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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.	**REQUEST FOR REHEARING** Docket No. 09-015-01

Pursuant to Sections 54-7-15 and 63G-4-301 of the Utah Code, Applicant/Complainant, Bear Hollow Restoration, LLC ("Bear Hollow"), by and through its attorneys of record, respectfully submits this Request for Rehearing of the Public Service Commission's Order on Motions to Dismiss ("Order"), issued February 4, 2010. (A copy of the Order is attached hereto as Exhibit A.) This Request is timely under Utah Code Ann. § 63G-4-301.

INTRODUCTION

Bear Hollow is a shareholder of Class A shares of Summit Water Distribution Company ("Summit"). On September 10, 2009, Bear Hollow filed its Complaint and Request for Agency Action with the Utah Public Service Commission (the "Commission"), requesting, *inter alia*, that the Commission revoke the exemption from Commission regulation granted Summit. Bear Hollow's request was based on several factual allegations that demonstrated that two of Summit's shareholders, Saunders and Knowles, owned or controlled, either directly or indirectly, more than 51% of all outstanding Summit shares and that, through this majority ownership, Saunders and Knowles, and the entities owned or controlled by them, have operated and continue to operate Summit as a vast for-profit investment scheme.

Given the fact that Saunders and Knowles had used their majority ownership and control of Summit to exploit Summit's resources in exchange for nearly $6,000,000.00 from ***known*** stock sales transactions at the expense and detriment of the remaining Class A and Class B shareholders, Bear Hollow requested that the exemption granted Summit pursuant to Rule R746-331-1.C be revoked to ensure that the interests of each of Summit's members and consumers will be protected.

The Respondents moved to dismiss the Complaint and Request for Agency Action on the ground that the Commission lacked jurisdiction. Specifically, the Respondents claimed that the Commission had no jurisdiction over Summit because it was a mutual, non-profit water company that provided water only to its shareholders. Moreover, the individual Respondents alleged that the Commission lacked jurisdiction over individual shareholders of a water corporation, such as Saunders and Knowles.

The Respondents' motions to dismiss were heard before Administrative Law Judge Ruben H. Arredondo on December 8, 2009. Thereafter, on February 4, 2010, the Commission issued its Order on Motions to Dismiss, wherein it granted both Respondent Summit's motion to dismiss and the individual Respondents' motion to dismiss for lack of jurisdiction. In that Order, the Commission declared, "[a]bsent any allegation that would factually allege that [Summit] serves those who are not shareholders, the Commission cannot assert jurisdiction—even for an investigation, and must dismiss." (Order at 12.)

ANALYSIS

1. The Commission's Order Constituted *de facto* Rule Making and Is Therefore Invalid

Because the Commission's Order on Motions to Dismiss constitutes a clear change in law in the Commission's interpretation of its jurisdiction over mutual, non-profit culinary water companies, the Order constitutes *de facto* rule making and is therefore invalid for failure to comply with formal rule making procedures. This case is governed by the rule articulated by the Utah Supreme Court in *Williams v. Public Service Commission*, 720 P.2d 773 (Utah 1986). In that case, the Utah Supreme Court declared that "the Commission cannot reverse its long-settled position regarding the scope of its jurisdiction and announce a fundamental policy change without following the requirements of the Utah Administrative Rule Making Act." *Id.* at 777.

On April 6, 1998, the Commission enacted Rule R746-331-1, entitled "Conditions for Finding of Exemption." The Rule provides that, "[u]pon the Commission's own motion, complaint of a person, or request of an entity desiring a finding of exemption, the Commission may undertake an inquiry to determine whether an entity organized as a mutual, non-profit corporation, furnishing culinary water, is outside the Commission's jurisdiction." Utah Admin. Code R746-331-1.A. Essential to the determination that a mutual, non-profit culinary water

company is outside the Commission's jurisdiction are the following three findings: (1) the water company is a non-profit water company in good standing with the Utah Division of Corporations; (2) the water company owns or controls assets necessary to furnish culinary water service; and (3) the voting control of the entity is distributed in a way that each member enjoys a complete commonality of interest, as a consumer, such that rate regulation would be superfluous. *Id.* R746-331-1.C.

In interpreting this rule and its statutory grant of jurisdiction, the Commission has consistently (until recently) held that culinary water companies serving only their shareholders are within the Commission's jurisdiction absent a demonstration of all of the factors set forth in R746-331-1.C.[1] For example, *In re Petition for and Order to Show Cause Regarding Exemption from Commission Regulation of Boulder King Ranch Estates Water Company*, Docket No. 02-2254-01, in response to Boulder King's claim that it did not qualify as a public utility because it served only its shareholders, the Commission held as follows:

> Boulder King claims that because it is a nonprofit corporation which serves only its owning members with each lot having one vote, that it is not a "public utility." We disagree. Boulder King falls within the definition of a public utility. It is a water corporation that owns, controls, operates, or manages a water system for public service within this state. The fact that it is a nonprofit corporation owned by the owners of lots in the Boulder Kings Ranch Estates subdivision does not cause it to be exempt from regulation. The statutes set forth above that define "water corporation" and "water system" do exempt from regulation systems engaged in distribution of *irrigation* water to their stockholders. There is no similar exemption for culinary systems.

[1] Indeed, although the Utah Legislature has excluded "private irrigation companies engaged in distributing water only to their stockholders," Utah Code Ann. § 54-2-1(30)(b), the Legislature did not include a similar exclusion for private culinary companies. Accordingly, given the Legislature's refusal to extend the statutory exclusion to private culinary water companies, the Commission has consistently and properly interpreted its jurisdiction to include non-profit, mutual water companies "furnishing culinary water." Utah Admin. Code R746-331-1.A.

See In re Boulder King, Docket No. 02-2254-01, Amended Report and Order, issued October 16, 2002 (emphasis in original).[2]

In this case, it appears that the Commission has applied the exclusion found in section 54-2-1(30)(b) for "private irrigation companies engaged in distributing water only to their stockholders" in finding that it does not have jurisdiction over Summit. However, that section is not applicable because, as in Boulder King, Summit is not a "private *irrigation* company" but is instead furnishing culinary water to its consumers. Given the Commission's prior interpretation of its jurisdiction over culinary water companies that deliver water solely to their shareholders, as clearly articulated in *Boulder King* and set forth in its administrative rule R746-331-1,[3] as well as over those individuals operating or controlling such entities, the Commission's departure from that interpretation in the present case constitutes *de facto* rule making, which requires the Commission to comply with the procedures for formal rule making. Because the Commission did not comply with the formal requirements of the Rule Making Act, its Order in this case is invalid. *See Williams*, 720 P.2d at 777.

Accordingly, Bear Hollow requests on rehearing that the Commission reverse its Order and hold that, pursuant to its prior interpretation of Section 54-4-1 and Rule R746-331-1, the Commission has jurisdiction over the Respondents sufficient to commence an investigation to determine whether Respondents meet all the requirements of R746-331-1 to qualify for an exemption from regulation.

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[2] The Commission has also consistently interpreted its jurisdiction to include the officers and individuals operating or controlling a water corporation, such as is alleged in this case against the individual Respondents. For example, the Commission has issued Orders to Show Cause to officers of water corporations operating 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. Thus, the Commission's determination that it cannot exercise control over the individual Respondents is likewise contrary to its prior interpretation and, therefore, constitutes *de facto* rule making.

[3] It should be noted that, because R746-331-1 applies only to an "entity organized as a mutual, non-profit corporation, furnishing culinary water," it appears that the Commission's ruling in the present case renders R746-331-1 a nullity.

2. The Commission's Order Is Contrary to the Holding in *Garkane*

In addition to representing a departure from its prior interpretation and exercise of jurisdiction, the Commission's Order in the present case is also contrary to the Utah Supreme Court's holding in *Garkane Power Co. v. Public Service Comm'n*, 100 P.2d 571 (Utah 1940). In *Garkane*, the Court held that the Commission does not have jurisdiction over a cooperative "***provided*** the arrangement is a bona fide cooperative or private service organization and is not a device prepared and operated to evade or circumvent the law." *Id.* at 573 (emphasis added). To ensure that form is not elevated over substance, the Court mandated that the organizations must be "scrutinize[d] closely to determine whether or not a certain organization or method of conduct has for its purpose evasion of the law." *Id.*

In this case, Bear Hollow's Complaint contains numerous factual allegations that establish that Saunders and Knowles, and the remaining individual Respondents which are owned or controlled by Saunders and Knowles, are operating Summit in such a way as to evade or circumvent the law. Indeed, the Complaint alleges that 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.) The Complaint also alleges that

> it appears that immediately after the DPU made its recommendation to the Commission that [Summit] 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, [Summit] 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 [Summit].

(*Id.* at ¶ 44.) Finally, the Complaint alleges that

> Saunders and Knowles, the Saunders and Knowles Entities, and/or SK Resources' manipulation of [Summit'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.)

Given the Utah Supreme Court's mandate that an organization be "scrutinized" to determine whether it is, in fact, not a device to evade or circumvent the law, the Commission erred in determining that it lacked jurisdiction over both Summit and the individual Respondents without first conducting an investigation into the substance of Bear Hollow's claims that the individual Respondents have manipulated and operated Summit for their own personal gain.[4]

It should be noted that, pursuant to the terms of the Order, the Commission has found that it does not have jurisdiction to determine whether individual shareholders are owning, controlling, manipulating, and dominating a public utility for personal gain because the Commission is not a court of equity. (Order at 8-9.) However, such a finding is an abdication of the Commission's role to "supervise all of the business of every … public utility in this state, ***and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction.***" Utah Code Ann. § 54-4-1 (emphasis added).

3. The Complaint Properly Alleged Factual Allegations Supporting Jurisdiction

The Commission dismissed Bear Hollow's Complaint based on its determination that Summit does not serve the public generally. (Order at 14.) However, such a determination is

[4] Indeed, given that the Commission, pursuant to Rule 12 of the Utah Rules of Civil Procedure, "may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing," *Anderson v. American Society of Plastic Surgeons*, 807 P.2d 825, 827 (Utah 1990), the Commission erred in simply dismissing the Complaint without further investigation into whether the individual Respondents are operating Summit in such a way as to evade or circumvent the law.

contrary to the allegations of the Complaint and all reasonable inferences to be drawn from those allegations, which the Commission must construe in favor of Bear Hollow. *See Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226. For example, the Complaint alleges that Summit's Class B (use) shares are "appurtenant to and inseparable from the lot" upon which such water is used. (Compl. at ¶ 76.) As such, Summit cannot preclude a purchaser from receiving ownership of the water right appurtenant to the lot. *See In re Johnson's Estate*, 228 P. 748, 751 (Utah 1924) ("[O]wnership of shares of stock in the corporation is but incidental to ownership of a water right. Such shares are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence.") In *Boulder King*, the Commission recognized that such a fact brings a water corporation within the Commission's jurisdiction, reasoning as follows:

> At the hearing on this matter representatives of Boulder King agreed that it did not have the ability to choose its members. Lot owners in the subdivision are, by virtue of their lot ownership, members. Boulder King representatives further stated that every person or entity that purchases a lot is entitled service from the Company. Boulder King cannot choose its members as required by the *Garkane* decision, and is obligated to serve the public within its service area.

In re Boulder King, Docket No. 02-2254-01, at 3.

Because Summit, like Boulder King, Questar, or Rocky Mountain Power, cannot choose who it will or will not serve within its service area, the Commission erred in determining that Summit does not serve the public generally.

The Commission also erred in finding that the issues raised in Bear Hollow's Complaint, which allege that a small group of majority shareholders are operating and controlling Summit to their benefit and to the detriment of the remaining shareholders, "do not involve the provision of service affecting consumer interests, or other areas typically under Commission jurisdiction" and

"are not within the Commission's jurisdiction."[5] (Order at 9.) Indeed, such a finding is in derogation of the Commission's express statutory authority to ensure that no "preference or advantage" has been granted "to any person" and that no person, such as Bear Hollow, has been subjected to "prejudice or disadvantage." Utah Code Ann. § 54-3-8 (2009). Utah law, not what the Commission considers to be typical, defines the jurisdiction, role, and duty of the Commission. Consequently, the Commission should reverse its ruling and hold that it has jurisdiction to enforce its statutory obligation to prevent discriminatory treatment.

4. The Commission Should Amend Its Order and Consider the Additional Factual Allegations Included in the Amended Complaint and Request for Agency Action

In the event the Commission determines, on rehearing, that Bear Hollow's Complaint lacks sufficient allegations to support a finding of jurisdiction, Bear Hollow requests that the Commission amend its order to allow consideration of Bear Hollow's First Amended Complaint and Request for Agency Action, which has been filed concurrently herewith. Rule R746-100-3 provides that "[t]he Commission may allow pleadings to be amended or corrected at any time," and that "[i]nitiatory pleadings may be amended without leave of the Commission at any time before a responsive pleading has been filed or the time for filing the pleading has expired." Utah Admin. Code R746-100-3.D. As Respondents have not filed a responsive pleading, the Commission should consider Bear Hollow's Amended Complaint. By doing so, the Commission

[5] It should be noted that the Commission's holding is not supported by the statute. Section 54-2-1(16)(a) defines a "public utility" as a "water corporation" that provides service or water to "the public generally." Utah Code Ann. § 54-2-1(16)(a). A "water corporation," in turn, is defined as "every corporation and person,… owning, controlling, operating, or managing any system for public service within this state." *Id.* § 54-2-1(29). The statute does not include any additional requirement that the "control" affect the reasonableness of price and service, as required by the Order. (Order at 9.)

Moreover, even if such a requirement could be read into the statute, Bear Hollow's Complaint clearly supports the inference that Saunders and Knowles' control of Summit has affected, and continues to affect, the "price and service" of the water delivered by Summit. Indeed, because Saunders and Knowles are able to eliminate competition for the sale of Class A shares, (Compl. at ¶ 119), they are able to charge monopolistic prices to those desiring to build a residence within the service area of Summit. This price, which is passed on to the consumer as essentially a "connection fee," is, therefore, artificially inflated.

will conserve judicial resources by allowing the issues presented in this case, both substantive and jurisdictional, to be heard at the same time rather than in two largely duplicative and repetitive cases. Additionally, review of Bear Hollow's Amended Complaint may moot any need to seek judicial review of the Commission's current Order in the event that the Commission determines that the Amended Complaint alleges sufficient factual allegations to support a finding of jurisdiction. Accordingly, Bear Hollow requests that the Commission amend its Order and deem as filed Bear Hollow's Amended Complaint and Request for Agency Action.

Respectfully submitted this ____day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of March, 2010, I caused a true and correct copy of the foregoing **PETITION FOR REHEARING** to be delivered via hand delivery to:

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

and to be mailed, via U.S. mail, postage prepaid, to the following:

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