

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.

**REPLY 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

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

INTRODUCTION

Bear Hollow’s opposition memorandum paints an image of a shadowy, nefarious conspiracy that controls SWDC for personal profit even though the company continues to offer quality water service to its shareholders at a fraction of the cost of other local water companies. This inaccurate depiction of SWDC’s management largely results from Bear Hollow’s desire to gloss over the notable lack of any new facts or changed circumstances that could justify reexamination of SWDC’s exemption from regulation by the Public Service Commission (“PSC”). As expressed by Supreme Court Justice Pratt, “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.”² Ignoring SWDC’s unblemished service record, extensive history of cooperation with PSC inquiries, and virtually unchanged voting structure, Bear Hollow focuses on two shareholders’ alleged profit from sale of their shares as “newly discovered facts” that warrant PSC

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.

² *Mulcahy v. Public Serv. Comm.*, 117 P.2d 298, 273 (J. Pratt, dissenting).

investigation. This approach does not withstand even casual scrutiny, as there is no allegation that these facts were concealed or otherwise unavailable to the PSC in its previous investigations, nor would shareholder share sales invalidate any part of the PSC's reasoning in granting SWDC's exemption.

Additionally, even if there were some new facts, the PSC still cannot assert jurisdiction as nothing has changed regarding the crucial element of serving the general public. Bear Hollow concurs that *Garkane* offers the proper standard for evaluating whether a company serves the public or only its shareholders, but misapplies the facts and reasoning of that case. SWDC does not provide water service to the public, and none of Bear Hollow's arguments rely upon any new information or change in circumstances since the PSC last found SWDC exempt.

In short, Bear Hollow's "complaints" about SWDC amount to little more than a vehicle for encouraging the PSC to weigh in on Bear Hollow's contract dispute with the company. It is notable that Bear Hollow's opposition does not deny that the plain terms of their Development Agreement render their shares appurtenant to the development property, but merely claims that it would prefer to have acquired its shares without that restriction. The PSC is not situated to rewrite the contractual terms between the parties several years after the transaction. Accordingly, the PSC should decline to assert jurisdiction over SWDC and deny Bear Hollow's request for reconsideration of SWDC's exempt status.

ARGUMENT

I. BEAR HOLLOW'S MEAGER "NEW FACTS" ARE NEITHER NEW NOR ADEQUATE JUSTIFICATION FOR REEXAMINING SWDC'S EXEMPTION AT THIS TIME.

There have been no material changes in SWDC's corporate structure that warrant reconsideration of SWDC's exempt status, particularly in light of the multiple investigations already conducted by the PSC. *See* Memorandum in Support of Motion to Dismiss ("Supp. Mem.") at 1-2. Bear Hollow's opposition memorandum identifies only one change in circumstance that allegedly alters the PSC's previous conclusions regarding SWDC's exemption – the issuance of additional Class A shares to Mr. Saunders, Mr. Knowles, "and/or their related entities" in 2002.³ Memorandum in Opposition ("Opp. Mem.") at 10. Again, this "change" is neither new nor relevant to whether the PSC should regulate SWDC. Information regarding the current shareholder list was available to the PSC in 2003, and the issuance of additional Class A shares carries no implication of improper conduct.

SWDC's Articles of Incorporation provide that shares are issued upon transfer to SWDC of "approved water rights together with a source site from which potable water can be developed." SWDC Amended and Restated Articles of Incorporation, Art. IV, ¶ 1. The issued shares represent the interest of the shareholders in the property rights

³ As previously noted, Bear Hollow continually and inaccurately refers to various entities as being controlled by Mr. Saunders and/or Mr. Knowles. Bear Hollow has not alleged, and cannot prove, specific facts sufficient to show that the Individual Shareholder Respondents are interrelated or controlled by Mr. Saunders and/or Mr. Knowles. Any implication to the contrary is unsupported and false.

conveyed to SWDC. Those provisions relating to the creation and issuance of shares have remained unchanged since at least 1991. Moreover, the corporate structure of SWDC provides protections for the existing SWDC shareholders with respect to the creation of new shares. Since 1994, SWDC's bylaws have provided that additional shares may be issued by SWDC relating to system expansions contributed by a shareholder, so long as the expansions meet SWDC requirements. *See* Nov. 3, 1994 Rules and Regulations for the Expansion of Summit Water Distribution Company's Water Delivery System ("Expansion Rules") at § 8 (attached as Ex. A to Bear Hollow's Opp. Mem.). For an expansion to receive water delivery, not only must the proposed expansion serve the long term interests of SWDC, but the shareholder must have contributed sufficient water rights to meet the needs of the proposed expansion, paid for any modifications to the existing system, and ensured sufficient water source, pipeline, and storage capacity to meet the needs of the intended use. *Id.* at §5.⁴ These provisions apply equally to all shareholders.⁵

Accordingly, having made significant contributions to SWDC's water rights and water infrastructure, SWDC shareholders have qualified for the issuance of additional

⁴ The Rules and Regulations ensure that existing shareholders do not have to pay for, or in any way subsidize, expansion of the water system and its facilities. The Rules and Regulations also require that additional source, system and storage capacity are proven before any new connections can be made to the Summit Water system.

⁵ In fact, when the Bear Hollow shares were originally acquired in 1998, a significant number of those shares were issued pursuant to Article IV, ¶ 1 of the SWDC Articles of Incorporation based on decreed water rights conveyed to SWDC.

shares, such as the shares issued to Mr. Saunders and Mr. Knowles in 2002.⁶ All of these provisions are set out in the corporate documents already reviewed by the PSC, and are unchanged since that review. Moreover, SWDC has not exceeded the number of shares anticipated by the corporate Articles reviewed by the PSC (15,000 Class A shares alone), and the PSC clearly understood and anticipated that share transfers and issuances were a regular and ongoing occurrence.⁷

Bear Hollow's claim that the issuance of new shares implicitly "undermined" the PSC's finding that SWDC owns sufficient water assets fails in light of the undisputed error in Bear Hollow's calculations and the extensive government review of SWDC's water assets each year since 2000 under the Summit County concurrency ordinance. First, Bear Hollow's calculations rely on the erroneous assumption that the basis for each SWDC share is 0.76 acre feet, but the undisputed corporate documents require that each share is based upon 1.0 acre feet of water right. *See* Supp. Mem. at 4-5; 1991 Amended and Restated Articles of Incorporation, Article IV, ¶¶ 1, 2, 3 and 4. Bear Hollow makes no response to this correction. Further, as detailed above, any new shares issued must be backed by sufficient water rights to support the extension, as well as the related source,

⁶ In addition to Bear Hollow's other misstatements, the claim that Mr. Saunders and Mr. Knowles "do not utilize their Class A Shares for their developments" is patently false. *See* Opp. Mem. at n.16. Notably lacking a supporting citation, this claim ignores the multiple developments for which Mr. Saunders, Mr. Knowles, and their partners have used their shares over the years. These developments include Walmart, Factory Stores, McDonald's, Arby's, Landmark, Powderwood Condominiums, Ranch Place, White Pine Ranches, Parley's Lane, Parley's Creek and Parley's Park.

⁷ Further, Bear Hollow's arguments ignore the fact that Mr. Knowles and Mr. Saunders have had their interests further diluted since the 2002 issuance of shares by subsequent transfers to third parties.

pipeline and storage capacity. Finally, Summit County reviews SWDC's water assets in detail each year, pursuant to its concurrency ordinance, and ensures that the company maintains adequate water to serve each of its shareholders entitled to water, as well as a sufficient reserve of source and storage capacity. Summit County Ordinance 525.

Perhaps in tacit recognition of the fact that there has been no significant change in SWDC's corporate structure or internal controls since the PSC's last review, Bear Hollow claims that certain pre-existing, but "newly discovered" facts warrant reconsideration of SWDC's exemption. However, the alleged new facts are merely that Mr. Saunders and Mr. Knowles have sold some of their class A shares for profit, and then received additional shares.⁸ Opp. Mem. at 12. The sales alone are neither new information, nor pertinent to the PSC's review. Further, as discussed above, new shares are issued in exchange for water rights and infrastructure contributed by shareholders for the benefit of SWDC, not as the result of some secret deal.⁹ Finally, the requirements for share issuance apply equally to all shareholders, not merely those selectively identified by Bear Hollow's Complaint. In short, there is nothing in Bear Hollow's Complaint that

⁸ On their face, Bear Hollow's allegations make very little intuitive sense – if the sales in question diminished the shareholders' "control" over the company, how then could they pressure SWDC to issue them new shares solely by virtue of their share ownerships?

⁹ Bear Hollow asserts that these facts "have largely been concealed by Saunders and Knowles through the formation of various entities, including an unregistered partnership" and alleges that the DPU "was unaware of the collusion of Saunders and Knowles". Opp. Mem. at 12. Apart from being untrue, this allegation improperly implies that SK Resources was required to be registered, and the "concealment" is squarely refuted by the fact that Bear Hollow was apparently able to obtain copies of the sale agreements and information regarding the "various entities". Moreover, SWDC complied fully with all requests for information from the PSC in all previous investigations and considerations of potential investigations (as in 2003).

proffers relevant evidence newly come to light, or a significant change in circumstances since the PSC's last consideration of SWDC. Accordingly, the request for agency action should be denied as unwarranted at this time.

II. BEAR HOLLOW'S REQUEST FOR AGENCY ACTION SHOULD BE DISMISSED BECAUSE THE PSC LACKS JURISDICTION OVER RESPONDENTS.

A. SWDC Should Be Exempt Under *Garkane*.

Having conceded that *Garkane* is the controlling standard for serving the general public, Bear Hollow simply misapplies the facts and reasoning of that case to SWDC. Bear Hollow asserts three reasons SWDC serves the general public, none of which accurately interprets the law. First, Bear Hollow claims that the potential sale of land with Class B shares appurtenant to that property entitles any potential purchaser to service from SWDC. Opp. Mem. at 3-4. In fact, as Bear Hollow acknowledges, any potential purchaser would have to comply with multiple requirements before becoming a shareholder and qualifying for water service from SWDC. See Opp. Mem. at n. 4. These requirements are at least as restrictive as the membership criteria approved in *Garkane*, where potential members merely had to meet three simple prerequisites: payment of a five dollar (\$5) membership fee; agreement to pay a monthly minimum; and compliance with the company's articles and by-laws upon acceptance by the board or other members. *Garkane Power Co. v. Public Serv. Comm'n*, 100 P.2d 571, 572 (Utah 1940). The Court even pointed out that although membership in that case was "easy to obtain" and *Garkane* had apparently accepted everyone who had paid their fees, this did not render the

corporation a “public service” corporation as it still had the right to select those who became members. *Id.* at 573; *see also San Miguel Power Assoc. v. Public Serv. Comm’n* 292 P.2d 511, 512 (Utah 1956) (applying *Garkane* to find corporation was not public utility so long as membership was required before service was given, even where company “committed themselves to serve electric energy to all unserved persons who desire such service and meet the reasonable requirements of the cooperatives” and membership was easily obtained).

Second, Bear Hollow claims that by marketing to the general public, SWDC is providing water to the general public. Opp. Mem. at 5. Again, *Garkane* refutes this claim as the Court acknowledged that the corporation there also solicited membership, but did not find this indicated it served the public. *Garkane*, 100 P.2d at 573. Regardless of whether SWDC or its shareholders advertise the possibility of water service, any potential member still must comply with the membership requirements and standards set by SWDC. Competing for the business of those seeking water service does not necessitate serving anyone who asks. Further, Bear Hollow’s evidence that SWDC “has solicited the public” consists of a misleading quotation from negotiations with a specific development, with convenient ellipses that render the quotation superficially broader than its original context – Bear Hollow claims that “SWDC has solicited the public and ‘offered to sell water...for a fee of \$7,600 per 0.76 acre foot connection’”. Opp. Mem. at 5. The unedited quotation more accurately reads, “Summit Water offered to sell water *to Promontory* for a fee of \$7,600 per 0.76 acre foot connection.” *See* Ex. B to Opp. Mem.

at ¶ 62 (emphasis added). There should be no implication that SWDC simply offers water to the general public without restrictions or preconditions.

The “internal controls” of *Garkane* are equally present with SWDC. As reiterated in the opening brief, there is no conflict of interest because the consumer and producer interests are aligned, and the shareholders have the right to elect other directors to the board. *See* Supp. Mem. at 5-6. These are the same internal controls repeatedly approved by the PSC over the years, with no changes since the last review.

Finally, Bear Hollow offers the anemic argument that SWDC provides water to the general public because people may enter the public facilities that obtain their water from SWDC, and use the water there. *Opp. Mem.* at 4. This illogical argument entails that merely allowing a guest to wash his hands or have a drink of water entitles that guest to water service from SWDC. The general public does not have any sort of right to claim water service from SWDC; the only contractual right to service is between SWDC and its member shareholders, and cannot qualify as service to the general public.

B. SWDC Also Qualifies for Exemption Under Rule 746-331-1.

Bear Hollow disputes the PSC’s prior findings on three points: 1) SWDC’s non-profit status; 2) SWDC’s ownership and control of the necessary water assets; and 3) the commonality of interest among SWDC shareholders. *Opp. Mem.* at 6-8. However, none of these claims is supported by new or relevant factual allegations. SWDC’s non-profit status is not seriously contested, as it is undisputed that the State of Utah has SWDC as a non-profit in good standing, and there is no legal basis for the contention that any sales of

shares by shareholders somehow invalidate that standing. Similarly, SWDC's ownership of the necessary assets is confirmed by annual governmental verification, as discussed above. Again, Bear Hollow does not respond to SWDC's correction of its flawed calculations based on 1.0 acre feet of water right, and therefore cannot merely rely on its unsupported assertions.

Finally, Bear Hollow's allegations about Mr. Saunders and Mr. Knowles secretly controlling SWDC are not only inaccurate, but improperly conflate the concept of control by a majority shareholder with a lack of commonality. There is no standard that holds any company with a majority shareholder necessarily subject to PSC jurisdiction, particularly where, as here, there is no indication that the alleged control has resulted in any exploitation of the other SWDC shareholders. To the contrary, SWDC shareholders enjoy lower rates, and quality service with a virtually unblemished record of complaints over the past several decades. *See Supp. Mem.* at 6. Bear Hollow itself does not contend that the rates it pays as a shareholder are excessively high. Moreover, as Bear Hollow admits, Mr. Saunders and Mr. Knowles are Class B shareholders as well as Class A shareholders, so they continue to have an interest in the rates remaining low.

Bear Hollow's claim of inequitable treatment comes down to merely its dissatisfaction with the terms of its development agreement and the appurtenancy provisions of the corporate Bylaws; however, that dispute fails to demonstrate any inequity resulting from lack of commonality. When Bear Hollow acquired its shares through bankruptcy proceedings, those shares were already appurtenant to the

development property in accordance with the Bylaws.¹⁰ Accordingly, far from preserving equity, allowing Bear Hollow to sever the shares from the development project would have violated the Bylaws and singled Bear Hollow out for special treatment among the shareholders.

CONCLUSION

The PSC has no new facts or changed circumstances before it that merit reconsidering its decisions on SWDC's exempt status. Without that justification, there is no basis for the PSC to now assert jurisdiction over SWDC after twenty years of non-regulation and no allegations of excessive rates or failure to provide quality water service. Bear Hollow's attempt to encourage the PSC to weigh in on its private contract dispute with SWDC should be rejected and the Complaint dismissed for lack of jurisdiction.

DATED this 6th day of November, 2009.

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

¹⁰ As recently found by a second district court judge, "Once a share of water from Summit Water attaches to a particular parcel of property, it becomes appurtenant thereto, and the water right cannot be sold or transferred separate from the property." *Summit Water Distrib. Co. v. Utah State Tax Comm'n*, No. 030923183, Findings of Fact, Conclusions of Law and Order, ¶ 8 (2nd Dist. Ct. Utah, Oct. 7, 2009) (J. Morris) (attached hereto as Exhibit A).

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 RESPONDENT SUMMIT WATER DISTIRBUTION COMPANY'S MOTION TO DISMISS BEAR HOLLOW'S COMPLAINT AND REQUEST FOR AGENCY ACTION** to the following:

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

(Via Electronic Mail and U.S. Mail)

J. Craig Smith
Daniel J. McDonald
Kathryn J. Steffey
SMITH HARTVIGSEN, PLLC
215 South State Street, Suite 600
Salt Lake City, Utah 84111

(Via U.S. Mail)

Brent O. Hatch
Mitchell A. Stephens
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

(Via Electronic Mail)

_____/s/_____

Exhibit “A”