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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Dammeron Valley Water Works, LLC for Approval of General Rate Increase and Expansion of Service Area	Docket No. 15-2025-01 DIVISION OF PUBLIC UTILITIES' RESPONSE TO INTERVENOR HJELLE'S MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to the direction of the Administrative Law Judge at the August 11, 2015 hearing, the Division of Public Utilities (Division) files its Response to Intervenor Hjelle's Memorandum of Points and Authorities (Response).

BACKGROUND

On August 10, 2015 Intervenor Hjelle (Intervenor) emailed her Memorandum of Points and Authorities (Memorandum) to the Public Service Commission (Commission) and the parties in this case. The next day at the hearing the Division requested an opportunity to file a response and Intervenor Hjelle requested an opportunity to reply to the Division's response. Both the Division's and the Intervenor's requests were granted.

INTRODUCTION

The issues raised in the Memorandum can be distilled into a simple question: Does applicable Utah law permit or require the Commission to set different rates for Dammeron Valley Water Works, LLC (DVWW) customers owning water rights than its customers who do not own such rights? The simple answer is that the Commission may, but is not required to, set different rates for DVWW customers owning water rights than for customers who do not own such rights. While the question and answer are simple, they prompt a thorough analysis of applicable Utah law.

The Intervenor's Memorandum ignores the important distinctions between owning a water right (a property right);[1] the rights and obligations of a water rights holder versus others with or desiring a water right, and the state; and the authority and obligation of the Commission to set rates and terms of service for public utilities, including DVWW. Approving the Division's amended recommended rates and terms of service is consistent with the Commission's authority and obligations, and the Division respectfully requests that the Commission do so.

ARGUMENT

I. Only the Commission has Jurisdiction to Set Rates and Terms of Service for Dammeron Valley Water Works, LLC.

The Commission has determined that DVWW is a public utility. By statute, the Legislature explicitly and exclusively delegated the authority to set rates and terms of service for DVWW and other public utilities to the Commission.

[1] See Memorandum at p. 3. See also Liston v. Liston, 269 P.3d 169, 171 (Utah 2011).

The Commission's general jurisdiction over public utilities is set forth at Utah Code Ann. § 54-4-1, which states:

> The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction; provided, however, that the Department of Transportation shall have jurisdiction over those safety functions transferred to it by the Department of Transportation Act.

This statute, while seemingly sweeping in nature and scope, has been construed narrowly by the Utah Supreme Court, which has said, "Explicit or clearly implied statutory authority for any regulatory action must exist."[2]

Explicit statutory language authorizes the Commission to set rates and terms of service for public utilities.[3] First, the Commission is granted the authority to determine if public utility "rates, fares, tolls, rentals, charges, or classifications demanded, observed, charged, or collected . . . are (A) unjust; (B) unreasonable, (C) discriminatory; (D) preferential, or (E) otherwise in violation of any provisions of law; or . . . are insufficient."[4] Second, if the Commission makes such a finding, the Commission "shall . . . (i) determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in

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[2] Mountain States Telephone and Telegraph Co. v. Public Service Commission, 754 P.2d 928, 930 (Utah 1988) (internal citations omitted).
[3] The Commission's powers are discussed only in summary form below. For a more detailed description, see Utah Code Ann. § 54-4-1 et seq.
[4] Utah Code Ann. § 54-4-4(1)(a) (emphasis added).

force; and (ii) fix the determination described [above]."[5] Third, to fulfill its duties, the Commission may:

> investigate . . . one or more rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, or practices of any public utility; or one or more schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, or practices of any public utility; and . . . establish, after hearing, new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, practices, or schedules in lieu of them.[6]

Fourth, specific statutes guide the Commission's ratemaking process.[7]

Not only is the Commission's authority to set rates and terms of service explicit, but it is also exclusive. This exclusivity is established by the statutes discussed above and is recognized by case law.[8] The Commission's exclusive power is derived by delegation from the Legislature and its police power.[9] The Court has stated, "The legislative branch possesses the police authority to regulate public utilities and the power to fix public utility rates in order to secure for the public just, uniform, and nondiscriminatory rates."[10] The Court has held that "courts are prohibited from

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[5] Utah Code Ann. § 54-4-4(1)(b) (emphasis added).
[6] See Utah Code Ann. § 54-4-2(1)(a) (emphasis added).
[7] See, e.g., Utah Code Ann. § 54-7-12.
[8] Consistent with this explicit and exclusive authority, insofar as rates and terms of service are affected, the Commission may examine Intervenor's claim that her water rights include "a proportionate share in the components of the system necessary to deliver the rights and an obligation to pay as set forth in the statute," that her water rights include "a proportionate share in the components of the system necessary to deliver the rights and an obligation to pay as set forth in the statute," and other factual assertions. See Memorandum generally and at pp. 2, 4. See generally and at pp. 15-18, 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 (May 5, 2015) (Hi-Country). The Commission denied Review and Rehearing of Hi-Country on June 19, 2015 and June 25, 2015, respectively (citations omitted). The Commission's Hi-Country order has been appealed, and is currently pending before the Court of Appeals as Dansie v. PSC, Appellate Case No. 20140653-CA. See also Hi-Country Estates Homeowners Association v. Bagley & Company, 262 P.3d 1188 (Utah Ct. App. 2011), cert. denied, 268 P.3d 192 (Utah Nov. 2011), and cases discussed therein.
[9] See Beaver v. Qwest, 31 P.3d 1147, 1150 (Utah 2001), citing Utah Copper Company v. Public Utilities Commission, 203 P 627, 631 (Utah 1921) (Beaver).
[10] See Beaver, supra.

exercising the powers properly belonging to the PSC, which is an arm of the legislative branch of government."[11] Consistent therewith, limitations have also been placed upon the Court's ability to review Commission decisions.[12]

Therefore, only the Commission has the responsibility and jurisdiction to set Dammeron's rates and terms of service. In doing so, the Commission is subject to and guided by Title 54.

II. Title 54 Governs the Commission in Setting Dammeron Valley Water Works' Rates and Terms and Conditions of Service.

The Commission must set DVWW's rates and terms of service in accordance with Title 54, not Title 73 as the Intervenor erroneously alleges. By design and application, Title 73 governs relationships between and among water rights holders, claimants, the state, and the public.[13] Title 73 does not govern the ratemaking process. Only Title 54 governs the ratemaking process.

The Legislature has given the Commission criteria and guidance for setting public utilities' rates and terms and conditions of service.[14] Utah Code Ann. § 54-3-1 states:

> All charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. . . . All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable. (emphasis added)

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[11] See Beaver, supra, at p. 1149.
[12] See Beaver, supra, citing Mulcahy v. Public Service Commission, 117 P.2d 298 (Utah 1941).
[13] The following discussion is by no means a comprehensive recital and analysis of Utah water law.
[14] The Legislature has tasked the Division with assisting the Commission. In furtherance therefore, the Legislature has provided the Division with specific objectives. See Utah Code Ann. § 54-4a-6. The Division's amended recommended rates and terms of service are consistent with these objectives.

The statute continues, stating:

> The scope of definition “just and reasonable” may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the state of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of encouraging conservation of resources and energy.

This statute explicitly allows the Commission, if it chooses, to consider how DVWW’s rates and terms and conditions of service work as a “means of encouraging conservation or resources and energy.”[15] Thus, the Intervenor’s complaint about DVWW’s rates and terms of service causing forfeiture[16] or that there is a “potential risk of effectively being a constitutionally impermissible ‘taking’ of a valuable property right without just compensation”[17] are without merit because the Commission may consider conservation when setting rates and terms of service. Furthermore, the only specific directive the Legislature has given the Commission with regard to setting irrigation rates applies only to setting rates for electric power, and then, only in special circumstances.[18]

Despite the Intervenor’s claims to the contrary, the Division’s proposed amended rates and terms of service for DVWW do not put the Intervenor at risk of forfeiture or constitute a taking but instead are consistent with the statutes authorizing the

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[15] Utah Code Ann. § 54-3-1.
[16] See Memorandum in general, but also specifically at pp. 2-3.
[17] See Memorandum at p. 3.
[18] See Utah Code Ann. § 54-3-8.5 which states, “The commission in approving any rate applicable to customers who use electric power for agricultural irrigation or soil draining purposes which includes a demand or power charge as a separate charge shall take into consideration the productive utilization of agricultural water and electric energy.” This statute does not even apply to all electric rates pertaining to irrigation. It only applies to electric rates where there is a separate demand or power charge.

Commission to set rates and terms of service. The Division's amended proposed rates establish a "second tier" of 40,000 gallons/month for holders of irrigation rights (Second Tier). The Second Tier category does not prohibit the Intervenor from using her full water right, but instead only mandates how many gallons per month she can receive at this special Second Tier rate.[19] The Intervenor can choose to avoid forfeiture and use more than 40,000 gallons per month merely by paying the rate established in DVWW's subsequent tiers. If the Intervenor chooses to use less than her full water right and face forfeiture, the Second Tier rate is not the reason nor is it a taking – rather it is the unwillingness of the Intervenor to pay the Commission determined just and reasonable rate for water delivery. Additionally, delivering a large quantity of water such as that of Intervenor's water right may tax DVWW's infrastructure in a different way than delivering normal culinary amounts. Thus, setting an escalating rate is within the Commission's discretion. Also within the Commission's discretion is setting a rate, such as the Second Tier rate, that excludes some portion of a commodity cost.

Furthermore, the Intervenor's claim that Utah Code Ann. § 73-1-9 governs the rate DVWW charges for delivery of water she holds pursuant to a water right is incorrect. This statute states:

> When two or more persons are associated in the use of any dam, canal, reservoir, ditch, lateral, flume or other means for conserving or conveying water for the irrigation of land or for other purposes, each of them shall be liable to the other for the reasonable expenses of maintaining, operating and controlling the same, in proportion to the share in the use or ownership of the water to which he is entitled.

[19] Similarly, just as the Commission has the authority to determine if the Second Tier should be set at 40,000 or 50,000 per month, the Commission has the authority to determine if the first tier should be 12,000 gallons per month as set forth in the Division's proposed amended rates, or 24,000 gallons per month as urged by the Intervenor. See Memorandum at pp. 3-4.

Not only is this statute inapplicable when the Commission is setting rates, it also is inapplicable when there is a contract between joint owners and users.[20] By analogy, a contract exists when the Intervenor has chosen and agreed to pay the rates established by the Commission pursuant to its regulatory authority for delivery of her irrigation water. Thus, Utah Code Ann. § 73-1-9 is inapplicable here.

CONCLUSION

The Intervenor's arguments fail. The Commission is explicitly and exclusively authorized to set DVWW's rates and terms of service, and must do so in accordance with Title 54, not Title 73. Title 54 allows the Commission to adopt the Division's recommended rates and terms of service or otherwise charge customers appropriate amounts for their use of DVWW's water and water system.

Respectfully submitted this ____ day of August 2015.

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[20] See Gunnison-Fayette Canal Company v. Roberts, 364 P.2d 103 (Utah 1961), distinguished on other grounds by Swasey v. Rocky Point Ditch Company, 660 P.2d 224 (Utah 1983) and Green River Canal Company v. Thayn, 84 P.3d 1134 (Utah 2003), cert denied (2003).

CERTIFICATE OF SERVICE

On this ____th day of August 2015, I hereby certify that I caused a true and correct copy of the forgoing Division of Public Utilities' Response to Intervenor Hjelle's Memorandum of Points and Authorities to be served via email to the following:

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