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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

BEAR HOLLOW RESTORATION LLC,

Applicant/Complainant,

vs.

LEON H. ("HY") 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, STUAT A. KNOWLES and
TRILOGY LIMITED, L.P. dba SK
RESOURCES, a Utah general partnership
and/or joint venture; and SUMMIT WATER
DISTRIBUTION COMPANY, a Utah
nonprofit mutual corporation,

Respondents.

RESPONDENT SUMMIT WATER
DISTRIBUTION COMPANY'S
MEMORANDUM IN OPPOSITION TO
BEAR HOLLOW RESTORATION, LLC'S
REQUEST FOR REHEARING

Docket No. 09-015-01

Respondent Summit Water Distribution Company (“Summit Water”) hereby files this Memorandum in Opposition to Bear Hollow Restoration, LLC’s (“Bear Hollow”) Request for Rehearing.

INTRODUCTION

Bear Hollow’s Request for Rehearing asks the Commission to reconsider the precise same arguments and facts as those raised in the administrative proceedings leading up to the Commission’s Order dismissing Bear Hollow’s Complaint. Bear Hollow is understandably unhappy with the Commission’s well-reasoned and legally supported Order. However, that dissatisfaction, in and of itself, does not warrant granting Bear Hollow’s request, particularly when the arguments contained in that request do not satisfy the threshold determination requirements necessary for the Commission to assert jurisdiction in this matter.

Bear Hollow fails to raise any new facts or legal arguments that would justify reversal of the Order and satisfy the jurisdictional tests properly applied by the Commission in finding that Summit Water does not serve the public generally. Each of the arguments contained in Bear Hollow’s request were fully addressed by the Commission in its ruling and supported by Utah Supreme Court cases that unambiguously define the limitations of Public Service Commission jurisdiction. Moreover, Bear Hollow misconstrues the nature of inquiry mandated under the Utah Supreme Court precedent. It argues that the Commission should conduct a detailed inquiry that would be the equivalent of a formal investigation as a prerequisite to the jurisdictional determination. Such an inquiry is prohibited by the Utah Supreme Court’s holding in *Garkane*

and *Nelson* and the other cases cited in previous briefs that deal with the threshold jurisdictional question. Sensing the novelty and unsupported nature of those arguments, Bear Hollow concedes the weakness of its position by urging the Commission to allow it to amend its original Complaint and effectively reinitiate these proceedings and subvert the Commission's Order. There is no factual or legal basis for granting Bear Hollow's petition and its request should be denied.

As a procedural matter, Summit Water is aware that the Individual Shareholder are filing a separate Memorandum in Opposition to Bear Hollow's Request for Rehearing. Summit Water adopts the arguments and reasoning contained in that memorandum and incorporates it by reference herein.

ARGUMENT

A. Seeking to Overturn the Commission's Order, Bear Hollow's Request for Rehearing Necessarily Side-Steps the Core Issue of Jurisdiction Properly Addressed by the Commission.

The Public Service Commission's Order directly addresses the Motions to Dismiss brought by Summit Water and the Individual Shareholders, which argued that the Commission lacks subject matter and personal jurisdiction to hear and decide Bear Hollow's claims. Those jurisdictional questions were the only issues before the Commission at the time that it issued its February 4, 2010 Order and are the only issues relevant to Bear Hollow's request.

As correctly applied in the Order, the determination of jurisdiction is a threshold question that must be decided before any further Commission action in this case. Relying on *Garkane Power Co. Inc. v. Public Service Commission*, 100 P.2d 571, 572 (Utah 1940), the

Order properly applies the jurisdictional test defined by the Utah Supreme Court that requires a finding that the water corporation *serves the public generally* before the Commission may act. The portion of *Garkane* quoted in the Order states: “If the business or concern is not public service, where the public has not 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.” *Order* at p. 11. That threshold determination is also required by *State of Utah ex. rel. Public Service Commission v. Nelson*, 238 P. 237 (Utah 1925), which holds: “It is only by the presence of such factor or element that the commission has power or authority to regulate or control such business. Eliminating it, its powers and jurisdiction are gone.” *Order* at p. 11. In other words, the analytical framework delineated in *Garkane* and *Nelson* requiring service to the public to invoke the jurisdiction granted to the Public Service Commission by Section 54-4-1, is the condition precedent to Bear Hollow’s case.

As correctly applied in the Order, the jurisdictional standard bars Bear Hollow from proceeding further with the PSC based on the allegations present in its Complaint. Since the Commission found that there were no allegations that Summit Water serves the public generally, the Commission was required to hold that it lacked jurisdiction and dismiss the case.

Accordingly, the only relevant issue raised by Bear Hollow in its Request, is the question of whether there are facts indicating that Summit Water serves the public generally as required under Utah Code Ann. § 54-4-1. Unfortunately for Bear Hollow, its Complaint does not point to any facts that demonstrate in any way that Summit Water does anything other than provide water to its shareholders. All of the water distributed by the company is distributed under shares

of corporate stock. All of the assessments imposed by the company are based on share ownership and shareholder interest. No charges for water supply are levied against any individuals or corporations that are not already shareholders in the water company. These facts are among the bases for the Commission's Order. *See* Order at 13-14.

Rather than raise new facts, Bear Hollow merely reshuffles the arguments already addressed in the briefing and during the administrative hearing on this matter. Importantly, the Commission has already addressed the relevant issues and specifically ruled contrary to the position again taken by Bear Hollow. *See* Order at 13. Accordingly, Bear Hollow's request that the Commission reconsider its previous findings is nothing more than a suggestion that the Commission does not understand its own function and limitations and that the findings in the Order are incorrect despite the lack of factual support in the Complaint.

B. The Commission's Order Was Based on Established Supreme Court Precedent, and Required No Additional Rule-Making to Dismiss Bear Hollow's Complaint.

Bear Hollow improperly conflates the Supreme Court's authority to define the Commission's jurisdiction, with the Commission's ability to craft administrative rules in line with that precedent. Bear Hollow seems to believe that the Supreme Court's definitions cannot be binding upon the Commission until they have adjusted their rules accordingly. There is no legal support for this proposition. The case cited by Bear Hollow, *Williams v. Public Serv. Comm'n of Utah*, 720 P.2d 773 (Utah 1986), dealt with area of regulation not specifically enumerated by statute where the Commission enjoyed discretion to define the authority it would assert. In other words, this issue in *Williams* did not involve express statutory limits of the

Commission's jurisdiction as interpreted by the Supreme Court in cases like *Garkane* and *Nelson*.

Applying the reasoning of *Williams* here in this case would require the Commission to determine whether an entire class of entities should be regulated, rather than evaluating its jurisdiction over a single company as mandated under Section 54-4-1. For example, the situation in *Williams* would be akin to the Commission deciding to extend the exemption for irrigation companies to all water companies, effectively deregulating an entire class of companies that had been issued and relied upon certificates of convenience and public necessity. That situation is markedly different from the Commission's Order finding that it does not have jurisdiction over a particular water company (i.e., Summit Water) under the test mandated by *Garkane* and the applicable statute. In fact, in this case, the Commission is not applying its own standards or discretion in deciding the question of jurisdiction at all. Rather, it is performing its statutory and judicially mandated obligation to assess whether a company serves the public generally, as required for *asserting* jurisdiction under Section 54-4-1. Further, unlike *Williams*, the Commission's Order was not reversing a long-held decision on jurisdiction – Summit Water has expressly and consistently been found to be exempt from Commission regulation for decades.

Moreover, Bear Hollow improperly presumes that the Commission's Order was necessarily in conflict with R746-331-1. Contrary to that unsubstantiated assertion, the Commission has already found that application of that administrative rule is an analytical step that *follows* determination of jurisdiction under Supreme Court precedent, rather than

conflicting with it. In the Deepwater Distribution case, the Commission stated, “However, even before considering the factors stated by the Division and those in R746-331-1.C, the commission must determine whether the service being provided by the Company is provided to the public.” *In the Matter of the Application of Deepwater Distrib. Co., Inc. for Exemption*, Docket No. 09-2516-01 (Nov. 30, 2009), at 3. Accordingly, Bear Hollow’s claim that the Commission’s Order in this case is invalid for lack of rule-making boils down to little more than disagreement with the Commission’s application of the precedent in this case.¹

C. Contrary to Bear Hollow’s Contention, the Commission’s Order Correctly Applies *Garkane*.

Perhaps in tacit recognition of the fact that its allegations cannot show Summit Water serves the public generally, Bear Hollow attempts to focus its Request for Rehearing on encouraging the Commission to look past the allegations and examine the internal corporate affairs of Summit Water for possible evidence that *might* support asserting jurisdiction. *Garkane* expressly rejects this approach. As noted above, *Garkane* precludes any formal investigation of specific facts not alleged in the Complaint in order to determine jurisdiction. Each of the Supreme Court cases addressing jurisdiction examined the issue under a standard of review that is essentially the same as the Commission’s review under Summit Water’s motion to dismiss. Were the Commission to accept Bear Hollow’s approach, it would both exponentially expand its workload and remove the protection from regulation that the Supreme Court has extended to private water companies. Nothing in the Commission’s own rules or the binding

¹ It is telling that Bear Hollow does not urge the Commission to adjust its rule as a result of the alleged deficiency, nor does it identify what type of amendment would be necessary to accurately reflect the Supreme Court precedent, but merely claims the Order is invalid without further rule-making.

Supreme Court precedent supports this blurring of the jurisdictional analysis with substantive investigations that should only be undertaken once jurisdiction is established. In fact, the investigation urged by Bear Hollow in its request contradicts the holdings of those cases by creating a provisional jurisdiction not authorized or contemplated by the statute. The Commission applied the proper standard when it held, “[Summit Water] does not serve the public generally and absent that “essential feature [i.e. that it is] open to the indefinite public,” *Garkane*, 100 P.2d at 573, ***the Commission does not have jurisdiction to commence an inquiry*** or otherwise assert jurisdiction at this time.” Order at 14 (emphasis added); *see also Id.* at 12 (“Absent 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.”) (emphasis added).

D. The Complaint Lacks Factual Allegations Necessary for Commission Jurisdiction.

In an attempt to undermine the sound basis for the Commission’s Order, Bear Hollow inappropriately relies on the Commission’s decision in *Boulder King* to suggest that Summit Water is subject to Commission jurisdiction by analogy. Specifically, Bear Hollow argues that Summit Water, like the respondent in *Boulder King*, lacks the ability to choose who it will serve within its service area, and thus serves the public generally. This very argument was already rejected by the Commission in its Order. *See* Order at p. 13 (“Although Summit might not have the ability to control to whom a shareholder sells its interest, Summit does retain the power to reject anyone that is not willing to meet the requirements imposed on shareholders...Even if the

requirements are minimal, so long as Summit serves only its shareholders, it is not serving the public generally.”) Further, the holding of *Garkane* itself preemptively rejects Bear Hollow’s arguments in that it held, “So long as the cooperative serves only its owner-members and so long as it has the right to select those who become members, ordinarily it matters not that 5 or 1000 people are members or *that a few or all the people in a given area* are accorded membership....” *Garkane*, 100 P.2d at 573 (cited by Order at 14) (emphasis in Order). The citation to *Boulder King* does nothing to change the express findings contained in the Order that Summit Water does not serve the public generally and maintains sufficient control over who may become shareholders in accord with the *Garkane* test.²

E. The Commission Cannot Consider Bear Hollow’s Amended Complaint After Ordering Dismissal of the Action.

As a last-ditch effort to avoid the well-reasoned holdings of the Commission’s Order, Bear Hollow introduces an Amended Complaint that allegedly contains further factual justifications for asserting jurisdiction over Summit Water. However, this tactic is both procedurally improper and factually insufficient. First, it is well established that once an action has been dismissed, the party may not resurrect it simply by filing a belated amendment to the pleadings. *Nichols v. State*, 554 P.2d 231, 232 (Utah 1976). The Individual Shareholders opposition memorandum also addresses this procedural failing, and Summit Water joins in their reasoning. Were the Commission and the Courts to accept this tactic, it would create an endless cycle of litigation, where any dismissal based on the pleadings can be circumvented by a new

² Moreover, *Boulder King* cannot trump the Supreme Court precedent already acknowledged by the Commission in this case.

filing closely tailored to avoid the deficiencies recently identified by the previous ruling. This rationale would unfairly expose potential defendants to increased legal expenses, uncertain timeframes for closure, and repeated litigation over the exact same issues.

Moreover, Bear Hollow's Amended Complaint contains nothing in the way of new factual allegations that could justify a different outcome to the Commission's jurisdictional analysis. There are no new allegations that Summit Water serves the public generally, and that is the only question with which the Commission need concern itself. As noted by the Commission, merely making "conclusory legal allegations, alleging Summit is serving the public, ... is no factual allegation that Summit provides services directly to anyone other than shareholders." Order at 11. With respect to the jurisdictional question, the Amended Complaint does not offer any new facts that would defeat the finding of exemption under *Garkane*.

CONCLUSION

For all the foregoing reasons, the Commission should deny Bear Hollow's Request for Rehearing and allow its previous Order to stand.

DATED this 26th day of June 2018.

FLITTON & SWENSEN



John S. Flitton
Lara A. Swensen
Attorneys for Respondent,
Summit Water Distribution Company

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June 2018, I caused to be transmitted, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing RESPONDENT SUMMIT WATER DISTRIBUTION COMPANY'S MEMORANDUM IN OPPOSITION TO BEAR HOLLOW RESTORATION LLC'S REQUEST FOR REHEARING, to the following:

Electronic and U.S. Mail:

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

Electronic:

Brent Hatch
Mitchell Stevens
HATCH, JAMES & DODGE
10 West Broadway, Suite #400
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U.S. Mail:

J. Craig Smith
SMITH HARTVIGSEN
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