollow, the PSC may inquire into a mutual water company's exemption again "*if changed circumstances or later-discovered facts* warrant another inquiry." Utah Admin. Code R746-331-1(C) (2009) (emphasis added); Complaint at ¶ 24. The Division of Public Utilities' recommendation to the PSC in 2002 that regulation of SWDC was "superfluous" specifically noted the multiple investigations with which SWDC had complied, and anticipated further examination only "[i]n the event that there are *substantial changes* in the future...." Aug. 2, 2002 Recommendation to the Utah Public Service Commission ("2002 Recommendation") (emphasis added) (attached hereto as Exhibit "A"). The history of SWDC's interactions with the PSC demonstrates that there is no justification for reexamination of the exemption because there have been no substantial changes in the facts already considered (and approved) by the PSC.

Since initially granting SWDC a letter of exemption from PSC regulation in 1989, the PSC has entertained three other requests that the exemption be reexamined. In 1994, the Summit County Planning Office (a non-shareholder) asked the Division to investigate whether SWDC continued to meet the exemption requirements. That investigation resulted in a finding that the exemption "remains in full force and effect." Sept. 15, 1994

letter to Corvin Snyder (“1994 Recommendation”) (attached hereto as Exhibit “B”). In 2002, the Commission reexamined SWDC’s exemption, and concluded that “The Division did not find anything during its investigation that would justify recommending a change in SWDC’s exempt status at this time.” 2002 Recommendation at 1. Finally, in 2003, the PSC again considered initiating an investigation into the exempt status of SWDC, and concluded that there was no need for further review and investigation. July 9, 2003 Letter (“2003 Recommendation”) (attached hereto as Exhibit “C”). During each of these proceedings, SWDC complied fully with any requests for information and provided the Division of Public Utilities and the PSC with its corporate documents, shareholder information, voting structure, and all other relevant information. In fact, representatives from the Division of Public Utilities also attended SWDC shareholder meetings and carefully observed those proceedings. 2002 Recommendation at 2.

Bear Hollow ignores the fact that the PSC has already had full access to the documentation presented with the Complaint, and concluded it does not justify regulation of SWDC. In fact, all of Bear Hollow’s information was available to the PSC at the time of its 2002 and 2003 investigations. For example, Bear Hollow presents a 2002 shareholder list, development agreements with SWDC from 1993 to 2002, amended Articles of Incorporation from 1991, and information regarding SWDC’s voting structure that has remained unchanged since 1991. None of these facts are new, nor do they reflect “changed circumstances,” and accordingly cannot warrant reexamination of SWDC’s exemption under the administrative rules and prior PSC findings. Thus, Bear Hollow’s

own Complaint, on its face, demonstrates that there are no material changed circumstances. *See also, e.g.* Complaint at ¶ 97 (“From 2001 to 2009, the makeup of SWDC’s officers and directors has changed very little....”).

In its Complaint, Bear Hollow specifically asks the PSC to investigate SWDC’s non-profit status, its control of adequate assets, and the commonality of interest between its shareholders. None of the facts pertinent to these factors are new, nor have they changed materially since the PSC’s 2002 and 2003 decisions. With respect to SWDC’s non-profit status, not only is it unclear why Bear Hollow considers itself the proper enforcement arm of the IRS (or why such a dispute should be heard by the PSC), but SWDC accurately maintains that none of its directors have received any compensation over the past thirty-plus years of existence. Notably, Bear Hollow does not directly dispute this, but instead implies that because some of the Class A Shareholders have profited from selling their individual shares, that constitutes “compensation” under the Internal Revenue Code and invalidates SWDC’s non-profit status.³ Bear Hollow’s arguments completely miss the mark. Their contentions do not relate to the operations or governance of SWDC but rather concern sales of property and shares of stock by individual shareholders separate from the operation of SWDC. Moreover, all of the transactions identified by Bear Hollow occurred before the PSC’s last review of SWDC’s exemption, and the PSC determined that they did not provide a justification for revoking

³ *See* Memorandum in Support of Individual Shareholders’ Motion to Dismiss at 4-5.

the exemption. *See* Complaint at ¶¶ 28-29 (alleging transactions between 1993 and 2002).

The entire premise of Bear Hollow's arguments relating to "lack of control of assets" is based upon erroneous information and a fundamental misunderstanding of the corporate structure of SWDC. First, Bear Hollow's arguments rest entirely upon the mistaken conclusion that the basis for each SWDC share of stock is 0.76 acre feet. It is absolutely clear from even a casual examination of SWDC's Articles of Incorporation, that each share of stock is based upon 1.0 acre feet of water right. *See* 1991 Amended and Restated Articles of Incorporation, Article IV, ¶¶ 1, 2, 3 and 4. SWDC's Articles of Incorporation provide that each share of stock is based on 1.0 acre feet of water right approved in SWDC's sources. *Id.* Every share of stock in SWDC is tied to an approved and valid water right. However, as considered by the PSC in the 2002 and 2003 investigations, the right to delivery of water under Class B shares is dependent upon more than an approved water right. The right to water delivery also depends on having adequate source capacity, distribution capacity and storage capacity attached to the shares of stock. Bear Hollow's arguments do not consider this important distinction. Furthermore, it is important to note that Bear Hollow makes no claims that SWDC, as a company, does not hold title to or adequately control all of the physical assets of the corporation, including water rights, necessary for water delivery. The reason for the lack of contradictory evidence on this point is that none exists. The PSC examined and addressed that issue in the 2002 investigation and found that, "all facilities and water

rights used in providing culinary water are owned and controlled by SWDC.” 2002 Recommendation at 4. No change in asset control has occurred since the 2002 investigation and none is alleged in the Complaint.

Finally, Bear Hollow’s allegations regarding the commonality of interest between SWDC shareholders fail to present any information not already fully considered by the PSC regarding the voting structure or share distribution of the company. SWDC’s voting rights have remained unchanged since 1991. The PSC’s prior decisions already concluded that, although not necessarily typical, SWDC’s corporate structure ensures a commonality of interest between the shareholder members. As the Division concluded in 2002:

After reviewing SWDC’s current by-laws and operating rules the Division is satisfied that *there have been no material changes to SWDC operations or changes in voting rights since the 1994 letter was issued*. ... SWDC’s rules and by-laws provide sufficient limitations on the actions which can be taken by the company [a]ffecting rates or service to Class B shareholders that the potential for Class B shareholders to be harmed by the voting rights of Class A shareholders is minimized and there is currently no evidence of such harm. ... The Division feels that there are *substantial controls in place* to prevent the Class B shareholders from being harmed by the actions of the Class A shareholders. Furthermore, SWDC’s record of operations over the past 20+ years have demonstrated a history of providing safe and adequate culinary water service to its water users at a fair price.

2002 Recommendation at 2-4 (emphasis added). The interests and corporate controls in place in 2002 remain the same to date, including the general shareholder distribution and voting structure. Bear Hollow also does not contend that SWDC shareholder or voting structure has changed since 1991. In fact, it has not. Moreover, as the Division noted in

2002, there have been no complaints from any Class B shareholders that might indicate a need for change in SWDC's status.⁴ Accordingly, there is no basis for reexamining SWDC's exemption at this time.

II. BEAR HOLLOW'S COMPLAINT IMPROPERLY RAISES AN UNDERLYING CONTRACTUAL DISPUTE IN THE WRONG FORUM.

The context for Bear Hollow's Complaint reveals its underlying motivations and the impropriety of hearing this dispute before the PSC. Notably, Bear Hollow is not making any of the typical claims that merit PSC investigation and potential regulation. Bear Hollow makes no allegations that SWDC provides water to Class B shareholders at unfair rates, nor does Bear Hollow claim that there has ever been any shortfall in the quality or quantity of water supplied. Instead, Bear Hollow brings this Complaint before the PSC seeking regulation of the entity with which it has a contract dispute.

As stated in the Complaint, Bear Hollow entered into a March 2009 agreement to sell Park City some of Bear Hollow's Class A shares in SWDC. Complaint at ¶ 114. However, at the time of the agreement, Bear Hollow was fully aware that its Class A shares were explicitly made appurtenant to the Bear Hollow development property under its Development Agreement with SWDC and Article V, ¶ 1(a) of the SWDC Bylaws. *Id.*

The Bylaws specifically provide:

⁴ Although Bear Hollow currently raises a Complaint as a shareholder, it is important to note that Bear Hollow's Complaint does not raise any typical shareholder allegations regarding rates or inadequate service. In fact, Bear Hollow's only contention regarding "unfair charges" pertains not to the water rates charged Class "B" shareholders, but to the prices paid for Class A shares in private transactions. **No other shareholder complaints have been filed with the PSC.**

Class A (development) stock shall become *appurtenant* to the land upon which it is intended for use once SWDC's commitments are made thereon. Thereafter, such stock shall pass as an *appurtenance* to the land upon transfer or sale of the property or any portion thereof. ***Upon approval of development plans or recordation of subdivision plat plans, SWDC shall restrict the use of such shares of stock*** supporting such endeavor for use on the project and as security for any performance obligations SWDC may have.

Article V, ¶ (1)(a) of SWDC Bylaws (emphasis added). Consistent with the agreed upon terms of the Development Agreement and the SWDC Bylaws, the Class A shares Bear Hollow sought to transfer also contained a share restriction.

Despite those clearly stated appurtenancy requirements, Bear Hollow approached SWDC's Board of Directors in the summer of 2009, and requested that SWDC amend the Development Agreement to remove the appurtenancy requirement. *See id.* at ¶¶ 115-116. Understandably, SWDC denied that request because an approval would violate the company's bylaws. Moreover, given the factual background of the request, there are ample policy justifications (including engineering considerations, protection of homeowners, water rights considerations, environmental commitments, changing water use patterns, Division of Drinking Water minimum standards, and market stability) for maintaining the link between the water shares and the development property.⁵

⁵ Moreover, there is no inherent contradiction between SWDC's decision on Bear Hollow and the SWDC Articles of Incorporation. In fact, the SWDC's Board decision is entirely consistent with the mandates of the company's Bylaws. Contrary to Bear Hollow's contention, the shares are still available for the "use and benefit of the shareholders" (*see* Complaint at ¶ 120), including the Bear Hollow homeowners; they simply are not transferrable away from the property.

Under the facts as pleaded in the Complaint, the PSC is not the proper forum for adjudication of Bear Hollow’s contract dispute. Accordingly, the Complaint should be dismissed.

III. THE REQUEST FOR AGENCY ACTION SHOULD BE DISMISSED BECAUSE THE PSC LACKS JURISDICTION OVER RESPONDENTS.

Bear Hollow cannot allege any facts to establish PSC jurisdiction over SWDC because SWDC does not provide water service to the general public. The PSC has never found that SWDC provides water to the public, and there is no new evidence that alters this basic fact. Without that essential element, there is no basis for PSC jurisdiction over SWDC and the Complaint should be dismissed.

The boundaries of PSC jurisdiction are well defined in the enabling statute and case law interpreting that statute. Utah Code Ann. Section 54-4-1 vests the PSC “with power and jurisdiction to supervise and regulate every *public utility* in this state ...” (emphasis added). Accordingly, the threshold question presented is whether SWDC is a “public utility” as defined in Utah Code Ann. Section 54-2-1(16)(a). *See also Garkane Power Co. Inc., v. Public Service Commission*, 98 Utah 466, 100 P.2d 571, 571-2 (1940). Section 54-2-1(16)(a) provides:

“Public Utility” includes every railroad corporation, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer not described in Subsection (16)(d), *where the service is performed for, or the commodity delivered to, the public generally*, or in the case of a gas corporation or electrical corporation where the gas or

electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use.

(Emphasis added).⁶ According to the express statutory language, the key factor in defining an entity as a “public utility” turns on the question of whether or not the goods or services are provided to the public generally as distinguished from mere private service. *See Garkane*, 100 P.2d at 572.

The distinction between private and public service has been dispositive in at least six cases before the Utah Supreme Court where the Court found the PSC had no jurisdiction under its enabling statute.⁷ The controlling principle in each of these cases was the distinction made by the Court that the services rendered were not to an indefinite public, but to a restrictive group or limited class. As held in *State of Utah ex. rel. Public Service Commission v. Nelson*, 65 Utah 457, 238 P. 237, 239 (1925), “if the business or concern is not public service, where the public has a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission.” *Garkane* and subsequent jurisdictional cases reaffirm that, “the test ... is ... whether the public has a legal right to the use which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner.”

⁶ *See also* Utah Code Ann. Section 54-2-1(29) (incorporating the same standard of providing a public service in defining a “water corporation”).

⁷ *State of Utah ex. rel. Public Utilities Commission v. Nelson*, 65 Utah 457, 238 P.237 (1925); *Garkane Power Co. Inc. v. Public Service Commission*, 98 Utah 466, 100 P.2d 571 (1940); *San Miguel Power Ass’n. v. Public Service Commission*, 4 Utah 2d 252, 292 P.2d 511 (1956); *Medic-Call, Inc., et al. v. Public Service Commission of Utah*, 24 Utah 2d, 273, 470 P.2d 258 (1970); *Cottonwood Mall Shopping Center Inc. v. Public Service Commission of Utah, et al.*, 558 P.2d 1331 (Utah 1977); *Holmgren et al. v. Utah-Idaho Sugar Co.*, 582 P.2d 856 (1978).

Garkane 100 P.2d at 573 (omissions in original)(quoting *Farmers' Market Co., v. R.R. Co.*, 142 Pa. 580, 21 A. 902, 989, 990 (1891)). The *Garkane* court further distilled the test: “The essential feature of a public use is that it is not confined to privileged individuals but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character.” *Garkane*, 100 P.2d at 573 (quoting *Thayer v. California Dev. Bd.*, 164 Cal. 117, 127, 128 P. 21, 25 (1912)).

Moreover, the PSC must make a jurisdictional finding as a prerequisite to further inquiry or proceedings. In *Nelson*, the Court held that: “It is only by the presence of such factor or element [public service] that the commission has power or authority to regulate or control such business. Eliminating it, its power and jurisdiction are gone.” *Nelson*, 238 P. at 239. This renders careful examination of the Bear Hollow Complaint’s allegations even more vital.

The Complaint lacks any facts or analysis demonstrating that SWDC provides water service to the public generally. Bear Hollow correctly notes that SWDC is a “privately held mutual water company” (Complaint at ¶ 20), but then incorrectly implies that there is some sense in which SWDC serves the public. Bear Hollow claims that SWDC fulfills the “essential public use and purpose of providing water and water service... in western Summit County, Utah.” *Id.* at ¶ 21. Further, Bear Hollow contends that SWDC operates “public water service facilities in western Summit County, Utah” and that it is “operating a ‘public utility’” *Id.* at ¶ 22.

However, these allegations omit the critical detail that the water and water service provided, as well as all use of the water service facilities, are wholly owned by, and *solely for the benefit of SWDC shareholders*. Those facilities are not available to, or used by, the public generally. *See* 2002 Recommendation at 4. The Articles of Incorporation (attached to the Complaint as Exhibit “U”) clearly state that the company will engage in “operation of a general culinary water system and irrigation system for the use and benefit of the shareholders of the corporation.” Articles of Incorporation, Art. III. Pursuant to its charter, SWDC operates as a cooperative association limited in service to its shareholders. There has been no change in SWDC’s corporate purpose or structure, nor does Bear Hollow even contend that there are any non-shareholders who receive water or water service from SWDC. The PSC has never found that there is any sense in which SWDC serves the public, nor has Bear Hollow proffered any facts that contest the essential truth that SWDC limits its services to private members. Accordingly, the PSC should not assert jurisdiction over SWDC, and the Complaint should be dismissed.

CONCLUSION

Bear Hollow’s Complaint to the PSC fails to present any justification for reexamining SWDC’s exemption, nor should the PSC concern itself with the underlying contractual dispute between Bear Hollow and SWDC when it lacks jurisdiction over the parties. Accordingly, SWDC requests that the PSC dismiss Bear Hollow’s complaint and request for agency action.

DATED this 12th day of October, 2009.

_____/s/_____

John S. Flitton
Lara A. Swensen
FLITTON & SWENSEN
Attorneys for SWDC

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of _____, 2009, I caused to be served upon by electronic mail and by U.S. Mail, postage prepaid, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BEAR HOLLOW'S COMPLAINT AND REQUEST FOR AGENCY ACTION to the following:

Electronic and Hand Delivered:
Public Service Commission
Heber M. Wells Building
160 East 300 South, 4th Floor
Salt Lake City, Utah 84111

Courtesy Copy by U.S. Mail to:
J. Craig Smith
SMITH HARTVIGSEN
215 South State Street, Suite 600
Salt Lake City, Utah 84111

/S/