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Formal Complaint of David Burwen, Susan Burwen, and Venture Development Group, LLC against Pineview West Water Company	<u>DOCKET NO. 22-2438-01</u>
	<u>ORDER</u>

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ISSUED: June 13, 2022

**A. PROCEDURAL HISTORY**

On February 9, 2022, David Burwen, Susan Burwen, and Venture Development Group, LLC (together, the “Complainant”) filed a formal complaint and request for agency action (“Complaint”) with the Public Service Commission (PSC) against Pineview West Water Company (PWWC).<sup>1</sup> Several attachments support the Complaint including copies of pleadings and PSC orders in prior PWWC dockets, PWWC Tariffs No. 2 and No. 3 (“Tariff 2” and “Tariff 3”), a map illustrating the location of the Inn, the map PWWC filed in its 2019 general rate increase request (“2019 GRC Map”), Complainant’s water service hook-up invoice, a draft water agreement from PWWC, a notice of discontinuance from PWWC, court judgments related to a water rights interference case, PWWC’s 2019 notice of intent to request a rate review, a public comment in a related docket, an executed Release and Settlement Agreement related to the water rights interference claim, a copy of PWWC’s answer to the Araves’ complaint in Docket No. 20-2438-01,<sup>2</sup> Complainant’s informal complaint in this docket, PWWC’s response to the informal complaint, and PWWC’s prefiled testimony from its 2019 general rate case in Docket No. 19-2438-01 (the “2019 GRC”).

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<sup>1</sup> The Burwens and Venture Development Group, LLC are owners of the Snowberry Inn – the business whose culinary water service PWWC seeks to terminate. The PSC will refer to the business, individually, as the “Inn” in this Order.

<sup>2</sup> We explain the details of the Araves’ complaint in Section B.7. of this Order.

The Complaint generally requests the PSC enjoin PWWC from terminating the Inn's culinary water service, initiate a formal inquiry to determine whether PWWC may lawfully terminate service to the Inn, require PWWC to file an updated service area map showing the Inn within PWWC's expanded service territory, and initiate any other necessary proceedings for the PSC to exercise jurisdiction over PWWC.

On March 11, 2022, the Division of Public Utilities (DPU) filed its Action Request Response ("2022 DPU Comments").<sup>3</sup> The 2022 DPU Comments generally state the public interest is served by including contiguous, previously-served customers in PWWC's service territory.<sup>4</sup> They recommend the PSC consider that PWWC's facilities have served and can continue to serve the Inn and note that Complainant has water rights that may help supply the Inn with some culinary water.<sup>5</sup> They further assert that the parties should be able to reach a mutually beneficial settlement given the background in this docket.<sup>6</sup>

On the same date, PWWC filed its response to the Complaint and attached materials, including correspondence from the Division of Drinking Water approving PWWC's water connections, the October 15, 2020 Utah Supreme Court opinion ruling that Complainant and others did not meet their burden in their water rights interference claim against PWWC, and Complainant's "Application for Exchange of Water" and the Order of the State Engineer (collectively, the "PWWC Response"). The PWWC Response recommends the PSC dismiss the

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<sup>3</sup> Utah Code Ann. § 54-4a-1(1)(c), DPU may "investigate or study, upon complaint [or] order of the [PSC] ... any matter within the jurisdiction of the [PSC]." We requested DPU investigate the Complaint and provide a recommendation through an Action Request issued February 9, 2022.

<sup>4</sup> 2022 DPU Comments, at 1.

<sup>5</sup> *Id.*, at 2.

<sup>6</sup> *Id.*

Complaint because “the reason [PWWC] agreed to provide [service] to [Complainant] has been resolved by the Utah Supreme Court in [PWWC’s] favor. [Complainant] has an available alternative means of water supply through its own privately held water rights and well facilities. Requiring continued service ... would unduly stress [PWWC’s] limited water resources and impair [its] ability ... to provide adequate service to its shareholders.”<sup>7</sup> The PWWC Response explains that PWWC was created to provide service to shareholder residences located in specific subdivisions developed by PWWC’s founder and not intended to provide service to the general public. It reiterates that PWWC does not possess the resources that would allow it to do so.<sup>8</sup> The PWWC Response then concludes that the PSC should deny the Complaint because “[PWWC] has neither the duty nor the capacity to serve the water needs of [the Inn].”<sup>9</sup>

Complainant replied to the PWWC Response on March 29, 2022 restating that PWWC cannot lawfully terminate service to the Inn because Complainant is a customer located within PWWC’s service area, and PWWC can only terminate service for the reasons set forth under Utah Admin. Code R746-200-7(C)(1) and (F) and PWWC’s own approved Tariff 3. Complainant also argues that (1) PWWC has sufficient capacity to continue serving Complainant, (2) PWWC’s continued service to the Inn is in the public interest, (3) the Inn’s non-shareholder status is not relevant, and (4) the Inn is within the second lowest tier of five tiers of water usage and corresponding charges under Tariff 3.

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<sup>7</sup> PWWC Response, at 1-2.

<sup>8</sup> *Id.*, at 2.

<sup>9</sup> *Id.*, at 4.

On April 4, 2022, the PSC requested additional information from DPU and PWWC which it received April 20, 2022 and April 25, 2022, respectively.

**B. FACTUAL HISTORY**

The following facts are undisputed, supported by the record, or both.

1. PWWC holds a certificate of public convenience and necessity (CPCN) to operate as a public utility and a water corporation subject to regulation by the PSC.<sup>10</sup> PWWC's original service territory includes the Radford Hills and Pineview West No. 1 subdivisions, as illustrated in the map filed by PWWC in support of its application for a CPCN ("2004 CPCN Map"), and as clarified by the PSC in its clarifying order issued October 12, 2004 in the CPCN Docket ("Clarifying Order"). The Clarifying Order indicated the PSC "may not [have] adequately describe[d] [PWWC's] certificated service area, which is the Radford Hills and Pineview West No. 1 subdivisions located in Weber County, Utah"<sup>11</sup> (the "Original Service Territory").

2. In 2007, PWWC "added ... Well No. 4 to its [water] system."<sup>12</sup> Later that year, Complainant and others located beyond the borders of the Original Service Territory including Roger B. and Kimberly L. Arave (the "Araves") and Janet Southwick ("Mrs. Southwick,"

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<sup>10</sup> *In the Matter of the Application for a Certificate of Convenience and Necessity for Pineview West Water Company for Culinary and Secondary Water Services*, Docket No. 04-2438-01, Report and Order Certificate No. 2438, issued September 30, 2004 (the "CPCN Docket"). (The PSC order in the CPCN Docket states, "[t]he Division of Drinking Water has currently approved [PWWC] to provide service to one-hundred thirty-three lots. The Division recommends granting the Application and issuing a certificate limiting connections to the number approved by the Division .... We concur and conclude, as a matter of law, that the Application should be granted and certificate issued accordingly."). *See also*, Complaint, at 3, referencing the original service area map.

<sup>11</sup> Clarifying Order, at 1.

<sup>12</sup> PWWC Response to Informal Complaint, at 2.

together with the Araves and Complainant sometimes referred to as, the “Private Generators”)<sup>13</sup> claimed that PWWC’s operation of Well 4 interfered with their own water wells and water requirements.<sup>14</sup> (Prior to 2007, the Private Generators, obtained all of their culinary water from their own private wells.<sup>15</sup>) Shortly thereafter, PWWC extended its water lines to the Private Generators,<sup>16</sup> and the Inn hooked up to the PWWC water system.<sup>17</sup> PWWC started providing culinary water service first to the Araves and Mrs. Southwick and then to Complainant in approximately 2007<sup>18</sup> and charged them all a flat monthly fee of \$20.<sup>19</sup> Sometime between 2004 and 2007, PWWC also started providing culinary water service to the Pineview Yacht Club, which appears to be located beyond the borders of PWWC’s Original Service Territory.<sup>20</sup>

3. In late 2008, PWWC filed a request for “an expedited special assessment ... until [its] application for a rate increase can be approved”<sup>21</sup> (“2008 Assessment”) and a request for a rate increase (“2009 GRC”), with the PSC.<sup>22</sup> The PSC bifurcated the special assessment from the 2009 GRC.<sup>23</sup> DPU indicated it was seeking additional information from PWWC to support the

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<sup>13</sup> The Private Generators are apparently close neighbors – their wells are located within close proximity of Well 4 and of each other’s wells. *See* Complaint, at 8.

<sup>14</sup> *Id.*, at 9. The PWWC Response to Informal Complaint was made a part of this docket on the PSC’s public website February 9, 2022 and is titled Exhibit A (“Informal Complaint”). The Complaint includes its own attached Exhibit A which is a different document.

<sup>15</sup> Complaint, at ¶¶ 28 and 32.

<sup>16</sup> *Id.*, at 9.

<sup>17</sup> *Id.*, Exhibit I (the invoice for the hook-up costs in the amount of approximately \$7,700).

<sup>18</sup> *Id.*, at ¶ 15.

<sup>19</sup> *Id.*, at ¶ 37.

<sup>20</sup> *Id.*, at ¶ 15.

<sup>21</sup> *See* Complaint, at 5, referencing DPU recommendation in Docket No. 08-2438-01 (“2008 DPU recommendation”). *See also* Letter addressed to DPU, dated November 18, 2008, referenced in the 2008 DPU recommendation.

<sup>22</sup> *Id.*

<sup>23</sup> Docket No. 08-2438-01, Order of Bifurcation, issued January 27, 2009.

2009 GRC.<sup>24</sup> PWWC's supporting materials in the 2008 Assessment and the 2009 GRC revealed that its then-current operations included 58 metered customers, including some located beyond the borders of PWWC's Original Service Territory such as the Araves, Mrs. Southwick, the Inn, the Pineview Yacht Club, the HOA clubhouse and grounds, and Crimson Ridge.<sup>25</sup> Consistent with this revelation, PWWC's proposed new tariff and rate structure included a line item for "[n]on-shareholder contract rates" followed by the "same as shareholder" rates.<sup>26</sup> The PSC approved the 2009 GRC on July 15, 2009 (the "2009 GRC Order").<sup>27</sup> On August 6, 2009, PWWC filed its related Tariff 2 in a separate docket, which DPU recommended the PSC approve.<sup>28</sup> PWWC did not include a map of its service territory.<sup>29</sup> On August 12, 2009, the former developers/owners of PWWC filed an application for review and request for rehearing of the 2009 GRC Order ("Reconsideration") on the basis that PWWC still owed debts for loans they made to PWWC.<sup>30</sup> The PSC granted the Reconsideration and ultimately stayed its 2009 GRC Order with an Order on Stay.<sup>31</sup> While the PSC never lifted the Order on Stay, PWWC proceeded to implement new Tariff 2 as if the Order on Stay had been lifted.<sup>32</sup>

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<sup>24</sup> DPU Recommendation in Docket No. 08-2438-01, December 18, 2008.

<sup>25</sup> Complaint, at 6. *See also* Docket No. 09-2438-01, DPU Comments at 3, filed June 25, 2009. *See also*, DPU's response to the PSC's Information Request No. 1.1.

<sup>26</sup> Docket No. 09-2438-01, PWWC Water Tariff and Rate Filing, June 22, 2009. *See also*, Mr. Turner's original filing and rate increase request on behalf of PWWC, via email dated April 13, 2009, where he stated "I still need to talk to our non-shareholder customers to discuss proposed rates with them." *Id.*

<sup>27</sup> *See* Docket No. 09-2438-01, Report and Order, issued July 15, 2009.

<sup>28</sup> *See* Docket No. 09-2438-T01, DPU Comments, filed August 12, 2009.

<sup>29</sup> Complaint, at 7.

<sup>30</sup> PWWC Response, at 8.

<sup>31</sup> Docket No. 09-2438-01, Order on Stay, issued November 16, 2009.

<sup>32</sup> PWWC Response, at 8.

4. In June 2010, PWWC sent Complainant a draft water right lease and service agreement under which PWWC proposed to continue water service to the Inn.<sup>33</sup> The parties never reached an agreement.<sup>34</sup>

5. By letter dated November 15, 2013, PWWC notified Complainant that since “studies [conducted that summer had found] ... no significant hydrological connection between the Snowberry well and [Well 4],”<sup>35</sup> PWWC planned to terminate culinary water service to the Inn as of January 1, 2014.<sup>36</sup> To stop PWWC from terminating service, Complainant and the other Private Generators jointly filed a water rights interference claim in Utah’s Second District Court (the “lower court”) against PWWC in December 2013.<sup>37</sup> PWWC continued to provide uninterrupted culinary water service to Complainant.<sup>38</sup>

6. On December 12, 2019, PWWC notified the PSC of its plan to seek several requests including a request for a rate increase (the “2019 GRC Notice”).<sup>39</sup> The 2019 GRC Notice also listed the following request: “[m]odification of our recognized [service area] to reflect actual fact. The existing one is very old. It was created when the plat maps included other phases of development, now defunct, and additional water sources that were never built.”<sup>40</sup>

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<sup>33</sup> Complaint, Exhibit J.

<sup>34</sup> *Id.*, at 10.

<sup>35</sup> Complaint, Exhibit K.

<sup>36</sup> *Id.*

<sup>37</sup> Complaint, at 11.

<sup>38</sup> *Id.*, at 12.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

PWWC filed its 2019 GRC on April 24, 2020 with several supporting public and confidential attachments (“Application”)<sup>41</sup> including several financial spreadsheets containing a customer list with usage and other confidential customer-specific information.<sup>42</sup> In the spreadsheets, PWWC again listed the Inn among its customers with its specific usage and financial information.<sup>43</sup> Consistent with the 2019 GRC Notice, in the Confidential Request for Approval of a Conservation Rate Increase filed April 24, 2020, under “Service Area Reduction,” PWWC explained that “[t]he service area needs to be reduced to the area covered by the current infrastructure. The system only has enough supply for that area without any further expansion. Several contract users should also be removed from the service area. The Snowberry Inn has their own well water supply and should be removed from the service area.”<sup>44</sup>

Approximately one month later on June 4, 2020, PWWC essentially withdrew its request for a service area reduction. PWWC witness John Durig testified in his prefiled direct testimony that “[PWWC was] not seeking to change the service area for [PWWC] at this time.”<sup>45</sup> PWWC later explained that it “removed [the Inn] from the service area described” in its 2019 GRC because PWWC witness John Durig believed that “PWWC would not have adequate capacity for

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<sup>41</sup> See *Request of Pineview West Water Company for a Rate Review for Approval of a Conservation Rate Increase*, Docket No. 19-2438-01, April 24, 2020 and DPU Response to PSC Information Requests, issued April 4, 2022.

<sup>42</sup> *Id.*

<sup>43</sup> DPU Response to PSC’s Information Request No. 1.1.

<sup>44</sup> See the PSC’s Information Request to PWWC 1.1 in this docket, served April 4, 2022, referencing the document and requesting an explanation about the confidential designation of the “Request for Approval of a Conservation Rate Increase,” filed April 24, 2020. PWWC initially filed the document in Docket No. 19-2438-01 as a public document; however, the PSC recommended at the time that it be designated “confidential” since it potentially included customer-specific information.

<sup>45</sup> See Complaint, Exhibit W, at 196.



all of its 119 shareholders at full build-out of the subdivision it was formed to serve and still provide water to the Snowberry Inn.”<sup>46</sup>

No other party intervened in the case and PWWC and DPU eventually reached a settlement agreement. They filed the settlement agreement, proposed new Tariff 3, and the 2019 GRC Map with the PSC on November 20, 2020.<sup>47</sup>

In the same docket, on December 3, 2020, the Araves filed a public comment notifying the PSC of the ongoing water rights interference litigation between the Private Generators and PWWC, and requested the PSC stay the proceeding until the court ruled on the water rights interference claim.<sup>48</sup> The PSC issued its order approving the Settlement and Tariff 3 on January 25, 2021.<sup>49</sup> The PSC concluded, in part, that Utah law required the PSC to issue its order within 240 days of a general rate case complete filing and it had no jurisdiction over the pending water rights interference litigation that was pending before the Utah Supreme Court. *Id.*

7. On December 21, 2020, the Araves filed a complaint against PWWC, alleging that PWWC had not notified the Araves of its Application, and that the Araves were involved in the ongoing water interference litigation.<sup>50</sup> The Araves once again requested the PSC delay its decision related to the 2019 GRC. Noting that it had issued its order in PWWC’s 2019 GRC on

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<sup>46</sup> See PWWC’s April 25, 2022 Response to the PSC’s April 4, 2022 Information Requests, at 2-3.

<sup>47</sup> See Unopposed Motion to Approve Settlement Agreement and to Hold Hearings as Scheduled, including DPU Attachment 1 (the Settlement Stipulation), DPU Attachment 2 (Revised PWWC Tariff (Clean)), and DPU Attachment 3 (Revised PWWC Tariff (Redline)). The service area reflected in the 2019 GRC Map is inconsistent with the data PWWC submitted in support of its Application, i.e., the map excludes PWWC’s non-shareholder customers that are located beyond the borders of PWWC’s Original Service Territory including the Inn, the Araves, and Mrs. Southwick, whose financial information and usage information PWWC used to support its Application. See DPU Response to the PSC’s Information Requests 1.1 and 1.2.

<sup>48</sup> Complaint, at 13.

<sup>49</sup> See Order Approving Stipulation and Associated Tariff Changes, at 4, issued January 25, 2021.

<sup>50</sup> Complaint, at 14.

January 25, 2021, the PSC dismissed the Araves' Complaint February 2, 2021, concluding, again, that Utah law required the PSC to act within 240 days of a general rate case complete filing, it had no jurisdiction over the pending water interference litigation that was pending before the Utah Supreme Court, and there was no longer a basis for the Araves' Complaint since their sole request was for the PSC to delay its decision in PWWC's 2019 GRC.

8. In 2021, PWWC entered into an agreement with the Araves and Mrs. Southwick to continue to provide culinary water services to both even though neither is a PWWC shareholder.<sup>51</sup>

9. Complainant filed this Complaint on February 9, 2022.

### **C. DISCUSSIONS, FINDINGS OF FACTS, AND CONCLUSIONS OF LAW**

PWWC does not dispute that it is a public utility and subject to the PSC's regulation.<sup>52</sup> It argues however that it was "created to provide water to the residences of its shareholders located in specific subdivisions developed by [its] founder ... [and] was not intended to provide water to the general public and has never possessed the resources that would allow it to do so."<sup>53</sup> Despite its original intent, PWWC's actions over the years (as we describe below) constrain its ability to terminate the water service of any of its customers including the Inn, except under applicable tariffs and regulations. The 2019 GRC Map that excludes some of the customers it serves does not change or terminate PWWC's obligation to serve them.

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<sup>51</sup> See PWWC Response, at 7. See also, Complaint, Exhibit J, "Water Right Lease and Water Service Agreement," at 1.

<sup>52</sup> PWWC Response, at 11.

<sup>53</sup> *Id.*, at 2.

**1. PWWC voluntarily extended its water lines and started providing service beyond the borders of its Original Service Territory to the Inn and others indefinitely, and expanded its Original Service Territory in the process.**

PWWC contends that it extended its water lines and started providing water service to the Private Generators as a courtesy and an accommodation, explaining its “service area was temporarily expanded in [2007] as a convenience to the [Inn] and the individuals to support service while they pursued their claims of water right interference.”<sup>54</sup> PWWC takes the position that the Supreme Court’s recent resolution of the water interference claim in its favor, therefore, resolves the Complaint since that was the reason why it started serving the Inn in the first place.<sup>55</sup>

This theory, however, does not explain the six-year gap between the time PWWC first extended water lines to the Private Generators (late 2007) and the date they filed their water rights interference lawsuit (late 2013). Also, the Court’s resolution of the water rights interference claim in PWWC’s favor does not resolve the fundamental issues of this Complaint:<sup>56</sup> Is Complainant a PWWC customer and within PWWC’s service territory? Does PWWC meet the statutory requirements to terminate Complainant’s water service?

The draft water lease agreement that PWWC sent to Complainant for execution in 2010 reflects the best understanding that PWWC had at the time of the deal between the parties, yet it

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<sup>54</sup> Complaint, Exhibit U, at 2 and PWWC Response, at 3.

<sup>55</sup> See PWWC Response, at 1-2, recommending the PSC dismiss the Complaint because “the reason [PWWC] agreed to provide [service] to [Complainant] has been resolved by the Utah Supreme Court in [PWWC’s] favor.” *Id.*

<sup>56</sup> In addition, we have jurisdiction in matters involving a public utility’s continued service to the public. *See, e.g., In the Matter of Hi-Country Estates Homeowners Association’s Request for Reassessment of the Commission’s Jurisdiction*, Docket No. 11-2195-01, Report and Order, at 2 (issued July 12, 2012) (noting the Utah Court of Appeals’ decision over a water well agreement in which the Court found that the Dansie family members were “entitled to their contractual rights to free water and free hook-ups unless the PSC intervenes and determines otherwise.”).

does not state that PWWC's service was temporary or that its water service would terminate upon the resolution of the water rights interference claim, as PWWC now argues. Therefore, the draft agreement also does not support PWWC's theory. We must look to PWWC's actions since 2007 after it voluntarily extended its water system to the Inn.

We find based on the undisputed facts we discuss above that by extending its water lines beyond the borders of its Original Service Territory to connect the Inn to provide water service indefinitely, without a clear understanding of when the service would terminate, and without interruption, PWWC dedicated its water lines for public use. PWWC's actions - especially up until it sent the November 2013 disconnection notice to the Inn, showed a willingness to continue to provide service to the Inn indefinitely. Moreover, PWWC charged Complainant (and Complainant paid), the same monthly fee that it charged shareholder customers and that they paid, for the same service for much of the time since 2007.<sup>57</sup> Complainants have also been paying the prescribed rate under Tariff 3<sup>58</sup> which is further evidence that PWWC was serving and continues to serve Complainant as a public utility.

Once PWWC became Complainant's water service public utility, it assumed an obligation to serve Complainant as a customer. PWWC cannot terminate the Inn's culinary water service except under the narrow conditions set forth in Utah Admin. Code R746-200-7(C)(1) and (F) (Regulations "C" and "F", respectively) and Tariff 3.

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<sup>57</sup> Complaint, at 13. *See also*, the PWWC Response, at 37. (PWWC inferring that it started charging the Inn the rate under its tariff).

<sup>58</sup> *Id.*, at 15.

**2. Utah law does not prohibit a public utility from expanding its certificated service territory without seeking specific PSC authority.**

Utah Code Ann. § 54-4-25 (the “CPCN statute”) contemplates the possibility that a public utility may expand its approved certificated service territory to serve future customers stating, “(1) ... a ... water corporation ... may not establish, or begin construction or operation of a line, route, plant, or system or of any extension of [the same], without having first obtained ... a certificate that present or future public convenience and necessity does or will require the construction.” *Id.* The CPCN statute further states “this section” may not be interpreted to require any corporation to obtain a CPCN for an extension:

- (a) within any city or town within which it has lawfully commenced operations;
- (b) into territory, either within or without a city or town, contiguous to its line, plant, or system that is not served by a public utility of like character;
- or
- (c) within or to territory already served by it, necessary in the ordinary course of its business. *Id.*

In short, public utilities are not prohibited from expanding their certificated service areas, without PSC approval, (1) so long as the area where they expand is within a city or town where the utility is lawfully operating or (2) into areas that are contiguous to its own system (including its lines or plants) and (3) another public utility is not already offering the same service.

PWWC argues that our prior orders have not expressly confirmed the expansion of PWWC’s Original Service Territory, inferring that its unilateral expansion is therefore invalid or that it can be ignored. Specifically, it argues that while the 2009 GRC Order states that PWWC “serves’ Pineview West, Radford Hills, [the Araves], [Mrs.] Southwick, Snowberry Inn, the

Pineview Yacht Club, HOA clubhouse and grounds,”<sup>59</sup> it “does not include the term ‘service area’ or state the service area for [PWWC] extended to the few non-shareholders that [PWWC] had allowed to connect to its system, let alone the public generally.”<sup>60</sup> As is clear, the PSC did refer to PWWC’s then-58-metered customers, specifically the Inn, by name in its 2009 GRC Order.<sup>61</sup> Also, the CPCN statute allows this unilateral expansion under the circumstances of this case. We conclude therefore that the absence of an express PSC statement in our 2009 GRC Order approving the expansion does not invalidate the expansion. Rather, the public utility relationship between PWWC and the Inn and the concomitant obligations continued.

- 3. Over the years, PWWC has (i) continued to provide water service to the Inn and other non-shareholder customers without interruption, (ii) publicly considered them to be PWWC customers, and (iii) continued to extend its service territory. Therefore, since PWWC failed to go through the appropriate regulatory process to remove the Inn as a customer or reduce its service territory, its current service territory continues to include the Inn and the other non-shareholder customers.**

In addition to extending its water lines and providing culinary water service to the Inn and the other Private Generators without interruption over the years, PWWC has also extended its water lines to others. For example, sometime between 2004 and 2008, PWWC began providing water service to the Pineview Yacht Club and the HOA clubhouse and grounds and others whose locations are beyond the borders of the Original Service Territory.<sup>62</sup> While PWWC acknowledges it currently provides and has been providing service to just a few non-shareholder

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<sup>59</sup> PWWC Response, at 7.

<sup>60</sup> *Id.*

<sup>61</sup> *See* 2009 GRC Order.

<sup>62</sup> *See* DPU Response to PSC’s Information Requests 1.1 and 1.2; *see also*, the PWWC Response, fn. 3.

customers, it argues that this is not providing service to the public generally. We disagree.<sup>63</sup> PWWC's interactions with the PSC and DPU over the years is further evidence of its desire to operate as a public utility serving the public in general, and have created and fueled customer expectations of and reliance on PWWC's continued culinary water service subject to the few exceptions under its approved tariff and Regulations C and F.

In PSC dockets filed between 2008 and 2019 (including its special assessment request in 2008, its 2009 GRC, and its 2019 GRC), PWWC referred to the Inn, Mrs. Southwick, the Araves, the Pineview Yacht Club, the HOA grounds and landscape, and Crimson Ridge, as "customers" in materials filed to support the applications. PWWC also provided each of these non-shareholder customers' specific financial and usage information<sup>64</sup> which DPU used to assist PWWC to create specific customer rates that the parties recommended be approved by the PSC, which the PSC approved.<sup>65</sup>

The PSC also observes that the service territory outlined in the 2019 GRC Map covers more territory than the area shown in the 2004 CPCN Map (beyond the Radford Hills and the Pineview West 1 subdivisions) although it excludes some non-shareholder customers' (like the Inn's) locations. This reflects PWWC's own desire to continue to unilaterally expand its service territory. However, as PWWC well understood in its 2019 GRC, while it may unilaterally expand its service territory, it cannot unilaterally reduce it.

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<sup>63</sup> See *Garkane Power Co. v. Public Serv. Comm'n*, 98 Utah 466, 472 (Utah 1940) (explaining that "the public" does not mean all of the people in the state or in any county or town," and that an organization that "holds itself out to serve all who wish to avail themselves of its services might be a public utility even though only one or two people actually receive service").

<sup>64</sup> See DPU Responses to PSC's Information Requests, 1.1 and 1.2.

<sup>65</sup> *Id.*

PWWC listed the following request in its 2019 GRC Notice: "... [m]odification of our recognized service area to reflect actual fact. The existing one is very old. It was created when the plat maps included other phases of development, now defunct, and additional water sources that were never built."<sup>66</sup> Also, in the Confidential Request for Approval of a Conservation Rate Increase filed April 24, 2020, under the heading titled "Service Area Reduction," PWWC explained that "[t]he service [area] needs to be reduced to the area covered by the current infrastructure. The system only has enough supply for that area without any further expansion. Several contract users should also be removed from the service area. The Snowberry Inn has their own well water supply and should be removed from the service area."<sup>67</sup> Although the law at the time, in accordance with the lower court's opinion in the related water interference claim, was that Well 4 had interfered with the Inn's and the other Private Generators' water rights, PWWC nevertheless initially requested to reduce its expanded certificated service territory and remove the Inn from its expanded service territory.<sup>68</sup> PWWC's actions here are inconsistent with its theory that it extended its service territory and lines to the Inn as a courtesy while it and others pursued their water rights interference claim. Approximately one month later, it essentially withdrew its initial request.

However, PWWC never mentioned its request for a service territory reduction again in the 2019 GRC,<sup>69</sup> even after the Supreme Court reversed the lower court's opinion in October

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<sup>66</sup> Complaint, at 12.

<sup>67</sup> *Supra*, n. 44.

<sup>68</sup> First in the 2019 GRC Notice filed in December 2019 and again in the materials filed with the Application in April 2020.

<sup>69</sup> See Informal Complaint, Exhibit G (Rather, in prefiled direct testimony, PWWC witness J. Durig testified on behalf of PWWC that "[w]e are not seeking to change the service area for [PWWC] at this time.")



2020. We did not issue our opinion in the 2019 GRC until January 25, 2021. There was time for PWWC to renew its request in rebuttal testimony due November 17, 2020, surrebuttal testimony due December 2, 2020, or even at hearing on December 15, 2020, yet it did not. In this docket, in response to PSC Information Requests, PWWC acknowledged that it had “removed [the Inn] from the service area described”, explaining that PWWC witness John Durig believed that “PWWC would not have adequate capacity for all of its 119 shareholders at full build-out of the subdivision it was formed to serve and still provide water to the Snowberry Inn.”<sup>70</sup> PWWC took matters into its own hands. However, it should have reinstated its initial request for approval of a service area reduction. At a minimum, it should have provided notice.

Utah Code Ann. § 54-3-3 states, in part, that “[w]hen any change is proposed in any rate, fare, toll, rental, charge or classification, or in any form of contract or agreement, or in any rule, regulation or contract relating to or affecting any rate, toll, fare, rental, charge, classification or *service*, or in any privilege or facility, attention [in the Notice] shall be directed to such change on the schedule filed with the [PSC] by some character to be designated by the [PSC] immediately preceding or following the item.” This prohibits proposed changes to a utility’s service, among other things, except after 30 days’ notice to the PSC and the public. PWWC could have also filed a request for a certificate of exemption. PWWC cannot now attempt to ignore this history. Contrary to its argument, the 2019 GRC Map that was appended to Tariff 3 was not sanctioned by the PSC and does not automatically reduce its current service territory

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<sup>70</sup> See *supra*, n. 46.

which includes all of the customers it serves including shareholder and non-shareholder customers, whether voluntarily or not (“Current Service Territory”).

Once PWWC assumes the obligation to serve a customer including non-shareholder customers, it may only terminate service consistent with its Tariff 3 and Regulations C or F. “To hold that property has been dedicated to a public use is ‘not a trivial thing’ [citation], and such dedication is never presumed ‘without evidence of unequivocal intention.’ However, such unequivocal intention need not be expressly stated; it may be inferred from the acts of the owner and his dealings and relations to the property. Dedication is normally evidenced by some act which is reasonably interpreted and relied upon by the public as a ‘holding out’ or indication of willingness to provide service on equal terms to all who might apply.”<sup>71</sup>

Based on the undisputed facts we discuss above, we find and conclude that PWWC’s actions from 2007 through 2020 could be “reasonably interpreted and relied upon by the public as a ‘holding out’ or indication of [PWWC’s] willingness to provide [water service] to all who [would] apply.”<sup>72</sup> within its Current Service Territory. Further, its actions demonstrate its belief that it considered the Inn and its other non-shareholders to be PWWC customers. Finally, PWWC’s attempt to remove the Inn from its service territory without going through the appropriate regulatory process further undermines its arguments in this docket.

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<sup>71</sup> See *Cal. Water & Tel. Co. v. Public Utilities Com.*, 51 Cal. 2d. 478, at 494. (As stated in *Allen v. Railroad Com.*, 179 Cal. 68, 85, 175 P. 466, 8 A.L.R. 249.)

<sup>72</sup> *Id.*

**4. Any capacity limitations of the PWWC water system that may be exacerbated by the Inn’s water service requirements can be dealt with in a cost of service study filed as part of a general rate case.**

PWWC argues that its system does not have the capacity to serve the Inn’s business and was never intended to provide service to businesses like the Inn. It further argues that Complainant has its own well and secured additional rights “that would supply all of [the Inn’s] needs if Venture were to take steps to deepen or otherwise improve its well.”<sup>73</sup> Complainant rejects the assertion stating that, “[c]ontinuation of PWWC water ... is absolutely crucial to the maintenance, operation, and success of the Snowberry Inn. ... Since PWWC began using Well [ ]4, the Snowberry Well has become unreliable and insufficient to serve the needs of the Snowberry Inn. While the Snowberry Inn continues to use the Snowberry Well when it can, it is required to rely on service from PWWC to meet its water needs.”<sup>74</sup>

PWWC submitted information to support its 2009 and 2019 GRCs which indicates that the Inn was PWWC customer number 52 and number 60, respectively.<sup>75</sup> The Inn’s customer connection is within the 133 connection limit the PSC originally approved in its 2004 CPCN order for PWWC.<sup>76</sup> The Inn has been paying its water utility invoices consistent with Tariff 3 and relies on water service from PWWC to operate. If and when PWWC reaches system capacity, PWWC can file another general rate case and a cost of service study to ensure that

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<sup>73</sup> PWWC Response, at 3.

<sup>74</sup> Complaint, at 16.

<sup>75</sup> See DPU Response to PSC’s Information Requests 1.1 and 1.2.

<sup>76</sup> We acknowledge that the Inn was not within the Original Service Territory; however, PWWC represented in documents filed as part of its general rate cases in 2009 and 2019 that the Inn was customer number 52 in the 2009 GRC, and customer number 60 in the 2019 GRC.

PWWC's infrastructure is able to support all of its customers and that those customers that require more water service pay their corresponding share without being subsidized by others who do not.<sup>77</sup>

That the Division of Drinking Water noted additional capacity would need to be added to supply the full subdivision as approved is not controlling. Title 54 vests the PSC with the authority to ensure that, among other things, PWWC's service is just, reasonable, proper, adequate and sufficient.<sup>78</sup> By contrast, the Division of Drinking Water, as the administrative arm of the Utah Drinking Water Board, exists to implement the rules that the Board adopts.<sup>79</sup> The Board ensures the appropriate sizing of public drinking water facilities and sources.<sup>80</sup> These were not intended to constrain the PSC in determining whether PWWC is providing just, reasonable, proper, adequate and sufficient service, or to estimate future demand on the PWWC water system.<sup>81</sup>

In summary, for the reasons set forth above, we find and conclude that:

- (a) PWWC voluntarily extended its water lines and started providing service beyond the borders of its Original Service Territory to the Inn and others indefinitely, and expanded its Original Service Territory in the process.
- (b) Over the years, PWWC has (i) continued to provide water service to the Inn and other non-shareholder customers without interruption, (ii) publicly considered them to be its customers, and (iii) continued to extend its service territory. PWWC understood in

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<sup>77</sup> The Inn built its connection and all the necessary equipment needed to connect to PWWC's water system in 2007, in any event.

<sup>78</sup> See Utah Code Ann. § 54-4-7.

<sup>79</sup> See [https://deq.utah.gov/drinking-water/frequently-asked-questions-division-drinking-water#:~:text=The%20Division%20of%20Drinking%20Water%20\(DDW\)%20acts%20as%20the%20administrative,the%20rules%20which%20they%20adopt.](https://deq.utah.gov/drinking-water/frequently-asked-questions-division-drinking-water#:~:text=The%20Division%20of%20Drinking%20Water%20(DDW)%20acts%20as%20the%20administrative,the%20rules%20which%20they%20adopt.)

<sup>80</sup> *Id.*

<sup>81</sup> See also, *Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, 94 P.3d 242 (Utah 2004) (explaining that "neither Title 54 of the Utah Code nor the Drinking Water Board Standards themselves require that the [PSC] rely on the Drinking Water Board Standards in estimating the need for utility plant expansion.").

the 2019 GRC that removing the Inn from its customer base and reducing its service territory requires our approval yet failed to reinstate its initial request. Therefore, its Current Service Territory continues to include the Inn and the other non-shareholder customers.

- (c) Any capacity limitations of the PWWC water system that may be exacerbated by the Inn's water service requirements can be dealt with in a cost of service study filed as part of a general rate case. When it files its next GRC, PWWC is directed to file an updated service territory map showing its Current Service Territory that includes all shareholder and non-shareholder customers, including the Inn.

**D. ORDER**

Based on our discussion above, PWWC is prohibited from terminating the Inn's culinary water service because Complainant is PWWC's customer, except consistent with Tariff 3 or Regulations C and F.

DATED at Salt Lake City, Utah, June 13, 2022.

/s/ Yvonne R. Hogle  
Presiding Officer

Approved and Confirmed June 13, 2022, as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Gary L. Widerburg  
PSC Secretary  
DW#324480

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 PSC 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 PSC fails to grant a request for review or rehearing within 30 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the PSC'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 CERTIFY that on June 13, 2022, a true and correct copy of the foregoing was delivered upon the following as indicated below:

By Email:

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Division of Public Utilities

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Administrative Assistant