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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Deepwater Distribution Company, Inc. for Exemption	DOCKET NO. 86-999-08 DIVISION OF PUBLIC UTILITIES' REQUEST FOR AGENCY ACTION FOR AN ORDER TO SHOW CAUSE REQUIRING DEEPWATER DISTRIBUTION COMPANY, INC., TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE SERVICE
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Pursuant to the August 11, 2009 order (“Order”) of the Utah Public Service Commission (“Commission”), Utah Code Ann. § 54-4-2, Utah Code Ann. § 63-46b-3(3), R746-331-1, and other applicable statutes and rules, the Division of Public Utilities (“Division”) hereby files this Request for Agency Action for an Order to Show Cause against Deepwater Distribution Company, Inc. (“Deepwater” or the “Company”) ordering that Deepwater be required to obtain a

certificate of public convenience and necessity pursuant to Utah Code Ann. § 54-4-25 to provide service. In support of its motion, the Division submits:

1. Utah Code Ann. § 54-4-1 grants the Utah Public Service Commission general jurisdiction over and the power to regulate public utilities in Utah.
2. The Utah Code provides further definitions. A “water corporation” is defined under Utah Code Ann. § 54-2-1(29) and a “water system” is defined under Utah Code Ann. § 54-2-1(30). A water company can be a public utility if it provides public service within this state. See generally Utah Code Ann. § 54-2-1. See also Utah Code Ann. § 54-2-1(16), (29), and (30).
3. Water companies providing public service within this state are subject to Commission jurisdiction and are required either to have a certificate of public convenience and necessity (“Certificate”) or an exemption from such certification requirement (“Exemption”).
4. In its application dated December 5, 2008, Deepwater applied for an Exemption from Commission regulation pursuant to Rule 746-331-1 of the Utah Administrative Code (“Application”).
5. According to the facts in the Application and those discovered by the Division in its investigation, Deepwater is a “water corporation,” is providing public service under the statutes cited above, and is a public utility.

6. In addition to reviewing the submitted Application, the Division asked data requests, received correspondence, and spoke with a member of Deepwater's board and its attorney on the phone and in person.
7. In its Application, Deepwater represented that it was serving three connections. Deepwater does not have a certificate of public convenience and necessity. Deepwater could not specify the number of connections it anticipated, but noted that there were approximately 220-450 residential connections possible. Commercial connections are also allowed by Deepwater's bylaws.
8. Deepwater's bylaws establish three classes of stock: development stock, use stock, and irrigation stock. Development stock and use stock have voting rights; irrigation stock does not have voting rights. Voting rights for development stock and use stock are proportional to water shares held. Directors, who cannot number fewer than three, are elected by a simple majority of outstanding shares present, or by proxy, entitled to vote at the annual meeting. A quorum is determined by a simple majority of outstanding shares present to vote, in person or through proxy.
9. Currently Deepwater has issued 24 shares of stock. According to its Application, lot ownership is as follows:

Robert/Tanya Powel - 6 lots (development and use shareholders)

Sean/Bridget Brown - 2 lots (development and use shareholders)

Brad/Annabelle Lewis - 2 lots (development shareholders)

Ingrid Nygaard/Charles Saltzman - 2 lots (development shareholders)

10. In addition, from the November 2009 board meeting minutes, it appears as if there are five irrigation shareholders.
11. Deepwater's bylaws provide: 3,000 development shares may be issued - voting rights of one per share; 2,000 use shares may be issued - voting rights of one per share; and 5,000 irrigation shares may be issued, each of which is a non-voting share.
12. From its December 5, 2008 board of directors meeting, it appears that Deepwater voted not to allow the issuance of shares in excess of the Company's source capacity. To date Deepwater has issued 24 shares but did not specifically identify each stockowner along with classifications and numbers of shares owned or specify the assignment of shares to classes of stock.
13. Responsibility for cost incurrence differs between Deepwater's classes of stock. Development stock is not generally assessable and bears no responsibility for operation and maintenance expenses or standby fees, and seemingly bears no responsibility for general administrative costs but only bears responsibility for "holding costs" and charges related directly to this class of stock.

Use stock is fully assessable, and bears cost responsibility for operation and maintenance fees, standby fees, costs directly pertaining to its class of shares, and is subject to a water development fee. Irrigation shares are not subject to general assessments, but only to charges associated with the irrigation system and a proportionate share of administrative charges.

14. As such, Deepwater is required to obtain either a certificate of public convenience and necessity pursuant to Utah Code Ann. § 54-4-25 or an exemption pursuant to R746-331-1.
15. On July 14, 2009, the Division filed its recommendation that Deepwater should not be exempt from regulation, and that it should be required to obtain a certificate of public convenience and necessity.
16. On August 11, 2009, the Commission issued the Order in this case, denying Deepwater's Application for Exemption and directing the Division to file this motion for an Order to Show Cause.
17. R746-331-1 addresses the determination of a water company's exempt status. This rule states that an exemption shall be granted:

If on the basis of the information elicited, the Commission finds that the entity is an existing non-profit corporation, in good standing with the Division of Corporations; that the entity owns or

otherwise adequately controls the assets necessary to furnish culinary water service to its members, including water sources and plant; and that 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.

See R746-331-1.

18. Deepwater appears to satisfy the requirement to be a non-profit corporation in good standing, one requirement for an Exempt water company.
19. However, because of the uncertainty concerning the number and character of connections, source, and plant, it is not clear that Deepwater owns or adequately controls the assets, including water sources and plant, necessary to furnish culinary water service to its members. Sufficient water sources and water plant are required to support an Exemption. Deepwater has not provided adequate information concerning potential connections. Therefore, Deepwater does not satisfy this requirement for Exemption.
20. Furthermore, the current share structure does not create a commonality of interest for members as consumers making regulation superfluous, which is required for an Exemption. Deepwater has various classes of shares, with their differing cost responsibilities and the proportion of votes being tied directly to

water shares. Although at the time of application, all three board members were use shareholders, it is possible, depending upon development of the area, that board composition could change and board decision-making rest only with holders of development shares. In particular, this could occur because Deepwater's bylaws permit 3,000 development shares to be issued, but only 2,000 use shares to be issued. The 5,000 irrigation shares permitted by the bylaws do not have voting rights. Also, because the number of permitted development shares exceeds the number of permitted use shares, it is possible that under the applicable bylaws pertaining to establishing a quorum at a meeting, development shareholders could determine actions that would be paid for only by use shareholders.

21. At this point, the Company is providing service, without a certificate or an exemption, to three connections.
22. Based upon the information provided by Deepwater, there has been no showing of adequate water sources and plant, and no showing of commonality of interest as required by the rule. Thus, Deepwater has not shown that the requirements for Exemption are met.

Therefore, the Division recommends that the Commission issue an Order to Show Cause ordering that Deepwater obtain a certificate of public convenience and necessity.

RESPECTFULLY submitted this _____ day of September 2009.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the DIVISION OF PUBLIC UTILITIES' REQUEST FOR AGENCY ACTION FOR AN ORDER TO SHOW CAUSE REQUIRING DEEPWATER DISTRIBUTION COMPANY, INC., TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE SERVICE was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on September 10, 2009:

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