

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Hi-Country Estates)
Homeowners Association's Request for) DOCKET NO. 11-2195-01
Reassessment of the Commission's)
Jurisdiction) REPORT AND ORDER
)

ISSUED: July 12, 2012

SYNOPSIS

The Commission enters this Order revoking the Company's Letter of Exemption and reinstating Certificate of Public Convenience and Necessity No. 2737.

By The Commission:

CANCELLATION OF HEARING AND SCHEDULING ORDER

Notice is hereby given that the hearing previously scheduled in this matter for Wednesday, August 8, 2012, beginning at 10:00 am, is hereby cancelled. In addition, the scheduling order, issued on March 21, 2012, is hereby stricken.

ORDER REVOKING LETTER OF EXEMPTION AND REINSTATING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY NO. 2737

I. BACKGROUND

On March 23, 1994, the Commission issued Certificate of Public Convenience and Necessity No. 2737 ("CPCN") to Hi-Country Estates Homeowners Association in Docket No. 94-2195-01. See Report and Order, dated March 23, 1994.¹ Approximately two years later, on February 5, 1996, the Commission entered an order in Docket No. 95-2195-03

¹ Up until 1994, Foothills Water Company served water to Hi-Country Estate Homeowners Association members under Certificate of Public Convenience and Necessity No. 2151. Foothill Water Company received its CPCN in 1985. See Report and Order, issued August 8, 1985. Due to legal action, quieting title to the water system in favor of Hi-Country Estate Homeowners Association, the Commission cancelled CPCN No. 2151 and issued CPCN No. 2737. See Report and Order, dated March 23, 1994. The 1994 Order sets forth the service area for CPCN No. 2737 in a lengthy metes and bounds description. See id. at 3-5.

cancelling, effective 60 days hence, CPCN No. 2737, issued to Hi-Country Estate Homeowners Association Phase I Water Company (“Company”). See Report and Order, dated February 5, 1996 at 2. The Commission set forth these findings of fact in support of its order:

1. [The Company] is organized as a nonprofit corporation providing service to its members.
2. [The Company] serves a limited number of nonmembers pursuant to specific contracts; however, it does not offer its service to the public generally.

Id. at 1-2. Based on these findings, the Commission concluded, “the Company is outside our jurisdiction as established under [Utah Code Ann.] § 54-2-[1](29); consequently, [the Company’s] Certificate of [Public] Convenience and Necessity should be canceled.” Id. at 2. Thereafter, on May 14, 1996, the Commission issued Letter of Exemption No. 0057 to the Company. See Letter of Exemption No. 0057, dated May 14, 1996.

Between 1996 and present, litigation ensued between the Company and J. Rodney Dansie (“Mr. Dansie”), an intervenor in this docket, over a water well agreement.² On January 27, 2011, the Utah Court of Appeals issued a memorandum decision in *Hi-Country Estates Homeowners Ass’n v. Bagley & Co., 2011 UT App. 252* (memorandum decision), which was subsequently amended on July 29, 2011, see id. (amended memorandum decision). The Court held that Mr. Dansie and other Dansie family members “are, going forward, entitled to their contractual rights to free water and free hook-ups unless the PSC intervenes and determines otherwise.” Id. at ¶ 14 (emphasis added). Thereafter, the Utah Supreme Court denied certiorari on November 28, 2011. See 268 P.3d 192 (Utah 2011).

On December 23, 2011, the Company filed a letter requesting the Commission consider whether its CPCN should be reinstated. The Commission thereafter issued an action request to the Division of Public Utilities (“Division”) to review the request filed by the Company. See Action Request, dated January 5, 2012. On January 31, 2012, the Division filed a recommendation with the Commission to hold a scheduling conference. See Division Memo, filed January 31, 2012. A scheduling conference was held on March 20, 2012 by the Administrative Law Judge for the Commission, see Notice of Scheduling Conference, issued March 6, 2012, and a scheduling order issued on March 21, 2012. See Notice of Scheduling Order, issued March 21, 2012. The scheduling order set May 21, 2012 as the due date for the Division’s Report. See id.

On May 21, 2012, the Division filed a memorandum recommending the Commission revoke the letter of exemption and reinstate the CPCN based on an investigation completed by the Division.³ The Division’s investigation consisted of data requests to the Company and a site visit. The Division reported the Company has 132 customers/connections comprising 33 standby connections, 92 water connections and 6 connections in process. Of the 132 customers/connections, there are 123 customers who are members and have membership/stockholder and voting rights in the Company. The remaining nine (9) customers do not have membership in the Company and do not have voting rights. Seven of the nine customers have expressed that they neither have nor want membership in the Company. Two of

² The water well agreement is not at issue in this docket.

³ The Division filed a revised memo on June 15, 2011. To avoid confusion, the information contained here is from the Division’s revised memo.

the nine do not pay HOA dues to the Company, only water charges. The remaining two connections have requested water access.⁴

Based on the information contained in the Division's May 21, 2011 filing, a duly noticed order to show cause hearing was held on June 15, 2012. The order to show cause hearing was limited to the issue of whether the Company's letter of exemption should be revoked and its CPCN reinstated. See Order to Show Cause and Notice of Hearing at 2, issued June 6, 2012.

II. APPLICABLE LAW

The Commission is "vested with the power and jurisdiction to supervise and regulate every public utility in the state...." Utah Code Ann. § 54-4-1 (2010). Under Utah Code Ann. § 54-2-1(16), a "[p]ublic utility includes every . . . water corporation . . . [unless otherwise excepted], where the service is performed for, or the commodity delivered to, the public generally...." Id. § 54-2-1(16)(a) (internal quotations omitted). Likewise, under Utah Code Ann. § 54-2-1(29), a "[w]ater corporation includes every corporation and person . . . owning, controlling, operating, or managing any water system for public service within the state." Id. § 54-2-1(29) (internal quotations omitted).

III. FINDINGS OF FACT

1. On June 15, 2012, the Commission held a duly noticed Order to Show Cause hearing in this docket. See Order to Show Cause and Notice of Hearing, issued June 6, 2012.

2. At the Order to Show Cause hearing, J. Craig Smith appeared on behalf of the Company. Transcript of Hearing at 5, lines 24-25. Assistant attorney general Patricia Schmid

⁴ Mr. Dansie has requested these connections. See id. at 2.

appeared on behalf of the Division, along with utility analyst Shauna Benvegna-Springer (“Ms. Springer”) and assistant attorney general Justin Jetter. See id. at 6, lines 2-6. Intervenor J. Rodney Dansie (“Mr. Dansie”) appeared *pro se*. See id. at lines 9-10; see also id. at 7, lines 9-12.

3. The Administrative Law Judge took administrative notice of the Division’s recommendation filed May 21, 2012. See Transcript of Hearing at 8, lines 15-22.

4. Ms. Springer testified that the Division recommends the Commission revoke the Company’s letter of exemption and reinstate its CPCN, based on an investigation completed by the Division. Ms. Springer testified that the Division’s investigation showed that the Company is serving both members and non-members, thus it is acting as a public utility under state law.

5. Randy Crane (“Mr. Crane”) and Stephen Olschewski (“Mr. Olschewski”) testified on behalf of the Company.

6. Mr. Crane is the Company’s vice president and a director. See id. at 27, lines 6-7; see also id. at 60, lines 21-24. He testified that several customers are provided water for a fee but they are not members of the Company. See id. at 33, lines 22-25, and id. at 34, lines 1-5 (referring to “the Beagleys” and “the Olschewskis”), id. at lines 16-23 (referring to “the DeHaans”), id. at 36, lines 7-9 (referring to “the BLM”), id. at lines 12-15. Mr. Crane further testified that he agreed with the declarations (see paragraph 9 below) and the Division’s conclusion that the Company is offering service to the general public. See id. at 38, lines 19-20 (agreeing with declarations); see also at 39, lines 8-11 (agreeing Company is serving the public generally).

7. Mr. Olschewski receives water from the Company, but he is not a member and does not have voting rights. See id. at 107, lines 24-25, and id. at 108, line 1. See also id. at 109, lines 11, 21-23. Mr. Olschewski is in favor of the Commission exercising jurisdiction over the Company. See id. at 110, lines 6-20. Mr. Olschewski's testimony was uncontroverted. See id. at 163, lines 5-6 (“[Mr. Dansie]: I don't know whether [Mr. Olschewski] [is] a member of the Association.”).

8. The Company also submitted signed declarations of Jonathan Beagley, Larry Beagley, Greg DeHaan, Daniel Olschewski, Helmut Olschewski, and Stephen Olschewski (collectively, the “Declarants”). See HOA Exhibit No. 3. The Declarants certified that each receives water from the Company, but none is a member of the association and none has voting rights. See id.

9. Mr. Dansie testified on his own behalf. Mr. Dansie's main concern was that the Company is trying to circumvent its obligations under the water well agreement by coming before the Commission. See Transcript of Hearing at 153, lines 1-4. See also id. at 164, lines 22-25; id. 165, line 1, and id. at 187, lines 13-19. On cross examination, Mr. Dansie agreed that it was up to the Commission to decide whether to assert jurisdiction over the Company. See id. at 160, lines 5-16. A copy of the Utah Court of Appeals amended memorandum decision in *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2011 UT App. 252, was entered into evidence as Dansie Exhibit No. 3. See id. at lines 19-25.⁵

⁵ Dansie Exhibits No. 4 and No. 5 were also admitted. A copy of the “Second Quiet Title Order Issued to Hi-Country Estate Homeowners Association” in Case No. 85 090 1464 CV was admitted as Dansie Exhibit No. 4, and a copy of the “Final Judgment” in Case No. 020107452 was admitted as Dansie Exhibit No. 5. At Mr. Dansie's request, the Administrative Law Judge granted Mr. Dansie the opportunity to submit a copy of a recorded document he purported would show that certain declarants were members, provided that he obtain a “certified copy” of the document from the county recorder and that he file it with the Commission. See Transcript of Hearing at

10. After the hearing, Mr. Dansie filed several documents with the Commission on July 2, 2012. See Letter to Commission, from Mr. Dansie (June 22, 2012), filed July 2, 2012; Letters to the Commission, from Mr. Dansie (June 25, 2012), filed July 2, 2012 (collectively, “Mr. Dansie’s post-hearing filings”). The Company filed an objection to these documents on July 5, 2012. See Objection to J. Rodney Dansie Response to DPU Recommendation, to J. Rodney Dansie Correspondence dated 6/22/2012, 6/25/2012, and to Dansie’s Response to Hi-Country Estates HOA, filed July 5, 2012.

IV. CONCLUSIONS OF LAW

The Company presented evidence showing that it is serving members and non-members.⁶ In addition, the Company agrees it is subject to Commission jurisdiction because it is serving the public generally. We therefore reinstate the CPCN.

ORDER

In light of the foregoing testimony, Division recommendation, and comments, the Commission hereby ORDERS:

1. The Division’s letter of exemption, dated May 14, 1996, issued to Hi-Country Estate Homeowners Association Phase 1, is hereby cancelled.
2. Certificate of Public Convenience and Necessity No. 2737, issued to Hi-Country Estates Homeowners Association Phase 1 Company, is hereby reinstated. The Company shall comply with all requirements set forth in the CPCN.

191, line 25; see also id. at 192, lines 1-12. More than adequate time has passed since the hearing and Mr. Dansie has filed no such document with the Commission.

⁶ Mr. Dansie’s post-hearing filings are considered to the extent relevant.

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3. The Scheduling Order, issued March 6, 2012, is hereby stricken and the hearing scheduled for August 8, 2012, at 10:00 a.m. in Room 451, Heber M. Wells State Office Building, 160 East 300 South, Salt Lake City, Utah, is cancelled. In addition, the scheduling order, issued on March 21, 2012, is stricken.

4. Any issues pertaining to rates will be addressed in a separate proceeding if and when the Company files for a rate change.

DATED at Salt Lake City, Utah this 12th day of July, 2012.

/s/ Melanie A. Reif
Administrative Law Judge

Approved and confirmed this 12th day of July, 2012, as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
D#231284

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Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of July, 2012, a true and correct copy of the foregoing, was served upon the following as indicated below:

By U.S. Mail:

J. Rodney Dansie
7198 West 13090 South
Herriman, UT 84096

By E-Mail:

J. Craig Smith (jcsmith@smithlawonline.com)
Matthew E. Jensen (mjensen@smithlawonline.com)
Smith Hartvigsen PLLC

Patricia Schmid (pschmid@utah.gov)
Office of the Attorney General

By Hand-Delivery:

Division of Public Utilities
160 East 300 South, 4th Floor
Salt Lake City, Utah 84111

Office of Consumer Services
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111

Administrative Assistant