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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Application of  
Deepwater Distribution Company, Inc. for  
Exemption

DOCKET NO. 86-999-08

**RESPONSE OF THE UTAH DIVISION OF  
PUBLIC UTILITIES TO THE REQUEST  
FOR AGENCY REVIEW AND  
REHEARING OF DEEPWATER  
DISTRIBUTION COMPANY, INC.**

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On September 10th, 2009, Deepwater Distribution Company, Inc. (Deepwater) filed its Request for Agency Review and Rehearing (Request) of the Utah Public Service Commission's (Commission) August 11, 2009 report and order (Order) denying Deepwater's application for an exemption from Commission regulation and ordering the Division of Public Utilities (Division) to file an Order to Show Cause detailing why Deepwater should be required to obtain a certificate of public convenience and necessity (Certificate). Pursuant to Utah Code Ann. § 63G-4-301, R746-100-4, and other applicable statutes and rules, the Division hereby files its response to Deepwater's Request.

Deepwater's Request should be denied. The Order is a "preliminary, preparatory, procedural, or intermediate"<sup>1</sup> agency action, not a final order subject to rehearing and then judicial review as contemplated by statute and rule. The Order generated an additional proceeding, an Order to Show Cause proceeding, through which the necessity of a Certificate for Deepwater will be explored. Alternatively, if the Commission chooses to grant Deepwater's Request, the Commission should order consolidated proceedings through which Deepwater's Request and the Division's Motion for an Order to Show Cause can proceed simultaneously.

#### I. INTRODUCTION

On January 13, 2009, pursuant to R746-331-1, Deepwater filed an application for exemption from Commission regulation (Application). Deepwater was then providing service to three connections and did not have a Certificate.

The Division reviewed the Application, asked data requests, reviewed correspondence, and spoke with a member of Deepwater's board of directors and its attorney. In a memorandum dated July 14, 2009, the Division submitted its recommendation to the Commission that Deepwater should not be granted an exemption from regulation and should be required to obtain a Certificate. In this memorandum, the Division concluded that the evidence did not show the criteria for exemption pursuant to R746-331-1 were met, and requested that the Commission order the Division to file an order to show cause regarding certification. The Division's memorandum is attached as Attachment 1. In its

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<sup>1</sup> See Barker v. Utah Public Service Commission, 970 P.2d 702, 705 (Utah 1998) (Barker), discussed in more detail infra.

Order, the Commission denied Deepwater's request for an exemption and ordered the Division to file an order to show cause why Deepwater should be required to obtain a certificate. The Order also contained a paragraph addressing requests for agency review and rehearing, responses to such requests, denial of rehearing, and requests for judicial review.

On September 10, 2009, Deepwater filed its Request. Amended bylaws, dated September 9, 2009, were attached to Deepwater's Request.

## II. RESPONSE

### A. DEEPWATER'S REQUEST MUST BE DENIED BECAUSE IT IS PREMATURE AS IT SEEKS REHEARING AND REVIEW OF A NON-FINAL ADMINISTRATIVE AGENCY ORDER.

The Order is a preliminary, procedural order establishing further proceedings, not an agency order subject to rehearing.<sup>2</sup> The Utah Administrative Procedure Act mandates that an agency can reconsider or review an order only "if the order would otherwise constitute final agency action." Utah Code Ann. § 63G-4-302(1)(a).

Barker v. Utah Public Service Commission, 970 P.2d 702, and Utah Code Ann. § 63G-4-403(2)(a) provide guidance pertinent to Deepwater's Request. In Barker, the Utah Supreme Court discussed "final agency action resulting from formal adjudicate proceedings" looking to the U.S. Supreme Court and the U.S. Code for guidance:

[T]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage

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<sup>2</sup> The Division acknowledges that the Order contained a common provision addressing rehearing, but such a provision by itself cannot change the nature of the Order from a nonfinal order to a final order.

where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.

*Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S.Ct. 203, 209, 27 L.Ed.2d 203 (1970); see also *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S.Ct. 2767, 2773-74, 120 L.Ed.2d 636 (1992) (interpreting Administrative Procedure Act, 5 U.S.C. § 704 (1988)). Similarly, the Model State Administrative Procedure Act defines final agency action negatively as “the whole or a part” of any action which is not “preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.” 1981 Model State Admin. P. Act § 5-102(b)(2).<sup>3</sup>

The Utah Supreme Court provided further guidance in *Union Pacific Railroad Company v. Utah State Tax Commission*, 999 P.2d 17 (Utah 2000)

(*Union Pacific*) where the court stated:

the appropriate test to determine whether an agency action is final under Utah law includes three parts:

(1) Has administrative decision making reached a stage where judicial review will not disrupt the orderly process of adjudication?;

(2) Have rights or obligations been determined or will legal consequences flow from the agency action?; and

(3) Is the agency action, in whole or in part, not preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action?<sup>4</sup>

An analysis of the nature and status of the Order results in the conclusion that the Order is not subject to rehearing, but instead is “preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.” The Order resulted from Deepwater’s application for exemption pursuant to R746-331-1 which states:

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<sup>3</sup> *Barker* at 706.

<sup>4</sup> *Union Pacific* at 21.

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.

In its Order, the Commission determined that the criteria for exemption were not met and ordered the commencement of further proceedings. Consequently, the Commission ordered the Division to file an Order to Show Cause instituting further agency proceedings which would then explore whether Deepwater needed a Certificate. Thus, the Order should be classified as a “preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency,” not an order appropriate for a request for rehearing.

Additionally, rehearing is appropriate when an order results from a formal adjudicate proceeding. See Utah Code Ann. 54-7-15 and Utah Code Ann. § 63G4-403(2)(a). The process giving rise to the Order was not a formal adjudicative proceeding.

Denying the request will not deny Deepwater the opportunity to present its case that it should be exempt from Commission regulation. The Order to Show Cause proceedings will allow the issues to be fully explored. The Order serves as a springboard for the presentation and resolution of those issues, not as a final resolution of them.

Therefore, Deepwater’s Request should be denied, and the Order to Show Cause proceedings should be commenced.

B. IF REHEARING IS GRANTED, IT SHOULD BE CONSOLIDATED WITH THE ORDER TO SHOW CAUSE PROCEEDING.

Consolidating Deepwater's Request with the Order to Show Cause proceeding would allow expedient exploration of the issues because there are common issues raised in the Request and the Order to Show Cause. A scheduling conference should be held to set further activities promoting a full exploration and resolution of the issues by the Commission.

The Division believes that consolidating the issues would ultimately demonstrate that the arguments set forth in the Request are without merit, and suggests that further proceedings include submission of briefs where the issues could be thoroughly addressed. The Division believes that through these further proceedings, it would be found that facts set forth in Deepwater's Application and the Division's memorandum support the Commission's exercise of jurisdiction over Deepwater.

Deepwater's reliance upon the cases cited in its Request is misplaced. For example, Deepwater's enabling documents and facts can be distinguished from the situation set forth in Garkane Power Co. Inc. v. Public Service Commission, 100 P.2d 571 (Utah 1940) (Garkane), rendering Deepwater's reliance upon Garkane unfounded.

Deepwater's argument that "[b]oth the PSC Order and DPU Recommendation asserting authority based solely upon an administrative rule that is in direct conflict with the enabling statute" is flawed.<sup>5</sup> Commonality of interest is not the sole standard for regulation; instead application of all the

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<sup>5</sup> See Request at p. 5.

relevant facts, statutes, and rules establishes jurisdiction. In this case, it appears that jurisdiction is proper, and that an exemption would be required to avoid the exercise of jurisdiction.

Deepwater's final argument that it meets the commonality of interest criteria is not supported by the facts as presented. Among other reasons, because Deepwater's members' obligations vary dependent upon the class of stock owned, there is a resulting conflict of interest between the classes of stock. Deepwater's September 9<sup>th</sup>, 2009 revision of its bylaws does not ameliorate this conflict.

Therefore, the Division recommends that the Commission deny the Request and proceed with the Order to Show Cause proceeding or, alternatively, if the Request is granted, consolidate that proceeding with the Order to Show Cause proceeding.

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 **RESPONSE OF THE UTAH DIVISION OF PUBLIC UTILITIES TO THE REQUEST FOR AGENCY REVIEW AND REHEARING OF DEEPWATER DISTRIBUTION COMPANY, INC.** was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on September \_\_\_\_\_, 2009:

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