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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Hi-Country Estates Homeowners Association for Approval of Its Proposed Water Rate Schedules and Water Service Regulations	Docket No. 13-2195-02 Response of the Division of Public Utilities Opposing Mr. Rodney Dansie's Request for Rehearing and Reconsideration
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Pursuant to Utah Code Ann. § 54-7-15 and Utah Administrative Code R746-100-11.F, the Utah Division of Public Utilities (Division) files its response opposing Mr. Rodney Dansie's Request for Rehearing and Reconsideration (Request) of the Public Service Commission's (Commission) Report and Order dated May 5, 2014 (Order).

There are no persuasive arguments set forth in the Request that require rehearing or reconsideration of the Order. The Request should be denied because: (1) the Commission has jurisdiction to determine that the Well Lease Agreement

(Agreement)¹ is “void and unenforceable as against the public interest”² and (2) the Commission properly decided that the Agreement is not in the public interest.³

Hi-Country Estates Homeowners Association (the Company) and Mr. Dansie, and their predecessors such as Foothill Water Company, Dr. Gerald Bagley, and Mr. Dansie’s father Jesse Dansie, have long brought and pursued litigation against each other, and no attempt is made here to summarize the long history and the court and Commission decisions between those parties.

ARGUMENT

I. The Commission has Jurisdiction to Determine that the Agreement is Void and Unenforceable as Against the Public Interest.

Applicable case law and statutes⁴ support the Commission’s exercise of jurisdiction over the Agreement and its Order that the Agreement is “void and unenforceable as against the public interest.”⁵ The Commission does not have unlimited jurisdiction over all matters,⁶ or even unlimited jurisdiction over matters concerning a public utility’s contracts.⁷ However, in conjunction with the Commission’s regulation of public utilities, the courts have supported the Commission’s exercise of jurisdiction over certain types of contracts entered into by the public utility, such as the Agreement.

¹ In the context of this case and in this pleading unless specifically clarified otherwise, the term “Agreement” not only pertains to the original document but also amendments thereto.

² Order at p. 22.

³ The Division does not address the Request’s issue concerning Mr. Dansie’s western-most 40-acre parcel except to note that the Division believes the evidence supports the Commission’s decision regarding this issue.

⁴ See e.g., *Garkane Power Association v. Public Service Commission*, 681 P.2d 1196, 1207 (Utah 1984) (*Garkane*) and, e.g., Utah Code Ann. 54-4-1.

⁵ Order at p. 22. See *Garkane, Utah Hotel Company v. Public Utilities Commission* 204 P. 511 (Utah 1922), and *Logan City v. Public Utilities Commission*, 271 P. 961 (Utah 1928) (summarizing prior relevant cases).

⁶ See, *Mountain States Telephone and Telegraph Company v. Utah Public Service Commission*, 754 P.2d 928, 930 (Utah 1988).

⁷ See, e.g., *Garkane*.

The Garkane case is often cited when Commission jurisdiction over contracts is at issue. As stated in the Garkane case,

There can be no doubt that not every contract entered into by a public utility is subject to the supervision of the PSC. Many contracts for the purchase of supplies and equipment, and other contracts dealing with the ordinary conduct of a business, are contracts that could be litigated only in a district court not before the PSC.⁸

In Garkane, the Utah Supreme Court upheld the Commission's authority over a contract "involv[ing] the validity of electric rates – whether Garkane was entitle to charge CPN the rate initially stated in the UP&L tariffs or the roll-back rate."⁹ Similarly, in the instant case, the Agreement involves the validity of water rates, and what is the proper cost, if any, established by the Agreement to be included into rates. Moreover, the Agreement was not entered into, and amended, in the ordinary course of business for the Company.¹⁰ Thus, under Garkane, the Agreement falls into the category of contracts subject to the Commission's jurisdiction.

Whether Commission action is needed to protect the public interest also can affect whether a contract is subject to the Commission's jurisdiction.¹¹ The nature of the Agreement and Mr. Dansie's claim that the Agreement obligates the Company to provide him, and others, free water, treatment, and delivery in perpetuity requires Commission action to protect the public interest. How the Agreement affects the public

⁸ Garkane at 1207.

⁹ See, generally, *id.*

¹⁰ See, *In the Matter of the Application of Foothills Water Company, Inc. for a Certificate of Convenience and Necessity to Operate as a Public Utility* (Docket No. 85-2010-10), Report and Order, issued March 17, 1986 (Foothill Order).

¹¹ See Justice Durham's dissent in Garkane at 1208-1209.

interest and why Commission action is needed to protect that public interest are discussed below in detail, and that discussion is incorporated here.¹²

The Request's reliance on a 2008 Court of Appeals decision (2008 Decision)¹³ as determinative that the Agreement is outside the Commission's jurisdiction is misplaced, and the effect of that decision is overstated. The facts before the Commission today are far different than those before the appellate court when it made its decision. Critically, at the time the case resulting in the 2008 Decision was before the appellate court, the Company was not subject to Commission jurisdiction, but now it is.¹⁴ Also, the Commission now has before it evidence, to be given the proper weight by the Commission, of the burden imposed on ratepayers and the effect upon the public interest by the Agreement as interpreted by Mr. Dansie.¹⁵ The 2008 Decision should not be determinative under these new circumstances. Correspondingly, the Court of Appeals decision in 2011,¹⁶ issued when the Company was not subject to Commission jurisdiction and when there was not the evidence given in this docket as to the effect of the Agreement upon ratepayers and the public interest, should not be determinative either.

The implication that the Commission relied upon its prior Foothill Order¹⁷ alone to assert jurisdiction over the Agreement is incorrect. The Order addresses jurisdictional

¹² See discussion below entitled, "II. The Commission Properly Decided that the Agreement Is Not In the Public Interest."

¹³ *Hi-Country Estates Homeowners Association v. Bagley & Company*, 2008 UT App. 105.

¹⁴ *In the Matter of: Hi-Country Estates Homeowners Association's Request for Reassessment of the Commission's Jurisdiction*, Docket No. 11-2195-01.

¹⁵ See discussion below entitled, "II. The Commission Properly Decided that the Agreement Is Not In the Public Interest."

¹⁶ See *Hi-Country Estates Homeowners Association v. Bagley & Company*, 2011 UT App 252 (amended memorandum decision).

¹⁷ See, *In the Matter of the Application of Foothills Water Company, Inc. for a Certificate of Convenience and Necessity to Operate as a Public Utility* (Docket No. 85-2010-10), Report and Order, issued March 17, 1986.

issues when it discusses court case and prior orders.¹⁸ In addition, the Order specifically cites the Commission's decision to reinstate the Company's certificate of public convenience and necessity which again established the Commission's jurisdiction over the Company, and, as discussed above, over certain contracts.¹⁹ Finally, the Commission states:

There has been no evidence presented that would persuade us to overturn our prior 1986 order finding that the Well Lease Agreement is unreasonable, unjust, and not in the public interest. Therefore, based on the Commission's earlier order, the lack of contrary evidence, and the Division's evidence and recommendation in this docket, we decline to deviate from our prior precedent. We find the Well Lease Agreement is void and unenforceable as against the public interest.²⁰

Therefore, the Commission has jurisdiction over the Agreement to determine that it was "void and unenforceable as against the public interest."²¹

II. The Commission Properly Decided that the Agreement Is Not In the Public Interest.

Consistently and concurrently with its delegation of ratemaking authority to the Commission, the Legislature delegated to the Commission responsibility for determining what is in the public interest as it pertains to the regulation of public utilities. Thus, the Commission is charged not only with determining just and reasonable rates, and what expenses and revenues should be included when making that determination, but also

¹⁸ See Order at, generally, at 15-18.

¹⁹ Order at p. 17, including footnote 100 citing Report and Order issued July 12, 2012, In the Matter of: Hi-Country Estates Homeowners Association's Request for Reassessment of the Commission's Jurisdiction, Docket No. 11-2195-01.

²⁰ Order at p. 17.

²¹ Order at p. 17.

whether an action, here making ratepayers pay under the Agreement, is in the public interest.

The Commission's responsibility concerning making a public interest determination when evaluating a contract was discussed in Garkane:

[T]he Commission performs the extremely delicate, and not uncontroversial but nonetheless essential, function of balancing the interest of having financially sound utilities that provide essential goods and services against the public interest of having goods and services made available without discrimination and on the basis of reasonable costs. A large lump sum judgment entered by a district court for breach of contract, as could occur in any given case, could conceivably result in severe impairment of the financial integrity of the utility involved and even in its possible bankruptcy. That would be of no concern to a court in contract dispute. It is of major concern to the PSC.²²

In her dissent in Garkane, Justice Durham addressed public interest. She wrote:

There must be something more than the presence of a public utility as a party to a controversy in order to remove a contract interpretation dispute-traditionally a matter for the courts-from its usual forum. That 'something more' is the need to protect the public interest, which is the proper concern of the PSC.²³

In the instant docket, the Commission determined that it had jurisdiction over the Agreement in light of the nature of the Agreement and the need to protect the public interest and this decision is consistent with Garkane. The Commission discussed the Agreement's costs, benefits, and its effect upon the public interest.

²² Garkane at 1207

²³ Garkane at 1209.

In its Order, the Commission discussed its past Commission's findings and analysis in the Foothill case. The Commission specifically discussed the "virtually limitless benefits" showered upon the Dansie family by the Agreement.²⁴

In addition, in the Order the Commission discussed and analyzed the evidence presented by the Division's witness and the Company pertaining to associated costs if Mr. Dansie received the benefits he claimed under the Agreement.²⁵ The Division's testimony addressed the cost of additional water provided by the Agreement, and specially discussed the percentage increase in water use before and after service under the Agreement. The Division also addressed the issue of transportation and treatment of the water. The Division rejected the Company's proposed rate for service under the Agreement which was \$3.85 per 1,000 and said that more information was needed to determine what rate, if any, was appropriate.²⁶ As quoted in the Order,²⁷ the Division testified:

Allowing recovery from ratepayers for an obligation of indeterminate cost and duration is not in the public interest. Allowing recovery would create an undue burden requiring the ratepayers to fund the increasing perpetual cost of providing 12 million gallons of water indefinitely. The well lease water of 12 million gallons annually represents 40.4% over what 91 customers used in 2013. By allowing the cost to be recovered in rates, it would adversely affect the public interest and would not result in just and reasonable rates.²⁸

The Company also discussed its proposed rate for service under the Agreement and explained how it derived that rate. The Commission relied upon the Division's testimony,

²⁴ Order at p. 15.

²⁵ Order at pp. 9-12. The Commission also considered the prefiled testimony given by Mr. Dansie in reaching its decision. See, e.g., Order at p. 13, footnotes 75-78.

²⁶ Order at p. 11.

²⁷ Order at p. 16.

²⁸ Rebuttal Testimony of Shauna Benvegna-Springer at p. 6, line 94 and at p. 7, lines 95-101.

including that concerning the effect of the Agreement on the public interest, in concluding that costs associated with the Agreement should not be included in rates.²⁹

However, because Commission found that “the Well Lease is void and unenforceable as against the public interest,”³⁰ the Commission concluded that “the Company has no obligation to provide water to Mr. Dansie and, therefore, the Company’s proposed fee of \$3.85 per 1,000 to deliver water to Mr. Dansie is moot and disallowed from the tariff.”³¹ Nonetheless, as examined in light of by the Company’s testimony, the testimony of the Division, and the testimony of Mr. Dansie, although this case did not calculate an exact cost or rate for providing Mr. Dansie the water and service he claims he is entitled to under the Agreement, it is without question that there would be costs associated with providing Mr. Dansie what he claimed under the Agreement.

While the assertion in the Request that “the Commission’s decision exposes the Company to potential future costs and liability that could necessarily result from a future action by Mr. Dansie for breach of contract”³² is an interesting observation, it does not support requiring rehearing or reconsideration of the Order. Any Commission action based upon the possibility of a breach of contract lawsuit by Mr. Dansie is speculative and unripe for Commission consideration.

The Order makes it clear that the Commission complied with applicable statutes and case law when it analyzed whether the Agreement was in the public interest and

²⁹ Order at p. 16.

³⁰ Order at p. 17.

³¹ Order at p. 17.

³² Request at pp. 11-12.

determined and ordered that it is not. The Commission properly concluded that “The Well Lease Agreement is void and unenforceable as against the public interest.”³³

For the reasons set forth above, the Division respectfully asks the Commission to deny the Request.

Respectfully submitted this _____ day of June 2014.

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³³ Order at p. 22.

CERTIFICATE OF SERVICE

On this ____ day of June, 2014, I hereby certify that I caused a true and correct copy of the *forgoing Response of the Division of Public Utilities Opposing Mr. Rodney Dansie's Request for Rehearing and Reconsideration* by causing the same to be delivered via First Class Mail, postage prepaid, or by email to the following:

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