

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

Formal Complaint of Ronda and Martell
Menlove against Bridgerland Water
Company

DOCKET NO. 23-001-03
ORDER ON REQUEST FOR REVIEW

ISSUED: December 29, 2023

Background

On June 14, 2023, complainants Ronda and Martell Menlove (“Menloves”)¹ filed with the Public Service Commission (PSC) a formal complaint against Bridgerland Water Company (“BWC”) relating to a frozen water line servicing their residence located in or around Garden City, Utah (“Complaint”).

The parties provided extensive comments and information in support of their respective positions on the Complaint.² The parties also participated in an approximately two-hour evidentiary hearing on September 27, 2023 (“Hearing”).³ The parties put forth witnesses at the Hearing who testified to facts relating to the Complaint and other submissions, and who were also subject to cross-examination (“Complaint Proceedings”). The Menloves’ witnesses were Martell Menlove and Ronda Menlove; BWC’s witnesses were Tana Heninger and Rob Wilson.

After a factual and legal analysis, the Order⁴ provides:

Accordingly, we find and conclude that BWC’s actions were reasonable in its efforts to provide reliable water service, and therefore BWC has not violated the Tariff. We find that BWC took reasonable steps to attempt to

¹ Reference to the Menloves herein refers collectively to Ronda Menlove, Martell Menlove, or both.

² As the PSC’s order dated November 8, 2023 (“Order”) explains, in addition to the traditional complaint and response filings, the Menloves also submitted to the PSC a series of additional communications regarding this docket. See Order at 2, n.3.

³ The Hearing was set by notice dated August 24, 2023.

⁴ Terms defined in the Order are sometimes used herein without definition.

mitigate against the 2023 Freezing Event and has also taken appropriate steps to attempt to mitigate future freezing events, including engaging professionals and determining a course of action that the record indicates will occur soon. We conclude that BWC's decisions on these points are reasonable and therefore comply with the Tariff.⁵

Based on our findings and conclusions, the Complaint was dismissed.

On November 29, 2023, the Menloves submitted with the PSC an email titled Request for Agency Review or Rehearing that provides the bases for their request ("Request for Review").⁶ This request was timely filed, and BWC did not file a response.⁷

Discussion, Findings of Fact, and Conclusions of Law

Utah law allows the Menloves' Request for Review by a timely filing that includes specific information,⁸ including a statement of "the grounds for review and the relief requested."⁹ If the Request for Review "challenges a finding of fact ..." the Menloves must "marshal the record evidence that supports the challenged finding[.]"¹⁰ A Request for Review must show that specific determinations are not supported by

⁵ Order at 21.

⁶ The Menloves previously submitted what appeared to be a request for review of the Order, but they clarified on November 29, 2023, that submission was as a "new and different complaint[]" that they requested to "be considered aside from our initial complaint[.]" which is the Complaint as defined in this order. That submission is not addressed in this order.

⁷ BWC was allowed fifteen days from the date the Menloves filed the Request for Review to file a response. See Utah Code Ann. § 63G-4-301(2) and Utah Admin. Code R746-1-801(3).

⁸ See, e.g., Utah Code Ann. §§ 63G-4-301(1) and 54-7-15(1)&(2).

⁹ Utah Code Ann. § 63G-4-301(1)(b)(ii).

¹⁰ Utah Admin. Code R746-1-801(2). See also, *State v. Nielsen*, 2014 UT 10, ¶ 41 (the focus of marshalling the record evidence is "on the ultimate question of whether the appellant has established a basis for overcoming the healthy dose of deference owed to factual findings[.]").

substantial evidence in light of the entire record.¹¹ Thus, the Request for Review cannot now challenge facts that were unchallenged at the Hearing and cannot simply identify facts that the Menloves believe support their argument on review. Moreover, to the extent the Menloves are challenging the Order with factual assertions that were not presented as evidence during the Hearing, absent a compelling reason, new information cannot be used to try to support such a challenge.¹²

Some of the Menloves' assertions are based on evidence, and challenges to evidence, that were presented at the Hearing and considered in the Order; in those instances the Menloves disagree with the Order's findings that weighed and considered the evidence. However, much of the evidence of record now challenged by the Menloves was not challenged at the time of the Hearing, in which case we are prohibited from considering those challenges at this stage. The Request for Review also fails to marshal all facts from the entire record – favorable and unfavorable – in trying to demonstrate why we should reconsider certain findings and conclusions of the Order. Additionally, some of the bases articulated in the Request for Review are

¹¹ Substantial evidence "is a quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Becker v. Sunset City*, 309 P.3d 223, 2013 UT 51, ¶ 10 (citation omitted). "Substantial evidence is more than a mere 'scintilla' of evidence and something less than the weight of the evidence." *Johnson v. Bd. of Review of Indus. Comm'n*, 842 P.2d 910, 911 (Utah Ct. App. 1992). A substantial evidence review does not reweigh the evidence and independently choose which inferences are the most reasonable. See *Vote Solar v. Pub. Serv. Comm'n of Utah*, 2023 UT 13, ¶ 86 (internal citations and quotation omitted). Instead, "when reasonably conflicting views arise, it is the [PSC's] province to draw inferences and resolve these conflicts." *Id.* at ¶ 91 (internal citation and quotation omitted).

¹² *Cf.* Utah Code Ann. §§ 63G-4-403(4)(d) and -403(4)(g).

supported by “new information that [the Menloves proffer to] have obtained since the [Hearing].” New information, however, was not evidence of record at the time of the Hearing and cannot be considered evidence of record now. Finally, part of the Request for Review requests that we address an issue outside the scope of the Complaint Proceedings,¹³ an issue that we cannot properly or equitably consider in this reconsideration proceeding.

With these standards in mind, the Menloves provide four topics upon which they specifically request review, each of which is addressed as presented in the Request for Review.

1. The Precautions Letter

The Request for Review specifically states:

[W]e request that the Precaution[s] Letter be given little, if any, consideration in the case and ... whether we, or any other homeowner[s], ran or did not run water as a precaution against our personal lines freezing has no relevance to this case and should not be considered to determine culpability for BWC’s [M]ain [L]ine freezing. We request that the Order reflect this position.

This request appears to address two items: (1) the importance of the Precautions Letter; and (2) the relevancy of compliance with the suggestions in the Precautions Letter relating to the “culpability,” or fault, for the Freezing Event. For the reasons

¹³ This limitation has been previously explained. See, e.g., Order at pages 2, n.3, 6 & n.12, 7 & n.14, 11 & n.24, and 21.

outlined below, we conclude that the findings of fact from our Order were based on substantial evidence and should not be revised.

First, consideration of the Precautions Letter was relevant to this docket.¹⁴ At issue in the Complaint was whether BWC's efforts to meet its Tariff requirements were reasonable. The Precautions Letter is substantial evidence demonstrating one of at least four different reasonable efforts undertaken by BWC to try to avoid the Freezing Event.¹⁵

Second, like the Complaint originally filed by the Menloves, the Request for Review again focuses on "culpability," or fault. However, the Order makes no finding as to whether BWC or the Menloves were at fault for the Freezing Event.¹⁶ And there is no finding in the Order that the Menloves' compliance with the suggestions in the Precautions Letter would have averted the Freezing Event. To the contrary, there was no basis to show, and no evidence supporting, what might or might not have happened regarding the Freezing Event if the suggestions in the Precautions Letter had been followed.¹⁷

¹⁴ The Menloves recognized at least some value in the Precautions Letter because they testified that, prior to the Freezing Event, they trickled water in their house (see Order at 9) and knew that running a trickle of water in their house would impact the bigger system (i.e., BWC's Main Line). See Order at 18.

¹⁵ See, e.g. Order at 18-19 ("The Precautions Letter was a reasonable action by BWC, especially in light of other efforts to prevent line freezing, in furtherance of its Tariff obligations.").

¹⁶ BWC's testimony that it did not "intend ... asking people to run personal lines so that we keep all the mains open[.]" and that BWC did "not expect people to run their personal lines just so that we don't have to do our job[.]" does not support the culpability of either BWC or the Menloves. Instead, and as stated in the Order, "[t]he object of the Precautions Letter was about uninterrupted water service during the 2022/23 winter, regardless of whether such involved the Main Line, Personal Line, or both." See Order at 18.

¹⁷ See Order at 19.

2. Freezing Event/Freeze Point

The Request for Review specifically states:

[W]e request that the Order clearly reflect that it was BWC's [M]ain [L]ine that froze and that there is no evidence that any personal lines ever froze in connection with th[e] [Freezing Event]. Additionally, where the line froze should be given minimal if any consideration in this case.

This request appears to address two items, each seeking a specific finding that: (1) BWC's Main Line froze; and (2) there was no evidence that the Menloves' Personal Lines froze. We conclude that the findings from our Order related to these assertions should not be altered.

Our Order is clear on the lack of evidence to identify the specific location of the Freezing Event. The evidence of record shows neither party knows the location of where the Freezing Event occurred.¹⁸ The Request for Review acknowledges this, stating "[w]e both testified that we did not know where the freeze occurred[.]" and "[n]o one knows exactly where the line froze."

3. Flushing of the Hydrants¹⁹

The Request for Review specifically states:

[W]e request a review of the statement in the Order that 'BWC offered credible rebuttal testimony at the Hearing addressing and explaining' (Order pp 21) our doubts that the lines were flushed."

* * * * *

¹⁸ See Order at 3, n.5.

¹⁹ "Flushing" the hydrants is synonymous with flushing the lines. See Order at 3, n.7.

[W]e request that the testimonies be reviewed in light of what we believe are the facts provided above and that those with the responsibility to make this determination do so.

This request appears to challenge BWC's testimony that it flushed the lines. Many of the facts the Menloves now provide to support their position on this topic either (1) were not supported by evidence of record during the Hearing, (2) constitute new²⁰ information that was not evidence of record at the Hearing, or (3) directly challenge the testimony of BWC that was not challenged during the Hearing. Our consideration of the Request for Review cannot constitute a new evidentiary hearing to evaluate whether BWC in fact flushed the hydrants. We conclude that the findings from our Order that BWC flushed the hydrants were based on substantial evidence and should not be modified.

The Request for Review asserts that BWC's "flushing lines ... is consistent with [BWC's] tariff to 'use reasonable diligence to provide continuous water service to its customers.'" We found in the Order that line flushing was one of four reasonable efforts undertaken by BWC to try to avoid the Freezing Event. However, we conclude that the remaining points raised in the Request for Review on this topic do not provide a basis on which to modify the Order.

First, the Menloves testified at the Hearing that BWC told them that BWC "should've been flushing [the] lines ... but ... couldn't find anyone to do it." As explained

²⁰ The Request for Review provides no explanation as to why this information was not previously provided.

in the Order, BWC admitted that it once told the Menloves that it did not have anyone to flush the hydrants, but also specifically testified that it did in fact ultimately flush them. The Menloves did not directly challenge BWC's explanation at the Hearing. Attempting to now challenge BWC's testimony on this point, the Menloves, as they did previously, again assert that BWC told two additional individuals that BWC could not find anyone to flush the lines.²¹ However, and even assuming the truth of the Menloves' assertion on this point, although neither of these individuals were present at the Hearing to offer sworn testimony on this point,²² that hearsay evidence was properly part of the record at the Hearing and was considered in context of BWC's testimony,²³ which we found to be credible, that BWC ultimately flushed the hydrants. We decline to modify that finding.

Second, in a further challenge to BWC's testimony regarding its line flushing activity, the Request for Review attempts to introduce new information. Specifically, the Menloves assert that a person who BWC testified helped in its flushing efforts allegedly did not help "flush the hydrants along th[e] section ... of BWC's [M]ain [L]ine" that serves their residence. However, this new information was not raised or provided

²¹ Contrary to the assertion in the Request for Review, the claimed information from these two individuals is addressed in the Order. See Order at 11 & n.23.

²² The Request for Review offers no explanation as to why those two individuals did not testify under oath at the Hearing. Moreover, there was nothing presented at the Hearing, or presented in the Request for Review, concerning these individuals and BWC's testimony at the Hearing explaining that it did flush the lines.

²³ We may not exclude evidence solely because it is hearsay, and we may not make a finding of fact based solely on hearsay unless certain conditions are satisfied. See Utah Code Ann. §§ 63G-4-206(1)(c) and 63G-4-208(3).

by the Menloves at the Hearing.²⁴ Moreover, as noted in the Request for Review, our Order included a finding that BWC's testimony on this topic was credible. That determination was based on the evidence of record at the time of the Hearing and was supported by substantial evidence. Even if considered on the Request for Review, however, this new information would not be significant because it is an unsworn recitation by the Menloves about what they claim to know²⁵ from a third person about what that person did or did not do.

Finally, the Request for Review on this topic challenges sworn testimony that was not challenged at the Hearing.²⁶ For example, the Request for Review attempts to challenge BWC's testimony concerning the Menloves' claim that they never saw evidence of the lines being flushed, asserting that BWC "testified that [BWC] did the flushing and was at the site on only Saturday or Sunday. How does [BWC] know the daily snow conditions when [it] testified that [it] was only here weekly?" This assertion does not accurately characterize BWC's testimony. While BWC may have testified that it snowed every other day, the testimony further provided, as stated in the Order, that "[e]very time [BWC] went up there, [BWC] had to dig out the hydrants[]" because "[t]he snowfall this year was crazy." This testimony by BWC is broader than the narrow

²⁴ No explanation has been offered as to why this new information was not provided before or during the Hearing.

²⁵ The Request for Review is silent on how the Menloves allegedly know this information.

²⁶ *Cf. Gables at Sterling Vill. Homeowners Ass'n v. Castlewood-Sterling Vill. 1, LLC*, 2018 UT 4 (party not allowed to challenge previous testimony when party failed to do so at time when challenge should have been made).

characterization asserted by the Menloves, and BWC's testimony is not inconsistent. Moreover, BWC's testimony on this point was not challenged by the Menloves at the Hearing.²⁷

Similar to the way the Request for Review asks us to view the Precautions Letter, the Request for Review focuses on one aspect of the entirety of the reasonableness analysis, an analysis supported by substantial evidence. Based on the evidence we considered in the Order, we found that BWC took at least four reasonable precautionary actions to try to avoid the Freezing Event. BWC sent the Menloves the Precautions Letter, BWC had the Menloves' neighbor run water from the outside of his house throughout the 2022/23 winter, BWC added more gravel to the road covering the Main Line after the 2019 Freezing Event, and BWC flushed the lines.²⁸ The line flushing complained about in the Request for Review was simply one of at least four distinct efforts BWC undertook to meet its Tariff obligations.

4. The Bleeder

The Request for Review specifically states:

[W]e continue to seek assistance in assuring that this issue is resolved as initially recommended by [BWC] or as determined as the best/better resolution by a certified/licensed water engineer.

* * * * *

²⁷ The Request for Review also asserts that BWC did not specifically testify that its line flushing efforts occurred prior to the Freezing Event, nor did BWC provide dates or logs that would support BWC's line flushing activities. However, these new challenges were also not made at the Hearing and accordingly, we cannot consider them now in the context of the Request for Review.

²⁸ See Order at 9, 12, 18-19, and 20.

[W]e would like BWC to provide a permanent long-term fix to this problem as determined by those who have experience in this area and are certified/licensed to make such a recommendation.

This request appears to request that we order BWC to undertake efforts – as determined by experienced and certified/licensed personnel – to do whatever it takes to prevent any future freeze events from ever happening again. The PSC understands the Menloves' frustration with the Freezing Event (and the 2019 Freezing Event). However, this request was not supported by substantial evidence at the Hearing, and accordingly we cannot reconsider the issue now.

First, the Request for Review appears to indicate that this issue has already been partially resolved. The Request for Review seeks “assistance in assuring that this issue is resolved as initially recommended by [BWC] or as determined as the best/better resolution by a certified/licensed water engineer.” The Request for Review acknowledges that “the bleeder installation was completed on or around November 17, 2023.” As demonstrated by the evidence of record, and reflected in the Order, the “bleeder installation” was BWC’s initial recommendation.²⁹

Second, the Menloves’ desire that resolution of this issue be permanent and long-term, and that the solution be determined by an experienced and certified/licensed professional is, as previously explained to the Menloves,³⁰ outside

²⁹ In fact, the Menloves questioned BWC extensively on this issue at the Hearing. See Order at 11, n.24, and 13-14.

³⁰ In the Complaint Proceedings, the Menloves provided several submissions concerning this topic. On July 11, 2023, the Menloves provided a submission stating, among other things, their desire that future freezing events be avoided, suggesting specific construction solutions, and expressing concern about

the scope of this docket. The complaint process generally is not designed to address issues that potentially impact many or all customers of a particular utility's services.³¹ Nevertheless, there was not substantial evidence presented at the Hearing that BWC's decision to install the bleeder was based on advice from an unqualified individual or was performed by an unqualified individual. Accordingly, we decline to modify our conclusion that the installation of the bleeder was a reasonable action undertaken by BWC.

Finally, the Request for Review on this topic again presents new information and/or challenges now that should have been, but were not, challenged at the Hearing. The Menloves' attempt to challenge testimony regarding how BWC decided on the bleeder solution, claiming that new information reveals that the bleeder solution may not be the best solution or that this new information is inconsistent with BWC's testimony on this issue. However, as like many other challenges raised in the Request for Review, this too was neither evidence of record nor raised at the Hearing.

whether the water line was appropriately installed. On August 25, 2023, the Menloves provided another submission requesting, among other things, that BWC utilize a licensed water engineer in the remedy to this situation. Finally, by submission dated August 28, 2023, the Menloves reasserted the request that BWC utilize a certified water engineer and advised that BWC has refused to inform them who the engineer will be, or whether BWC is using an engineer. The PSC responded to these submissions explaining, among other things, the PSC's limited jurisdiction in this docket and provided information as to a possible alternative course the Menloves could pursue outside of this docket.

³¹ See, e.g., *Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶ 36 (matters before the PSC "are not designed to consider only the interests of the litigating parties. The [PSC] must consider the interests of the utility's customers and the interests of the public.") (internal citations omitted).

Conclusion

We are not unsympathetic to the Menloves being without water service for an extended period, or with their desire that any future freeze events never happen again. However, and as stated in the Order, the standard to which BWC is held is reasonableness. And in reviewing all evidence of record, the Order reflects our considered determination based on the facts that were properly before us. Those facts provide a spectrum from which to determine the reasonableness of BWC's actions in its attempts to mitigate against the Freezing Event, in contrast to the narrower topics in the Request for Review. None of the topics raised by the Request for Review were singularly dispositive in our determination that BWC's actions were reasonable in its efforts to meet its Tariff obligations.

In the overall analysis, even if the arguments raised in the Request for Review had been fully raised at the Hearing, our finding remains that substantial evidence supports the reasonableness of BWC's actions and efforts to provide reliable water service. Accordingly, we decline to modify the conclusion from our Order that BWC did not violate the Tariff, and that BWC has also taken appropriate steps to attempt to mitigate future freezing events, including engaging professionals and taking a course of action that apparently concluded on November 17, 2023.

ORDER

For the reasons set forth herein, and finding our Order supported by substantial evidence as to each of the four topics identified in the Request for Review, we deny the Request for Review.

DATED at Salt Lake City, Utah, December 29, 2023.

/s/ John E. Delaney
Presiding Officer

Approved and confirmed December 29, 2023, as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ John S. Harvey, Ph.D., Commissioner

Attest:

/s/ Gary L. Widerburg
PSC Secretary
DW#331548

Notice of Opportunity for Judicial Review

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 December 29, 2023, a true and correct copy of the foregoing was delivered upon the following as indicated below:

By USPS:

Ronda and Martell Menlove
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By Email:

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