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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 MANAGEMENT, 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 OPPOSITION TO
 RESPONDENTS SAUNDERS,
 KNOWLES, AND THEIR ENTITIES’
 MOTION TO DISMISS BEAR
 HOLLOW’S COMPLAINT AND
 REQUEST FOR AGENCY ACTION**

Docket No. 09-015-01

Pursuant to Utah Administrative Code R746-100-3.I.2, Bear Hollow Restoration, LLC (“Bear Hollow”) hereby responds to the Motion to Dismiss Bear Hollow’s Complaint and

Request for Agency Action filed by Respondents 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 Management, Inc.; Land & Water Resources, Inc.; Lawrence R. Knowles Irrevocable Trust; Leon H. Saunders, Stuart A. Knowles, and Trilogy Limited, L.P., dba SK Resources (collectively the "Saunders/Knowles Respondents").

INTRODUCTION

Contrary to the Saunders/Knowles Respondents' argument, Bear Hollow's Complaint and Request for Agency Action ("Complaint") does not petition the Public Service Commission (the "Commission") to exercise jurisdiction over the Sanders/Knowles Respondents merely because they own Class A shares in Summit Water Distribution Company ("SWDC" or the "Company"). Rather, as set forth in considerable detail in Bear Hollow's Complaint, the individual Respondents Saunders and Knowles, and the entities owned or controlled by them, are operating a vast, for-profit enterprise behind the false façade of a non-profit, mutual water company.¹ In less than nine years, these Respondents, together acting under the name "SK Resources," have "engaged in the retail sale of culinary water that is then distributed and delivered by [SWDC] for commercial and residential use," (Anti-Trust Case at ¶ 39), receiving

¹The Saunders/Knowles Respondents do not contest that they are operating a joint venture; to the contrary, their motion expressly states that Respondents Saunders, Knowles, and at least one entity owned or controlled by Knowles are operating SK Resources, an unregistered, for-profit joint venture or partnership. (Saunders/Knowles Respondents' Mem. in Supp. at 1.)

It should also be noted that Leon H. Saunders, Stuart Knowles, Trilogy Limited, L.P., Land & Water Resources Co, Inc., and Larry R. Knowles Irrevocable Trust joined SWDC in filing an Anti-Trust Complaint against Summit County. In that case, those Respondents concede that they are "Investor" Class A shareholders who, together with SWDC, "compete in the production, sale and distribution of culinary water in the Snyderville Basin." (Second Amended Complaint, dated March 17, 2006, at ¶ 41 ("Anti-Trust Complaint"), attached hereto as Exhibit A.)

nearly \$6 million for the sale of SWDC stock.² And, to maintain their majority ownership and ensure their continued control of SWDC, the Saunders/Knowles Respondents have caused SWDC to issue them new shares, not backed by a specific water source.

Thus, although SWDC is holding itself out to the public as a non-profit mutual water company, the Saunders/Knowles Respondents are in actuality operating the Company and exercising manipulation and control of the Company behind the scenes in a manner that allows them to exploit the Company's limited resources for their personal gain. Consequently, as a result of the Saunders/Knowles Respondents' manipulation and control of the Company, which is a "water system," Bear Hollow petitions the Commission to exercise its jurisdiction over them. As the Commission has authority over water systems and those corporations or persons "owning, controlling, operating or managing" the system, the Commission's jurisdiction over the Saunders/Knowles Respondents is proper, and the Saunders/Knowles Respondents' motion to dismiss should be denied.

² It must be noted that the Saunders and Knowles entities' legal counsel in this matter also represent them in the Anti-Trust lawsuit against Summit County. Thus, they obviously know of the factual statements made to the court, many of which they try to recant here.

ARGUMENT

The extent of the Commission’s jurisdiction is broad, as set forth in Section 54-4-1 of the Utah Code. Pursuant to that section, the Commission has the “power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state.” Utah Code Ann. § 54-4-1 (2009). A public utility includes “every ... water corporation,” which is defined as “every corporation and *person*, their lessees, trustees, and receivers, owning, *controlling, operating, or managing* any water system for public service within this state.” *Id.* § 54-2-1(29) (emphasis added).

Without addressing any of the detailed facts set forth in the Complaint, which demonstrate the Saunders/Knowles Respondents’ control and manipulation of SWDC and its operations for their own personal gain,³ the Saunders/Knowles Respondents ask the Commission to dismiss them from the current proceedings by arguing that (1) they do not own or control a water system; and (2) any water system owned or controlled by them does not meet the definition of a public utility. As discussed below, each of these arguments is contrary to the allegations to the Complaint and without merit. Consequently, the Saunders/Knowles Respondents’ motion must be denied.

1. The Commission Has Jurisdiction Over the Saunders/Knowles Respondents Because They Are Controlling and Operating SWDC, a Water System

The Saunders/Knowles Respondents are subject to the Commission’s jurisdiction because they are controlling and operating a water system. As discussed in Bear Hollow’s Memorandum in Opposition to SWDC’s Motion to Dismiss, which is incorporated by reference herein, SWDC

³ In considering the Saunders/Knowles Respondents’ Motion to Dismiss, the Commission must consider all of the allegations in the Complaint to be true. See *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226.

is subject to the Commission’s jurisdiction as a public utility because it is a corporation operating a water system providing services to the general public. (*See* Mem. in Opp’n to SWDC’s Mot. to Dismiss Bear Hollow’s Compl. and Request for Agency Action at 2-6.) As Section 54-2-1(29) extends the Commission’s jurisdiction to any “person ... owning, controlling, operating, or managing a water system,” Utah Code Ann. § 54-2-1(29), the Saunders/Knowles Respondents are likewise subject to the Commission’s jurisdiction based on their operation and control of SWDC.

The Saunders/Knowles Respondents attempt to avoid the Commission’s jurisdiction by arguing, contrary to the Complaint, that their ownership of SWDC shares does not entitle them to any ownership interest in SWDC’s assets. Aside from incorrectly stating the relevant portions of the law of corporations and omitting important aspects of the law pertaining to Utah water corporations,⁴ the Saunders/Knowles Respondents almost entirely miss the point. The

⁴ The Saunders/Knowles Respondents’ reliance on general corporate law is irrelevant to the unique legal landscape of water law. As recognized in *Salt Lake City Corp. v. Cahoon & Maxfield Irrigation Co.*, 879 P.2d 248 (Utah 1994), stock in a water company is not similar to stock in a regular corporation. Indeed,

Water rights are pooled in a mutual company for convenience of operation and more efficient distribution, and perhaps for more convenient transfer. *But the stock certificate is not like the stock certificate in a company operated for profit. It is really a certificate showing an undivided part ownership in a certain water supply....*

Id. at 251 (first alteration in original) (internal quotations omitted).

Even the case relied on by the Saunders/Knowles Respondents to support their argument unequivocally provides that, prior to an amendment to the Utah Revised Nonprofit Corporation Act in 2001, the Act “permitted a corporation’s stock to ‘evidenc[e] ... interests in water or other property rights.’” *Dansie v. City of Herriman*, 2006 UT 23, ¶ 4, 134 P.3d 1139 (quoting Utah Code Ann. § 16-6-42 (1999) (repeated 2001)). Moreover, because the revisions to the Nonprofit Corporation Act included a savings clause that would “recognize and preserve property rights that shareholders of the [c]ompany may have acquired under provisions of its articles of incorporation,” the question of whether a shareholder holds an ownership interest in any water system is resolved by reference to the water company’s articles of incorporation. *Id.* And, in this case, the SWDC Articles of Incorporation, which were last revised in 1991, clearly state that Class A shares “shall represent a proportionate but specific interest in the corporation’s domestic and culinary water, including the contributed source site, source and source capacity.” (Compl., Exhibit U, at 4.) Thus, Class A shareholders have an ownership interest in SWDC’s water system.

Saunders/Knowles Respondents' ownership of SWDC's assets is irrelevant to the Commission's determination that it has jurisdiction over the Saunders/Knowles Respondents. Indeed, contrary to the Saunders/Knowles Respondents' attempts to mischaracterize the Complaint by alleging that they are named as parties "solely because they are shareholders of Summit Water," (Saunders/Knowles Respondents' Mem. in Supp. at 5), the Complaint does not assert that the Commission has jurisdiction over the Saunders/Knowles Respondents merely because they own shares in SWDC. Rather, the Complaint clearly establishes that the Saunders/Knowles Respondents are named as parties to this proceeding based on their *control* of SWDC, which thereby qualifies them as a "water corporation" pursuant to Section 54-2-1.

For example, the Complaint alleges that "SWDC is a non-profit organization in form only. In substance, SWDC and [the Saunders/Knowles] Respondents operate a vast, for-profit enterprise *controlled* and orchestrated by Saunders and Knowles and/or the Saunders Entities and Knowles Entities." (Compl. at ¶ 25 (emphasis added).) Additionally, the Complaint states, "[t]ogether, Saunders and Knowles own and/or control 80.1% of all Class A shares and 51.9% of all outstanding shares." (*Id.* at ¶ 26.) The Complaint also states that,

it appears that immediately after the DPU made its recommendation to the Commission that SWDC not be regulated, based, in part, on the assumptions that only 5,000 Class A shares had been issued and that it would take unlikely collusion between Class A shareholders to warrant regulation, SWDC immediately issued at least 2,819 more Class A shares to Saunders and Knowles and/or the Saunders and Knowles Entities so that Saunders and Knowles and/or the Saunders and Knowles Entities could, once again, manipulate and dominate SWDC.

(*Id.* at ¶ 44.)

The Complaint also describes how the Saunders/Knowles Respondents use their control of SWDC to their advantage and to the detriment of the remaining Class A shareholders. For instance, the Complaint alleges that

Saunders and Knowles, the Saunders and Knowles Entities, and/or SK Resources used their ownership and control over SWDC to require [Bear Hollow] to sign a Development Agreement with SWDC by which the 260 Class A (development) shares purchased by [Bear Hollow] were required to be appurtenant to the Development and inseparable from the Development property without the written consent of SWDC, even though the shares owned and/or controlled by SK Resources and/or its constituent members were not, themselves, subject to any type of appurtenancy limitation or restriction.

(*Id.* at ¶ 111.) Finally, the Complaint alleges that

Saunders and Knowles, the Saunders and Knowles Entities, and/or SK Resources' manipulation of SWDC's rules, regulations, and practices prohibiting or refusing the transfer of the Class A (development) share to the Buyer arbitrarily and unreasonably results in the creation of at least two classes of Class A shares—extremely valuable and fungible shares owned by Saunders and Knowles and/or the Saunders and Knowles Entities, which are readily marketable and not tethered to any particular piece of land within the Snyderville Basin, and worthless and unusable shares owned by parties such as Bear Hollow, which cannot be sold because they *are* tethered to a particular piece of land that does not need them.

(*Id.* at ¶ 119.)

In considering the pending motions to dismiss, the allegations in the Complaint must be considered to be true. Thus, the effort by the Saunders/Knowles Respondents to misrepresent the nature and basis of the claims must be disregarded. The Saunders/Knowles Respondents have not disputed (nor can they at this stage) that they directly participate in and control the operations of SWDC in distributing culinary water to the public, and any attempt to do so would be directly contrary to the allegations made in their pending Anti-Trust Complaint filed against Summit County. For example, in that case, SWDC and Respondents Saunders and Knowles affirmatively assert that “SWDC, *together with* Class A investor shareholders, compete in the

production, sale and distribution of culinary water in the Snyderville Basin.” (Anti-Trust Compl. at ¶ 41 (emphasis added).) And the Anti-Trust Complaint also describes how the Saunders/Knowles Respondents are able to use SWDC as an investment scheme, stating that Respondents Saunders and Knowles, along with other Class A “Investor Shareholders are engaged in the retail sale of culinary water that is then distributed and delivered by [SWDC] for commercial and residential use.” (*Id.* at ¶ 39.) As a result of their control and management of SWDC, Saunders and Knowles and their entities, together with SWDC, “were the leading, largest and strongest competitor for the retail sale, distribution and delivery of water in the Snyderville Basin” as of January 2000. (*Id.* ¶ 55.)

Thus, by their own statements and admissions, the Saunders/Knowles entities are working together with SWDC to “compete” in the “retail sale” of culinary water. It is this operation and control of a water system and the control and manipulation alleged in the Complaint that renders the Saunders/Knowles Respondents a water corporation subject to the Commission’s jurisdiction pursuant to section 59-2-1. *See* Utah Code Ann. § 59-2-1(29) (defining a “water corporation” to include “*every ... person ... owning, controlling, operating, or managing* any water system for public service within this state” (emphasis added)).⁵ Therefore, the Saunders/Knowles Respondents’ motion should be denied.

⁵ The Commission has consistently exercised its jurisdiction both over water corporations and the individuals operating those corporations to ensure that the corporations are operated within the confines of the rules and regulations of the Commission. For instance, the Commission has never hesitated to issue an Order to Show Cause against the individual officers operating a water company without a certificate of convenience. (*See, e.g.*, Docket No. 04-2436-01, Notice of Hearing and Order to Show Cause, issued August 3, 2004, attached hereto as Exhibit B.)

2. The Commission Has Jurisdiction Over the Saunders/Knowles Respondents Because They Are Controlling and Operating SWDC for the Public Generally

As discussed in more detail in Bear Hollow's Memorandum in Opposition to SWDC's Motion to Dismiss, which is hereby incorporated by reference, SWDC has provided and continues to provide culinary water to the public at large. (*See* Memorandum in Opp'n to Respt. Summit Water Dist. Co.'s Mot. to Dismiss Bear Hollow's Compl. and Request for Agency Action at 2-6.) Therefore, the Saunders/Knowles Respondents' control and management of SWDC, a water corporation operating a water system for public service, subjects the Saunders/Knowles Respondents to the Commission's jurisdiction. *See* Utah Code Ann. §§ 54-2-1(16), (29), 54-4-1.

The Saunders/Knowles Respondents argue that they should not be subject to the Commission's jurisdiction because, even if they operate or control SWDC, a water system, they have "not offered their shares to the public at large." (Mem. in Supp. at 7.) However, this allegation is entirely inconsistent with Respondents Saunders and Knowles' Anti-Trust claims in the Third District Court against Summit County, in which they affirmatively allege that they "compete in the production, sale and distribution of culinary water in Synderville Basin." (Anti-Trust Case at ¶ 41.) This allegation is also contradicted by Respondent Trilogy Asset Management, Inc.'s website, which is registered under the domain name of "summitcountywater.com" and actively markets the sale and distribution of culinary water to the public generally. (Compl., Exhibit Q.)

Although the Saunders/Knowles Respondents attempt in their motion to dismiss to minimize the numerous transactions they have entered into to sell the right to receive culinary water from SWDC, their Anti-Trust Complaint paints a different picture of the

Saunders/Knowles Respondents' conduct over the past decade (or more) in operating a water system. That complaint states as follows:

Prior to the beginning of the events described herein, the retail sale, distribution and delivery of culinary water in the Snyderville Basin was highly competitive.

....

The competition was intense and healthy, resulting in low prices to developers and water customers, and enabling them to select from among the competitors in the Snyderville Basin based on normal market comparisons such as price, reliability, reputation, size, infrastructure, water capacity, excess water capacity, and the like.

As of January 2000, [SWDC and certain of the Saunders/Knowles Respondents, including Respondents Saunders and Knowles] were the leading, largest and strongest competitor for the retail sale, distribution and delivery of water in the Snyderville Basin.

(Anti-Trust Case at ¶¶ 51, 54-55.)

Clearly, these statements and admissions from Respondents Saunders and Knowles in the ongoing court proceeding they initiated demonstrate that the Saunders/Knowles Respondents sold shares to more than “a few individuals at negotiated prices,” as they now self-servingly assert. (Mem. in Supp. at 7.) The Saunders/Knowles Respondents have instead, as described by their own statements to the Third District Court, engaged in a broad, wide scale campaign to market SWDC's culinary services to those residing in the Snyderville Basin and, by their own statements and admissions, were very successful in doing so. (See Anti-Trust Case at ¶ 55.) As a result, the Saunders/Knowles Respondents are subject to the Commission's jurisdiction and oversight, and they cannot credibly argue that they do not control or operate a water system that provides services to the general public. See Utah Code Ann. §§ 54-2-1(16), (29) (defining a public utility, which is subject to Commission regulation, to include a water corporation and

“every ... person ... owning, controlling, operating, or managing any water system for public service within this state”).

CONCLUSION

Although the Saunders/Knowles Respondents attempt in this proceeding to minimize their role in the operations of SWDC, it is clear from their own statements and admissions in their Anti-Trust lawsuit that they have operated and are continuing to operate SWDC as an investment scheme in which they are able to receive and then sell substantial shares of stock in SWDC for a large profit. Because such conduct subjects the Saunders/Knowles Respondents to the Commission’s jurisdiction, the Saunders/Knowles Respondents’ motion to dismiss should be denied.

Respectfully submitted this ____ day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of October, 2009, I caused a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO RESPONDENTS SAUNDERS, KNOWLES, AND THEIR ENTITIES' MOTION TO DISMISS BEAR HOLLOW'S COMPLAINT AND REQUEST FOR AGENCY ACTION** to be mailed via U.S. mail to the following:

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