

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of Deepwater)
Distribution Company, Inc. for Exemption) DOCKET NO. 09-2516-01
) REPORT AND ORDER
)

ISSUED: November 30, 2009

SYNOPSIS

On August 11, 2009, the Commission entered an order denying Deepwater Distribution Company, Inc.'s (Company) application for exemption. The Company requested agency review and rehearing, requesting the Commission vacate its decision and grant its application for exemption. The Commission granted review and held rehearing. With this order the Commission vacates its previously entered order denying exemption, and grants the Company's application for exemption.

By the Commission:

This matter is before us on the Company's request for review and rehearing. The Company applied for exemption on or about January 13, 2009. The Division of Public Utilities (Division) commenced an investigation of the Company's application, including reviewing the application, requesting data requests, and conversing with a member of the Company's board and its attorney. The Division on July 14, 2009 submitted its recommendation urging us to deny the application for exemption and assert jurisdiction over the Company. Following the Division's recommendation, on August 11, 2009, we denied the exemption and ordered the Division to move for an order to show cause to assert jurisdiction over the Company. Subsequent to the issuance of August 11, 2009 order, the Company petitioned us for review and rehearing of that order. We granted the petition for review and rehearing.

We directed the administrative law judge of the Commission to hold a rehearing in the matter on Monday, November 9, 2009. Appearing for the Company were attorneys for the Company, John Flitton and Lara Swensen. Appearing for the Division, was assistant attorney general Patricia Schmid.

The Division, in its response to the Company's Request for Review and Rehearing, stated that the Company's request should be denied as our order denying exemption was merely "preliminary, preparatory, procedural, or intermediate" agency action, and that the order to show cause proceeding merely commenced a formal "proceeding, through which the necessity of a Certificate for Deepwater will be explored." We disagree with the Division, however. The Division's own recommendation asked us to deny the exemption and order it to move for an order to show cause "addressing the required certification obligations of Deepwater." The Division further conclusively stated that "exemption from regulation is not warranted, and that regulation of Deepwater is necessary." The Division's own recommendation does not show that it intended to now move to an additional formal proceeding to determine if the exemption was appropriate. The Division's argument in response to the request for review and rehearing would be inconsistent with R746-331-1.D which states that if we "determine that the entity is subject to Commission jurisdiction, the Commission shall initiate the proceedings, including an Order to Show Cause, as shall be necessary to assert Commission jurisdiction." The Rule does not, once the exemption is denied, require us to then move to a formal proceeding to determine if exemption is warranted. It requires us to assert jurisdiction. The determination made in the August 11, 2009 order was not "preliminary, preparatory, procedural, or intermediate" with regards to the Company's exemption.

The Division's basis for recommending denial of the application for exemption can be summarized in the following opening statement of its recommendation:

The Division's main concerns focus on the lack of specificity concerning potential shareholders, the Company's three classes of shares, with varying responsibilities for costs incurred, and that a shareholder's voting rights are directly proportionate to the number of water shares held. Given these circumstances, and the high degree of uncertainty concerning future development and assignment of shares, the Division does not believe that the Company has shown that each member enjoys a complete commonality of interest as a consumer that would make rate regulation superfluous, as required by Commission rule to support an exemption. Thus, the Division recommends that the exemption request be denied.

Division Recommendation, p.1.

In its arguments at rehearing, and its petition for review and rehearing, the Company argued that the "the key factor in defining an entity as a 'public utility' turns on the question of whether or not the goods or services are provided to the public generally as distinguished from mere private service." *Company Request for Agency Review and Rehearing, p.2.* Citing *State ex rel. Public Utils. Comm'n v. Nelson*, the Company reiterated that "if the business or concern is not public service, where the public has 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" 238 P. 237, 239 (Utah 1925).

The Division contends that "lack of specificity concerning potential shareholders", "varying responsibilities for costs incurred" among shareholders, and "high degree of uncertainty concerning future development and assignment of shares" require Commission jurisdiction. 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. Here there is no dispute that the water service

provided by the Company is limited to its 24 shareholders and not delivered to the public. The Division provided no evidence—either in its recommendation or at the rehearing, that the Company was providing service to the public generally. In fact, it admitted that the only persons receiving service were shareholders. The Division argued that because the requirements for becoming a shareholder were merely “ministerial”, the Company should be subject to Commission oversight. However, as stated in *Garkane Power Co., Inc. v. Public Service Commission*, it does not matter that

membership . . . is easy to obtain . . . [or] that 5 or 1000 people are members or that a few or all the people in a given area are accorded membership, 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.

100 P.2d 571, 573. Additionally, the fact that there is some uncertainty about the potential number of shareholders is irrelevant to the immediate proceedings so long as the service is limited to shareholders. If, in the future, the Company does begin to serve the general public, or those other than shareholders, then we would likely need to reevaluate the Company’s exemption. In this matter, however, and based on the facts before us, we find that so long as the Company is serving only its shareholders, concerns regarding “varying responsibilities for costs incurred” among shareholders, and “high degree of uncertainty concerning future development and assignment of shares” are not enough to assert jurisdiction.

ORDER

For the reasons stated above, we vacate our August 11, 2009 order (including the order to show cause proceedings) and grant the Company’s application for exemption.

DOCKET NO. 09-2516-01

- 5 -

DATED at Salt Lake City, Utah, this 30th day of November, 2009.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#64325