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Attorneys for 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.

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Bear Hollow Restoration, LLC, Applicant/Complainant, vs. Leon H. Saunders, et al., Respondents.	**MEMORANDUM IN OPPOSITION TO BEAR HOLLOW RESTORATION, LLC'S REQUEST FOR REHEARING** 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 Memorandum in Opposition to Bear Hollow Restoration, LLC's ("Bear Hollow") Request for Rehearing.[1]

[1] The Individual Shareholders understand that Summit Water Distribution Co. has filed or will be filing a separate memorandum in opposition. The Individual Shareholders hereby join in that memorandum.

INTRODUCTION

Bear Hollow has not filed its request for rehearing because there has been a change in the law, or because the Commission overlooked relevant legal authority, or even because the Commission misunderstood the facts before it. Rather, Bear Hollow's request for rehearing simply restates arguments the Commission already considered and rejected.

Bear Hollows' repeated arguments do not change the fact that the Individual Shareholders are *not* public utilities subject to the Commission's jurisdiction. Its arguments do not change the fact that "there is no *factual allegation* that any of [the Individual Shareholders] . . . is a water company serving the public or that any [of the Individual Shareholders] own[s] or control[s] a water system serving the public." [Feb. 4, 2010 Order on Motions to Dismiss ("Order") p. 6]. Its arguments do not change the fact that Summit Water does not offer water to the public generally and does not serve anyone other than its shareholders. [*See* Order p. 14 ("there is no allegation that Summit serves anyone other than shareholders")]. Finally, its arguments cannot alter the clear precedent from the Utah Supreme Court or the unambiguous provisions of the Utah Code.

The Commission has heard all of Bear Hollow's arguments before. Those arguments were fully briefed and addressed in detail during oral argument on December 8, 2009. The Commission reviewed Bear Hollow's arguments and issued a thorough and unanimous order dismissing this case. Nothing has changed since the Commission's Order, and Bear Hollow's request for rehearing presents nothing new. Its request should be rejected.

ARGUMENT

I. BEAR HOLLOW'S REQUEST TO AMEND ITS COMPLAINT SHOULD BE DENIED.

Bear Hollow argues that it has an absolute right to file an amended complaint because, while all of the respondents filed motions to dismiss, none of the respondents has filed a "responsive pleading." Bear Hollow further argues that even though its proposed amended complaint was not part of the underlying decision, the Commission nevertheless "should consider" it when deciding Bear Hollow's request for rehearing. [Request for Rehearing ("Request") pp.9-10]. Bear Hollow provides no authority for its positions other than Utah Admin. Code 746-100-3.D, which, like Rule 15 of the Utah Rules of Civil Procedure, generally provides that a party may amend its complaint before a responsive pleading has been entered.[2] Bear Hollow's reliance on this rule, however, is misplaced because it ignores the fact that this case was dismissed a month ago.

The rules that allow a party to amend its complaint before a responsive pleading has been filed do not apply when the underlying action has been dismissed. Rather, "an order of dismissal is a final adjudication, and thereafter *a plaintiff may not file an amended complaint.*" *Nichols v. State*, 554 P.2d 231, 232 (Utah 1976) (emphasis added); *see also National Advertising Co. v. Murray City Corp.*, 2006 UT App 75, ¶ 13, 131 P.3d 872 ("In Utah, upon occurrence of a final adjudication, and thereafter, *a [party] may not file an amended complaint*." (emphasis added) (alteration in original)); *Suarez v. Friel*, 2005 UT App 396, ¶ 5 n.1, 2005 WL 2303797 (same). *See generally Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir. 1985) ("A motion to dismiss is treated like a responsive pleading when final judgment is entered before plaintiff files an amended complaint.").

[2] *Compare* Utah Admin Code R746-100-3.D ("Initiatory 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.") *with* Utah R. Civ. P. 15(a) ("A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served . . . ."); *see also* R.746-100-1 ("In situations for which there is no provision in these rules, the Utah Rules of Civil Procedure shall govern . . . .").

Because Bear Hollow "may not file an amended complaint" under the current circumstances, *Nichols*, 554 P.2d at 232, its suggestion that "the Commission should consider Bear Hollow's Amended Complaint" when deciding its request for rehearing must be denied. Pursuant to the express declarations of the Utah Supreme Court and the Utah Court of Appeals, Bear Hollow's Amended Complaint was filed improperly and is not before the Commission. As such, the Amended Complaint should not and cannot be considered as part of Bear Hollow's request for rehearing. Rather, that request (like the Commission's original Order) must be based solely on Bear Hollow's original Complaint.

II. THE COMMISSION'S PRIOR DECISION WAS NOT A DEPARTURE FROM THE LAW; IT EXPRESSLY FOLLOWED THE MANDATES OF THE UTAH LEGISLATURE AND THE UTAH SUPREME COURT.

Bear Hollow argues that the Commission's prior Order "constitutes a clear change in [the] law" because "water companies serving only their shareholders are within the Commission's jurisdiction." [Request p. 4]. With respect to the Individual Shareholders, Bear Hollow's argument fails for several reasons.

A. Bear Hollow's Request for Rehearing Completely Ignores That the Individual Shareholders Are Not a Public Utility.

Bear Hollow has not and cannot establish a basic underlying assumption present in its request for rehearing—that the Individual Shareholders named in this action are a public utility. In fact, Bear Hollow ignores this basic, jurisdictional prerequisite and simply rehashes arguments primarily directed at Summit Water, as opposed to the Individual Shareholders. Bear Hollow's decision to ignore this foundational flaw—the Commission's lack of jurisdiction over the Individual Shareholders—is remarkable not only because it is the basic gateway to the Commission's authority,

but also because that flaw was the basis for the Commission's prior order of dismissal. [*See* Order pp. 3-10 (addressing "The Shareholders' Motion")].

As the Commission previously recognized, and as the Utah Code expressly declares, the Commission's jurisdiction is limited. The Commission only has "'jurisdiction to supervise and regulate every *public utility* in this state."' [*Order* p. 2 (quoting Utah Code Ann. § 54-4-1)]. A public utility includes "'water corporation[s] . . . where the service is performed for, or the commodity delivered to, the public generally.'" [*Id.* p. 3 (quoting Utah Code Ann. § 54-2-1(16)(a))]. Water corporations are defined as "every corporation and person . . . managing any water system for public service." Utah Code Ann. § 54-2-1(29). And, a "water system" is defined as the "reservoirs, tunnels, shafts, dams, dikes, pipes," etc when used for the distribution, or sale of water. *Id.* § 54-2-1(30)(a). "The PSC has no inherent regulatory powers [beyond these statutory provisions, and] . . . any reasonable doubt of the existence of any power must be resolved against the exercise thereof." *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988).

With respect to the Individual Shareholders, the basic flaw in Bear Hollow's arguments is that even if Summit Water falls under the Commission's limited jurisdiction (and it does not), Bear Hollow still has not and cannot establish that the named Individual Shareholders likewise meet these same statutory provisions. Indeed, as recognized by the Commission's prior ruling, these Individual Shareholders only were named in this action "because they own shares in Summit [Water], which Bear Hollow claims is a public utility." [Order p. 6; *see also* Complaint ¶¶ 3-7, 9-13 (naming the Individual Shareholders because each "is a Class A shareholder of Summit")]. The Commission further recognized that "there is no *factual allegation* that any of the [Individual Respondents], individually or collectively, is a water company serving the public." [Order p. 6]. Rather, Bear

Hollow "allege[s] *only that the shareholders have shares in Summit [Water]*, which in turn is allegedly a 'public utility,' 'water corporation,' or 'water system.'" [*Id.*].

As recognized by the Commission's Order, and as declared by the courts of this State, "'a corporation is regarded as a separate and distinct legal entity from its stockholders. This is true whether the corporation has many stockholders or only one.'" [*Id.* (quoting *DeGrazio v. Legal Title Co.*, 2006 UT App 183, *1)].[3] Moreover, as the Commission properly recognized, the Utah Supreme Court "dealt with a similar situation" in *Dansie v. Herriman*, 2006 UT 23, 134 P.3d 1139. "There, the Court clarified that the Herriman water company's articles of incorporation entitled shareholders 'to use Company water but gave them no ownership interest in Company assets'—that 'shareholders are promised equal participation not in the ownership, but rather in the *use* of Company assets.'" [Order p. 7 (quoting *Dansie*, 2006 UT 23, ¶¶ 2, 8)]. Much like *Dansie*, Bear Hollow has alleged that the "Class A development shares" held by the Individual Respondents "represent a proportionate but specific interest in the corporations' domestic and culinary water . . . *but no interest whatsoever in the corporation's water distribution works,* e.g. water diversion facilities, pipeline, water storage facilities" or any of the other items that constitute a "water system."[4] [Order p. 7 (quoting Complaint

[3] For this reason, it is black-letter corporate law that while a shareholder has an interest in the company itself, he has no interest in or control over the specific assets of that company. *See, e.g., Klein v. Board of Tax*, 282 U.S. 19, 24 (1930) ("The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members."); *Owens v. C.I.R.*, 568 F.2d 1233 (6th Cir. 1977) ("[S]tock in a corporation represents an ownership interest in a going business organization; the stockholders do not own the corporation's property. . . . When a stockholder sells his stock, he is selling his proprietary interest in a going concern and not an interest in the corporate assets."); 18A Am. Jur. 2d Corporations § 630 (2009) ("[T]he shareholders of a corporation do not own the property of a corporation; the corporation does. Thus, a purchase of stock . . . is not a purchase of the corporate assets, just as a sale of stock . . . is not a sale of the property and assets of the corporation itself. . . . A shareholder may not transfer or assign the properties or assets of the corporation . . . ."). Thus, even if the Individual Shareholders own stock in Summit Water and even if Summit Water owned and operated a "water system," it would be incorrect to impute Summit Water's ownership of that system onto the Individual Shareholders. It would be like exercising jurisdiction over Warren Buffet because he owns stock in PacifiCorp.

[4] The Utah District Court recently recognized a similar point. 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.

¶ 77)]. Thus, there is no legal or factual basis for imputing Summit Water's actions and ownership onto the Individual Shareholders. "The shareholders' mere interest in Summit [Water] is not enough to convey jurisdiction over them to the Commission, either to commence an investigation or to enter an order asserting jurisdiction sufficient to regulate them as a public utilities."[5] [Order p. 7]. Again, Bear Hollow has not challenged this conclusion. It does not challenge the legal rules the Commission applied, nor does it argue that the Commission misunderstood the issues before it.[6] Bear Hollow cannot point to a single allegation that the Individual Shareholders each individually own, for example, reservoirs, tunnels, dams, or other property constituting a "water system." *See* Utah Code Ann. § 54-2-1(30)(a). Rather, Bear Hollow focuses its arguments on issues that wholly are unrelated to the Individual Shareholders. As such, there is no reason why the Commission should reconsider the portion of its Order that addressed the Individual Shareholders. Based on the uncontested legal rules, the undisputed facts, and Bear Hollow's own Complaint, the Commission still lacks jurisdiction over these respondents.

B. Bear Hollow Has Not Alleged and Cannot Establish that the Individual Shareholders Serve "the Public Generally."

Even assuming the Individual Shareholders each independently owned or controlled a "water system," there is no evidence that they do so for the public generally. Indeed, Bear Hollow has not

[5] From a conceptual standpoint Bear Hollow's contrary argument makes no sense. If, as Bear Hollow alleges, Summit Water is subject to the Commission's jurisdiction and regulation as a public utility (and it is not), there would be no reason for the Commission to simultaneously assert jurisdiction over the Individual Shareholders. As recognized by the Utah Supreme Court, the "purpose[] for which the Legislature created the PSC" was the "regulation of utility rates." *Kearns-Tribune Corp. v. Public Serv. Comm'n*, 682 P.2d 858, 860 (Utah 1984). The rates Summit Water charges for water could be regulated through the exercise of jurisdiction over Summit Water; there is no reason why the Commission also would have to exercise jurisdiction over its shareholders.

[6] In a footnote, Bear Hollow cites an August 3, 2004, Notice of Hearing and Order to Show Cause in Docket No. 04-2436-01 for the proposition that "[t]he Commission has also consistently interpreted its jurisdiction to include the officers and individuals operating or controlling a water corporation." [Mem. in Supp. 5]. That order, however, did not address whether an individual shareholder qualified as a "public utility." Rather, the Commission issued an Order to Show Cause why an individual should not face the criminal sanctions expressly provided by Utah Code sections 54-7-26 & 28. Notably those statute, unlike the general jurisdictional statutes at issue here, expressly apply to "[e]very officer, agent, or employee," and not just to "public utilities." *See id.* § 54-7-26 & 28.

even alleged a single person that supposedly receives water from the Individual Shareholders (as opposed to Summit Water). As such, the claims against the Individual Shareholders must be dismissed.

In order to be subject to the Commission's jurisdiction, each of the Individual Shareholders must not only qualify as a public utility (in this case water system), but they must also be operating for "the public generally." *See, e.g.*, Utah Code Ann. § 54-2-1(16)(a) ("'Public Utility' includes . . . [a] water corporation . . . where the service is performed for, or the commodity delivered to, *the public generally* . . . ." (emphasis added)); *id.*§ 54-2-1(29) (limiting the definition of "water corporation" to entities that own or operate "water systems for *public service* within the state" (emphasis added)); *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."). The test for determining whether a utility serves "the public generally" is "whether the public has the legal right to use which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner." *Garkane Power Co. v. Public Service Comm'n*. 100 P.2d 571, 573 (Utah 1940).[7] In other words, "[t]he essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public." *Id.* (internal quotation marks omitted). On the other hand, if "membership in the association [is required] before service is given" the entity does not constitute a public utility, even if such "membership may be easily obtained." *Medic-Call, Inc. v. Public Service Comm'n.*, 470 P.2d 258, 276-77 (Utah 1970).

Here, Bear Hollow has not identified a single person that receives water from the Individual Shareholders (as opposed to Summit Water). Certainly, Bear Hollow has not alleged

[7] *Garkane* was superseded by statute on other grounds. *See Cottonwood Mall Shopping Center, Inc. v. Public Service Comm'n.*, 558 P.2d 1331, 1332 (Utah 1977).

facts sufficient to find that the Individual Shareholders serve "the public generally." Utah Code Ann. § 54-2-1(16)(a). Nevertheless, Bear Hollow asks the Commission to reconsider its prior Order in its entirety and exercise jurisdiction over the Individual Shareholders. It does so based on several arguments that have no merit.

First, Bear Hollow argues that the Commission's order in *Boulder King* requires the Commission to grant a rehearing and amend its Order in this case.[8] However, as noted in Summit Water's memorandum in opposition, the *Boulder King* order does not support Bear Hollow's arguments here. In fact, with respect to the Individual Shareholders, that case actually establishes the opposite of Bear Hollow's position. In *Boulder King*, the Commission found that one individual "ha[d] maintained control over [the water company], to the detriment of customers, and possibly the [c]ompany itself" and that the "[c]ompany was subject to the regulatory jurisdiction of this Commission." [*Boulder King*, Dkt. No. 02-2254-01, p. 4 (Oct. 16, 2002)]. Despite these explicit findings, the Commission did *not* assert jurisdiction over the individual who actually controlled the water company at issue. [*See id.* at p. 6 (Order)].

Second, Bear Hollow argues that Rule 746-331-1 supports its request for a rehearing. However, as Summit Water recognizes in its memorandum, Rule 746-331-1 is limited by the express declarations of the Utah Supreme Court.[9] Moreover, that Rule states that the Commission

[8] In so doing, Bear Hollow ignores precedent from the Utah Supreme Court, and more recent precedent from this Commission. *See, e.g.*, *Medic-Call, Inc. v. Public Service Comm'n.*, 470 P.2d 258, 276-77 (Utah 1970) (recognizing that if "membership in the association [is required] before service is given" the entity does not constitute a public utility, even if such "membership may be easily obtained"); *In re Deepwater Distrib. Co.*, Dkt. No. 09-2516-01, Report and Order p. 4 (Nov. 30, 2009) (recognizing that a water company did not provide "service to the public generally" when "the only persons receiving service were shareholders").

[9] Moreover, the Rule's express language states that "[u]pon the . . . complaint of a person . . . the Commission may undertake an inquiry . . . [regarding] the Commission's jurisdiction." Here, that inquiry already occurred, and the Commission unanimously determined that it did not have jurisdiction over any of the respondents. That decision was accurate and should not be reconsidered. In addition, the Commission's decision is supportable for an entirely separate reason. The use of the word "*may*" in rule 746-331-1 demonstrates that the Commission has the authority to refuse to "undertake an inquiry," even when a complaint has been filed. When, as here, the Commission already has

"may undertake an inquiry to determine whether *an entity organized as a mutual, non-profit corporation* . . . is outside the Commission's jurisdiction." *Id.* (emphasis added). Nothing in that rule, supports exercising jurisdiction over the individual shareholders of a corporation. Indeed, the subsequent provisions of Rule 746-331-1 further demonstrate that this rule is entirely inapplicable to the named Individual Shareholders in this case. For example, R746-311-1(B)(3) examines the "ownership and voting control *of the entity.*" *Id.* (emphasis added). That provision, of course, makes no sense when the named respondent is an individual person like Leon Saunders or Stuart Knowles (both named respondents). Simply put, Rule 746-331-1 has no relevance to the Individual Shareholders in this case.

Third, Bear Hollow tersely argues that Utah Code section 54-4-1 provides the Commission with jurisdiction over the respondents. That section merely states that the Commission has the authority to "supervise all of the business of every . . . *public utility* in the state, and do all things . . . which are necessary or convenient in the exercise of such power and jurisdiction." That statute may provide the Commission with broad authority over *public utilities,* but it does not provide the Commission *any* jurisdiction over the Individual Shareholders, who are *not* public utilities.[10]

In conclusion, even if the Commission believed that, all evidence to the contrary, the Individual Shareholders in this case owned and operated a water system, the Commission still lacks jurisdiction over the Individual Shareholders because there is nothing—not even an allegation—that

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evaluated whether Summit Water is subject to the Commission's jurisdiction four times within the past few years and consistently has determined that it is not, the Commission would be well within its discretion to refuse to reconsider the same issue and facts a fifth time. Indeed, the rule Bear Hollow relies on expressly indicates that the Commission only will conduct a subsequent review "if changed circumstances . . . warrant another inquiry." *Id.* R746-331-1(C). There are none here.

[10] Bear Hollow also argues that its Complaint contained sufficient factual allegations that Summit Water was serving the public generally. [*See* Request for Rehearing pp. 7-9]. While the Individual Shareholders disagree with Bear Hollow's characterization of the law and its complaint, ultimately this argument does not relate to the Individual Shareholders. As previously explained, even if the Commission has jurisdiction over Summit Water (and it does not), the Commission still lacks jurisdiction over the Individual Shareholders. Accordingly, the Individual Shareholders do not respond to this additional argument by Bear Hollow.

the Individual Shareholders serve water to the public generally. As such, there is no reason for the Commission to grant Bear Hollow's request for hearing.

CONCLUSION

Bear Hollow has failed to present any reason why the Commission should grant a rehearing on its Order dismissing the Individual Shareholders. The Individual Shareholders still do not qualify as a "public utility" or "water corporation." Even in this belated attempt to craft a new case, there still is no evidence or even allegations that the Individual Shareholders are independently offering water to the public. Accordingly, Bear Hollow's request for rehearing should be denied.

DATED this 19th day of March, 2010.

HATCH, JAMES & DODGE, PC

By: /s/ Brent O. Hatch
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2010, I did cause to be sent, in the manner indicated below, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO BEAR HOLLOW RESTORATION, LLC'S REQUEST FOR REHEARING** to the following:

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