

Barbara G. Hjelle, *Pro Se*
375 Juniper Road
Dammeron Valley, Utah 84783
Phone: (435) 574-3911
Fax: (435) 574-3911
Email: bghjelle@q.com

- 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 REPLY MEMORANDUM OF INTERVENOR HJELLE
--	--

The Division of Public Utilities (DPU) essentially makes two points in its Response Brief: (1) the Public Service Commission (PSC) has exclusive authority to set rates and terms of service to both undefined public users of Dammeron Valley Water Works (DVWW) and the owners of water rights delivered through the system, and (2) only Title 54 governs the Commission in setting such rates and terms of service, implying that it may disregard other applicable law. Intervenor Hjelle respectfully submits the following Reply:

THE PSC'S ACTIONS AFFECTING CHARGES FOR THE DELIVERY OF INDIVIDUALLY HELD WATER RIGHTS IS GOVERNED BY THE LAW OF WATER RIGHTS

While the PSC has authority to set rates and terms of service by DVWW to the public generally, the owner of a water right entitled to delivery through the DVWW system is a privileged class of persons as a result of the ownership of the water right. Given this distinction, the PSC does not have the discretion to ignore Utah water law and its decisions must be consistent with such law. Bradshaw v. Wilkinson Water Co., 2004 UT 38; 94 P.3d 242 (Utah 2004). Otherwise, the PSC's action would create internal inconsistencies within Utah law¹, as well as improperly burden the use of a valuable water right.

¹ See, e.g. Hi-Country Estates Homeowners Ass'n v. Bagley & Co., 901 P.2d 1017 at 1021 (Utah 1995).

Water rights are a type of interest in real property. Utah DOT v. G. Kay, Inc., 78 P.3d 612, 616 (Utah 2003). This right must be used to its full beneficial allocation or risk forfeiture. To the extent that the PSC must necessarily address the rates applied to water right holders, any PSC-established rate, term or condition of service which impairs or discourages full beneficial use of a water right is unjust, unreasonable, a violation of law and arguably unconstitutional.²

As DPU points out³, the PSC has authority to determine if public utility rates are unjust, unreasonable or otherwise in violation of any provisions of law. See also, Utah Code Ann. §§ 54-3-1 and 54-4-4(1)(a)(i)(e) (2014). “The scope of the definition ‘just and reasonable’ may include... the well-being of the state of Utah.” Utah Code Ann. § 54-3-1. The legislature has established that the well-being of the state is served by the beneficial use of water. “Because of the vital importance of water in this arid region both our statutory and decisional law have been fashioned in recognition of the desirability and of the necessity of insuring the highest possible development and of the most continuous beneficial use of all available water with as little waste as possible.” Wayman v. Murray City Corp., 23 Utah 2d 97, 99; 458 P.2d 861, 863 (Utah 1969).⁴ Since the legislature has spoken on the allocation of costs to deliver water rights through a shared system, Utah Code Ann. § 73-1-9 (2014), a tariff that violates that provision would violate rights granted by the state of Utah.

² Indeed, to do so could stretch beyond the reasonable interpretation of the PSC’s authority, since the delivery of water rights is not, strictly speaking, delivery to the public generally. In evaluating the scope of its discretion, the PSC must recognize the scope of the public utility function and the purposes and goals of the PSC that derive from the delivery of a commodity to the public generally. “It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute.” Heber Light & Power Co. v. Utah PSC, 2010 UT 27, P17, 231 P.3d 1203, 1208 (Utah 2010) (internal quotation marks omitted). “[T]o ensure that the administrative powers of the PSC are not overextended, ‘any reasonable doubt of the existence of any power must be resolved against the exercise thereof.’” Hi-Country Estates Homeowners Ass’n v. Bagley & Co., supra.

³ DPU Memorandum at 3.

⁴ In the context of water rights, waste is a function of beneficial use. The water you can and must use is the amount of water necessary to irrigate the landscape in accordance with applicable evapotranspiration rates. If you exceed that amount, you may be wasting water. If you do not use that amount, you may forfeit that portion of your water right. See, e.g., Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 246-247 (Utah 1930).

CONSERVATION CHARGES SHOULD NOT BE APPLIED TO UTAH STATE WATER RIGHTS

Given the law set forth above, the imposition of a conservation charge for any portion of the water right is unjust, unreasonable and contrary to law. The DPU's proposed tiered rates, above the fixed base amount, are designed precisely "to send a price signal for conservation." (DPU Exhibit 1.0, at 16, line 256). While DPU's Amended Recommended Rates modified the tier structure so that irrigation rates start after the first 12,000 gallons of use, the enforcement of a 40,000 gallon per month limit by imposing conservation rates on usage above that amount is still inconsistent with applicable law, particularly given that there is no evidence in the record that such a limitation is useful or necessary. The undisputed evidence shows that the DVWW system could deliver up to 120,000 gallons per month per acre foot. Mr. Pace's expressed concern about a "bookkeeping" burden cannot justify denial of the full water right when the irrigation is needed and should not be the basis for the PSC to deny this right.

DPU's assertion that "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"⁵ fails to acknowledge that the purported impacts on the infrastructure have been addressed in the proposed tariff:

The \$0.45 per 1,000 gallons rate covers all variable expenses of \$0.30 per 1,000 gallons plus an additional amount of \$0.15 per 1,000 gallons. This rate structure is consistent with full-cost pricing spoken of earlier, as it will help pay for the extra wear and tear on equipment that the irrigation users are imposing due to their large water use. The Division is using \$0.15 based on 50% increase of the incremental variable costs to transport the water. Without an extensive asset/infrastructure study to determine the exact cost of the wear and tear on the equipment and infrastructure, the Division believes that \$0.15 is a conservative estimate.... Because all irrigation users must first use their total allotment of culinary water at the culinary rates before using irrigation water, they are paying for an equal share of the overall water system's fixed costs for those culinary gallons used, just as is done by customers without irrigation. (DPU Exhibit 1.0, at 31, line 549 - 32, line 557, and 33, lines 576-581).

⁵ DPU Memorandum at 7.

The evidence in this case is undisputed that water right owners in the DVWW system have paid a special consideration in excess of that paid by the public generally for the express purpose of having rights to irrigation water to improve their property. A rate unrelated to the reasonable expenses of maintaining, operating and controlling the conveyance system, but rather for the sole purpose of discouraging water use, may be reasonable to encourage the conservation of water rights belonging to the DVWW but is not just, reasonable or consistent with law when applied to discourage the use of the water rights belonging to others.⁶

CONCLUSION

To the extent it may be necessary for the Public Service Commission to determine charges applicable to the delivery of privately held water rights, it must do so consistent with Utah water law.

To be just, reasonable and consistent with law under the facts of this case, the Commission should adopt a tariff structure that avoids the direct or indirect imposition of a conservation charge on privately held water rights delivered through the DVWW system and thus does not place an arbitrary monthly cap on the use of these rights.

RESPECTFULLY SUBMITTED this 2nd day of September, 2015

/s/ _____
Barbara G. Hjelle

⁶ The policy of gradualism would suggest that Pace's proposed rate of \$0.32- 0.38 per 1,000 gallons is a more reasonable increase than the DPU's proposed rate of \$0.45 per thousand gallons, especially given that the actual variable consumption cost of \$0.27 per 1,000 gallons was rounded up to \$0.30 per 1,000 gallons followed by a 50% surcharge on the \$0.30 proposed by DPU. Indeed, adding a 50% surcharge to the actual variable consumption cost would yield \$0.40 per 1,000 gallons, which should be the highest possible rate chargeable to water rights holders.

CERTIFICATE OF SERVICE

On this 2nd day of September, 2015, I hereby certify that a full, true and correct copy of the above and foregoing REPLY MEMORANDUM OF INTERVENOR HJELLE was served by email to the following:

Brooks Pace, President
Dammeron Valley Water Works, LLC
brooks@dammeronvalley.com

Chris Parker
William Duncan
Dennis Miller
Utah Division of Public Utilities
chrisparker@utah.gov
wduncan@utah.gov
dennismiller@utah.gov

Patricia Schmid, Esq.
Assistant Attorney General
Utah Division of Public Utilities
pschmid@utah.gov

/s/ _____
Barbara G. Hjelle