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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Bear Hollow Restoration, LLC,

Applicant/Complainant,

vs.

Leon H. Saunders, et al.,

Respondents.

**REPLY MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS BEAR
HOLLOW RESTORATION, LLC'S
COMPLAINT AND REQUEST FOR
AGENCY ACTION**

Docket No. 09-015-01

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 Individual Shareholders") hereby file this Reply Memorandum in Support of their Motion to Dismiss Bear Hollow Restoration, LLC's ("Bear Hollow's") Complaint and Request for Agency Action.¹

¹ The Individual Shareholders also hereby join in the Reply Memorandum submitted in support of Summit Water's independent motion to dismiss and incorporate those arguments here.

INTRODUCTION

Bear Hollow seeks to expand the Commission's jurisdiction well beyond the statutory limitation of "public utilities." Indeed, Bear Hollow essentially argues the Commission has jurisdiction over the owners and employees of every private water company, regardless of whether it sells water to the public. Bear Hollow's arguments are meritless, and should be rejected. The scope of the Commission's jurisdiction is clear, and Bear Hollow's arguments far exceed the Legislature's delegation of authority to the Commission.

ARGUMENT

I. THE INDIVIDUAL SHAREHOLDERS ARE NOT SUBJECT TO THE COMMISSION'S JURISDICTION SIMPLY BECAUSE THEY OWN STOCK IN OR WORK FOR SUMMIT WATER.

In its complaint, Bear Hollow indicated that the Individual Shareholders were named in this action solely because they, allegedly, are "Class A shareholder[s] of [Summit Water]." Complaint ¶¶ 3-13. Accordingly, in support of their motion to dismiss, the Individual Shareholders properly noted that mere stock ownership is insufficient to establish the Commission's jurisdiction. Supp. Mem. p. 4-6.² Indeed, the Individual Shareholders highlighted that if the law were otherwise, Bear Hollow itself would be subject to the Commission's regulation as it also is a "Class A shareholder of [Summit Water]." *Id.* p. 6 n.8.

Bear Hollow has not and cannot refute this simple proposition. Accordingly, Bear Hollow alleges a new theory. It no longer matters that the Individual Shareholders do not personally own or control any "reservoirs, tunnels, shafts, dams, dikes," etc. *See generally* Utah Code Ann § 54-

² A similar point recently was recognized by Judge John R. Morris, District Court Judge for the Second Judicial District In and For Davis County. For example, Judge Morris declared that "Class A stock [in Summit Water] represents a proportionate and specific interest in the company's domestic water . . . *but no interest in Summit Water's diversion or distribution facilities.*" *See* Oct. 7, 2009, Findings of Fact, Conclusions of Law and Order ¶ 3, attached as Exhibit A. *See also* Utah Code Ann. § 54-2-1-(30)(a) (defining water system as the property used facilitate the "diversion" or "distribution" of water for public use).

2-1(30)(a) (defining “[w]ater system”). Indeed, Bear Hollow argues that questions about ownership or control of a “water system” as defined by Utah Code “almost entirely miss the point” and are “irrelevant.” Opp. Mem. p. 2-3. Rather, Bear Hollow now argues the Individual Shareholders are “subject to the Commission’s jurisdiction based on their operation and control of [Summit Water].” *Id.* There are several problems with that novel argument.

First, Bear Hollow’s argument is contrary to the statutory provisions governing the Commission. The Commission has jurisdiction over “public utilit[ies],” which are defined to include “water corporations.” *See* Utah Code Ann §§ 54-2-1(16); 54-4-1. “Water corporation” is defined as any individual “controlling. . . any water system for public service within this state.” *Id.* at 54-2-1(29). “Water system” is, in turn, defined as “all reservoirs, tunnels, shafts, dams, dikes, headgates,” and other similar properties when used in connection with the public distribution of water. *Id.* at 54-2-1(30). None of those definitions subjects an individual to the Commission’s jurisdiction simply because they own or control a distinct legal entity. *See id.* § 54-4-1; 54-2-1(16), (29) & (30). This is true even if that distinct entity is a public utility. In other words, owning or controlling “reservoirs, tunnels, shafts, dams,” etc. may subject an individual to the Commission’s jurisdiction under the express statutory language. However, under that same express language, owning or controlling *a corporation* does not.

The Individual Shareholders gave an obvious example of the reason for this statutory distinction in their opening brief.³ As the CEO and largest shareholder of Berkshire Hathaway, Warren Buffet “controls” PacifiCorp, which is owned by Berkshire Hathaway’s family of businesses. Thus, if mere “control” of a public utility were sufficient to establish jurisdiction, the Commission would not only have jurisdiction over the Individual Shareholders in this action, but

³ Notably, Bear Hollow did not rebut or even respond to this argument.

also over Warren Buffet and every other officer, director, or major shareholder of Berkshire Hathaway. Such an assertion of jurisdiction far exceeds the anticipated scope or purposes of the Commission's jurisdiction. *See generally Kearns-Tribune Corp. v. Public Serv. Comm'n*, 682 P.2d 858, 860 (Utah 1984) (recognizing that the "purpose[] for which the Legislature created the PSC" was the "regulation of utility rates"). Accordingly, the Commission must distinguish between control of a corporation and control of "reservoirs, tunnels, shafts, dams," etc. *Utah Code Ann* § 54-2-1(30)(a). Here, it is undisputed that the Individual Shareholders do not control "reservoirs, tunnels, shafts, dams," or anything else that constitutes a water system. Rather, the Individual Defendants have been sued because they allegedly control Summit Water, and that is insufficient to convey jurisdiction. Accordingly, the claims against the Individual Shareholders must be dismissed.

Second, as a pure legal principle, Bear Hollow simply is incorrect when it alleges that the Individual Shareholders personally control Summit Water. Summit Water is its own entity, wholly distinct from the Individual Shareholders. *See generally* 18 Am. Jur. 2d Corporations § 2 (2009) ("A corporation is a legal entity with an identity or personality separate and distinct from that of its owners or shareholders and must be thought of without reference to the members who compose it."). For example, Summit Water can "sue and be sued . . . in its corporate name." *Utah Code Ann.* § 16-6a-302(2). It can "purchase . . . and own . . . real or personal property." *Id.* It can "make contracts and guarantees, incur liabilities, borrow money," and make charitable donations. *Id.* In short, it has "the same powers as an individual." *Id.* As its own entity, Summit Water is independent and distinct from its shareholders, officers, and directors. *C.f. id.* § 16-6a-115 (declaring such individuals "are not personally liable . . . for the acts, debts, liabilities, or obligations of a nonprofit corporation").

Of course, Summit Water must act through its authorized agents. However, those agents do not *control* the company for their own individual purposes. Rather, the agents are bound by strict legal duties that require them to act solely in the company's (as opposed to their own) personal interests. *See, e.g.*, 18B Am. Jur. 2d Corporations § 1480 (“As part of their fiduciary role, directors and officers must remain loyal to the corporation . . . whose interest must take precedence over any self-interest The duty of loyalty extends to nonprofit corporations as well as to ordinary business corporations.”).⁴ Very simply, Bear Hollow's argument has the law backwards. The Individual Shareholders do not control Summit Water. Rather Summit Water controls what actions the Individual Shareholders may undertake on its behalf.⁵ In fact, the Commission's examination of a company's exemption clarifies this relationship. The Commission investigates the company's corporate structure and bylaws, not the business ventures of each individual shareholder. The shareholders, officers, and directors of Summit Water must operate within the parameters of the applicable laws and corporate articles, and those are the internal controls examined by the Commission. As such, even if the Commission accepts Bear Hollow's factual allegations, there is simply no legal basis for determining that the Individual Shareholders control Summit Water.

⁴ Bear Hollow's memorandum only further emphasizes the inappropriate nature of addressing its claims in this forum. Many of Bear Hollow's arguments have nothing to do with the regulation of public utilities. Rather, they are thinly veiled arguments that the Individual Shareholders have breached the fiduciary duties owed to Summit Water. *See, e.g.*, Opp. Mem. at 3-4 (alleging improper stock distributions, preferential treatment, etc). If those allegations were true (and they are not) they might form a legal cause of action that should be addressed by the courts. Those same allegations do not, however, establish that anyone is a “public utility.”

⁵ A simple analogy can be drawn to an investment in a mutual fund. By investing with the fund, an individual has delegated certain responsibilities to the fund administrator. Accordingly, the administrator acts as the investor's agent and can purchase assets with the investment, sell assets obtained by the investment, or take other actions authorized by the individual. However, the administrator does not “control” the money. The administrator cannot pocket the money, donate it to his alma mater, or merely squander it away through neglect. Likewise, even if the Individual Shareholders have been authorized to act on Summit Water's behalf, they do not “control” Summit Water. For example, they too cannot pocket Summit Water's assets or take any action that is not authorized by Summit Water and in its best interests.

Furthermore, Bear Hollow has not alleged and cannot establish that the Individual Shareholders share common interests or control.⁶ Simply put, they do not. Each of the Individual Shareholders is a distinct entity or individual interested solely in its own best interest. For example, Landmark Plaza Associates is an entity that was created years ago by multiple parties to acquire property and develop land near Kimball Junction. That property has been fully developed and the shares in Summit Water were conveyed to the individual property owners (e.g. Hampton Inn) long ago. That respondent no longer owns shares in Summit Water, and undisputedly exercises no “control” of Summit Water. The remaining respondents likewise are distinct from each other and maintain almost no overlapping ownership.⁷ In short, the Individual Shareholders do not represent one conglomerate group designed to covertly control Summit Water. Rather, like Bear Hollow, each Respondent acts independently and is subject to the same corporate restrictions and regulations that would prevent Bear Hollow or any other shareholder developer from controlling Summit Water.

For these reasons, Bear Hollow’s arguments must be rejected, and the Individual Shareholders should be dismissed.

⁶ Bear Hollow asserts that page one of the Individual Shareholder’s initial memorandum “expressly states that respondents . . . are operating . . . an unregistered, for profit joint venture.” That is not true. Page one of the initial memorandum merely copies the names of the alleged respondents and abbreviates them as the “Individual Shareholders.” Indeed, the Commission is encouraged to check the veracity of Bear Hollow’s assertion. At no point (on page one or otherwise) does the initial memorandum state what Bear Hollow claims.

⁷ In fact, most of the organizations named in this proceeding are developers or development projects. For example, Parley’s Lane, Ltd is developing 75 acres of land near Parley’s Summit, and its shares are specific to that property. Parley’s Park and Parley’s Creek likewise are developments whose only interest in the Class A shares of Summit Water is in furtherance of their respective development projects. In short, much like Bear Hollow, the respondents have no interest in and obtain no benefit from holding onto their Class A shares in Summit Water or otherwise controlling Summit Water. Rather, their design is to quickly and successfully develop their projects and transfer both the real property and the attached shares in Summit Water to the eventual purchasers.

II. REGARDLESS OF THE INDIVIDUAL SHAREHOLDER’S INVOLVEMENT, THE COMMISSION LACKS JURISDICTION BECAUSE WATER IS NOT SOLD TO THE PUBLIC GENERALLY.

Both the Individual Shareholders and Summit Water moved to dismiss this action based on the obvious lack of jurisdiction where there is no evidence that any of the respondents are offering water to “the public generally.” *See* Utah Code Ann § 54-2-1(16)(a); Individual Shareholders’ Mem. in Supp. p. 6-8. Bear Hollow does not contest, nor could it, that if the Individual Shareholders do not operate a water system for the public generally, the Commission lacks jurisdiction. *See generally State v. Nelson*, 238 P.237, 239 (Utah 1925) (“[I]f the business or concern is not public service . . . it is not subject to the jurisdiction or regulation of the commission.”). Instead, Bear Hollow points to irrelevant material and hopes that the Commission will not closely examine the true facts of this case.

First, Bear Hollow asserts that “Respondent Trilogy Asset Management, Inc.’s website, which is registered under the domain name of ‘summitcountywater.com’ . . . actively markets the sale and distribution of culinary water the public generally.” Opp. Mem. p. 6.⁸ That assertion is false. The website, which is attached as Exhibit Q to Bear Hollow’s Complaint, does not offer anything for sale, does not mention “culinary water,” and is not marketing *anything*. For the Commission’s convenience, the Individual Shareholders have attached a copy of Bear Hollow’s Exhibit Q to this memorandum. The Commission is encouraged to review that exhibit. It simply does not say what Bear Hollow purports. *See* Opp. Mem. p. 6.

Second, Bear Hollow argues that the Individual Shareholders admitted in their antitrust case that they “are engaged in the retail sale of culinary water that is then distributed and delivered

⁸ Bear Hollow makes no argument as to how Trilogy Asset’s alleged website subjects the 12 other respondents in this case to the Commission’s jurisdiction.

by [Summit Water] for commercial and residential use.” Opp. Mem. at 6 (internal quotation marks omitted). That too is incorrect. The actual allegation Bear Hollow cites is prefaced by an important phrase: “*Through the sale of their Class A shares.*” Antitrust Complaint ¶ 39 (emphasis added). In other words, the Individual Shareholders are not operating a “water system for public service within this state.” See Utah Code Ann. § 54-2-1(29). Rather, at most, they have attempted to sell their Class A shares. As such, they are no different from Bear Hollow, who admits that it sold some of its “excess Class A . . . shares” and further intends to sell at least 20 more of its shares. Complaint ¶ 114.⁹

Third, and most importantly, Bear Hollow cannot and has not disputed that only stockholders are entitled to receive service from Summit Water. Bear Hollow’s inability to dispute this fact is fatal to their claim. As the Utah Supreme Court declared, if “membership in [an] association [is required] before service is given” the entity does not constitute a public utility and is not subject to the Commission’s jurisdiction. Indeed, in *San Miguel Power Assn. v. Public Service Comm’n*, 292 P.2d 511 (Utah 1956), the Court was asked to decide whether an entity that had contractually “committed [it]sel[f] to serve electric energy to *all unserved persons who desire[d] such service*” was offering its services to the public generally. *Id.* at 254 (emphasis added). The Supreme Court determined the entity was not because it “require[d] membership in the association before service is given.” *Id.* “[A]lthough membership may [have] be[en] easily obtained, without such membership no member of the general public [wa]s legally entitled to service.” *Id.* And, “[s]ince [the entity] c[ould] not legally be required to serve the public generally, [it was] not [a] public utility[y].” *Id.*

⁹ Bear Hollow, of course, does not disclose the negotiated sales price, how it located prospective buyer, or whether it made a profit from the sale of its shares. Rather, Bear Hollow continues to take the inconsistent position that everything the Individual Shareholders do subjects them to the Commission’s jurisdiction and regulation. However, when Bear Hollow undertakes the same actions, it should, of course, remain free of any oversight.

If accepted, Bear Hollow’s allegations and arguments may establish that “membership in [Summit Water] may be easily obtained.” *See id.* However, that does not change the undisputed fact that Summit Water still “requires membership in the association before service is given.” *See id.* Accordingly, like the entity in *San Miguel*, Summit Water and the Individual Shareholders simply “are not public utilities.” *See id.* As such, the Commission lacks jurisdiction.

In sum, Bear Hollow’s distracting allegations cannot alter the undisputed fact that neither Summit Water nor the Individual Shareholders are serving the public generally. For this reason, the Commission lacks jurisdiction, and this matter must be dismissed.

CONCLUSION

The Commission only has jurisdiction to regulate public utilities, not shareholders or directors of an independent corporation. The Individual Shareholders do not own or operate a water system. Further, the Individual Shareholders are not operating any activity on behalf of the public generally. As such, the Commission has no jurisdiction to continue with the claims against the Individual Shareholders. Those claims must be dismissed.

DATED this 6th day of November, 2009.

HATCH, JAMES & DODGE, PC

By: /s/ Mitchell A. Stephens
Brent O. Hatch
Mitchell A. Stephens

Attorneys for the Individual Shareholders

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2009, I did cause to be sent, in the manner indicated below, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BEAR HOLLOW RESTORATION, LLC'S COMPLAINT AND REQUEST FOR AGENCY ACTION** to the following:

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