- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of David L. Bradshaw vs. Wilkinson Water Developer=s Request for Commission Intervention	))))	DOCKET NO. 00-019-01 ORDER ON RECONSIDERATION

ISSUED: February 26, 2002

By the Commission:

The Commission originally adopted an Administrative Law Judge Recommended Order in this Docket on January 4, 2001. The Order dismissed Mr. David Bradshaw's complaint, determining that he had "failed to prove violations of [Wilkinson Water Company's] tariffs, or of Commission rules, or other applicable law." January 4, 2001, Order, page 4. Thereafter, Mr. Bradshaw petitioned for reconsideration. The Commission granted reconsideration on March 14, 2001. After numerous, unsuccessful efforts by the parties to mutually resolve their dispute after the grant of reconsideration, the parties informed the Commission that they were unable to resolve the matter through mutual agreement and that the Commission should proceed with reconsideration. Discussion with counsel for the parties indicated that the parties had factual disputes on matters which they claimed were relevant to resolution of the dispute and continued to have disputes concerning the application of the factual record previously developed in this matter. After the parties' requested extensions, a second hearing was held January 8, 2002. At that hearing, Mr. Bradshaw was represented by J. Craig Cook and Scott Crook, of the law firm of Nielsen & Senior, Wilkinson Water Company (Wilkinson Water or the Company) was represented by David Wright and William N. White, of the law firm of White & Mabey, and the Division of Public Utilities (DPU) was represented by Kent Walgren, Assistant Attorney General.

At the January 8, 2002, hearing, the parties introduced evidence through the following witnesses: Mr. Bradshaw; William Birkes, a representative of the Utah Division of Drinking Water, Department of Environmental Quality; Mike Babcock, a real estate developer; Barry Golding, an employee of the DPU; and Wayne Wilkinson, manager of Wilkinson Water. The evidence introduced at the January 8, 2002, hearing did not vary much from the evidence introduced at the prior hearing held October 3, 2000. Although the January 8, 2002, evidence replicates the prior evidence, it does provide greater detail or depth on the circumstances facing Mr. Bradshaw and Wilkinson Water. It also highlights the ultimate underlying dispute between the parties and clarifies that the Commission's prior order, although correct on the issue(s) that it addressed, did not resolve this dispute. The fundamental dispute between the parties concerns the just and reasonable terms, conditions and charges by which Wilkinson Water would serve in Mr. Bradshaw's proposed real estate development, including customers who subsequently move into the development.

At the second evidentiary hearing, the parties presented evidence reflecting their respective views of how to calculate the demand for water utility services, from Wilkinson Water's existing customers and those that may locate in Mr. Bradshaw's proposed development, relative to Division of Drinking Water recommendations for water source (gallons per minute production capability) and water storage amounts. The parties have conflicting views on how to determine the irrigable area of lots of existing customers and possible future customers of the Company. This calculation has bearing on determining the gallons per minute that the Division of Drinking Water's recommendations suggest the Company's wells should be able to produce. Mr. Bradshaw's calculation results in a lower number, which on an average basis, appears to be within the Company's wells' current capacity. Wilkinson Water's calculation produces a higher number, which would appear to exceed the current capacity.

Although the Commission believes that consideration of well production capacity has relevance in this matter, it does not believe that the absolute numbers resulting from the competing calculations should be directly applied in the fashion advocated by the parties. Whether the Company's wells appear to have production capacity that falls short of or exceeds the gallons per minute recommendations of the Division of Drinking Water, is not singularly dispositive of determining

the terms and conditions by which Wilkinson Water would prepare to serve possible, future customers in Mr. Bradshaw's proposed development. As Mr. Birkes, a representative of the Division of Drinking Water, testified, the recommendations are just that, recommendations. A water company's actual well production capability may vary from the numerical value suggested in an application of the recommendations to the company and still be an approved system. Mr. Birkes' testimony established that a system's evaluation is made on a number of factors. A company could have well capacity below or above the recommended gallons per minute and still receive either an approved or unapproved classification. Similar to the obligation our utility law imposes for "adequate service," see, U.C.A. § 54-3-1, the Division of Drinking Water's evaluation attempts to make a determination of the overall adequacy of a system's service. Absolute compliance with a water production recommendation is not necessary.

Such evidence has less direct relationship in resolving the actual dispute between the parties. Were the dispute about Wilkinson Water's current adequacy of service to Mr. Bradshaw, as a water service consumer, or to other existing customers, we would place greater weight on such evidence. But the parties' dispute deals with who bears the costs, and the recovery of such costs, of preparing to meet anticipated, future water service demands of consumers who may move into Mr. Bradshaw's proposed development. As will be discussed below, the Commission believes this evidence has some relevance to our consideration, but not in a 'straight by the numbers' application presented by the parties.

The parties' varying irrigable acreage assumptions and calculations also have an impact on comparing Wilkinson Water's water storage capacity to the level suggested by the Division of Drinking Water's recommendations. Again, Mr. Bradshaw's calculation results in a value below Wilkinson Water's current storage capacity; compared to the Company's calculation, which exceeds current capacity. In this instance, however, in addition to their opposing views of what constitutes the irrigable acreage, Mr. Bradshaw also includes a smaller value (60,000 gallons as opposed to 120,000 gallons) for storage levels for fire flow needs. Mr. Birkes' testimony established that the higher value is correct. When Mr. Bradshaw's calculation is corrected for this error, even his calculations show that the Company's existing storage capacity is less than that suggested by the recommendations. The testimony did establish that Wilkinson Water, in its usual operations, is using water storage capacity it does not own. Because the water storage capacity owned by the Wilkinson family is not physically segregated from the Company's storage capacity, the Company has routinely used the Wilkinson family's available capacity to meet the water service needs of the Company's customers. There was no evidence that the Company is paying the Wilkinson family any compensation for the Company's use of this additional storage capacity. As in well production capability, we believe information on water storage capacities is relevant, but not in as direct a fashion as advocated by the parties.

Mr. Bradshaw reargues his contention that Wilkinson Water's Facility Extension Policy, included in its tariffs, has application in resolving the dispute. As we originally held, we disagree. As the Commission construes those provisions, they are not applicable to Mr. Bradshaw's situation. The Commission continues to construe the Facility Extension Policy as applicable to a customer or prospective customer who requires an extension of the Company's facilities in order to begin his own consumption of water services offered by the Company. As such, the tariff's overall provisions make sense, relative to a utility's cash flows and investments. The Company may be required to extend its facilities, but the customer is required to bear the costs of extending distribution facilities and any necessary upgrades. Although the Facility Extension Policy's provisions state that the Company bears the costs of providing water storage and supply in this situation, the Company also receives revenues from charging the customer the service connection charge set out in its tariff and receives ongoing monthly revenues from the customer's monthly fixed charge and water consumption charges included in the tariff.

This is not Mr. Bradshaw's situation. Mr. Bradshaw would require Wilkinson Water to expand and upgrade facilities, not to meet Mr. Bradshaw's own water service consumption, but to be prepared to serve possible, future customers in his proposed development. But Mr. Bradshaw would make no additional contributions to the Company's costs beyond dedicating the distribution system which Mr. Bradshaw would ultimately install within the proposed development upon completion of the subdivision. The evidence introduced in this record shows that Mr. Bradshaw's efforts to actually develop the proposed subdivision have been intermittent. A number of years passed between the time Mr. Bradshaw first sought commitment from Wilkinson Water to provide water services to the proposed development and when he subsequently approached the Company for a written commitment from the Company. [(1)]

With Mr. Bradshaw's proposed multi-lot development, Wilkinson Water faces the prospect of incurring costs to be

prepared to serve possible, future customers, in Mr. Bradshaw's multiple lot development. While the Company incurs such expansion costs in the near term, it would be left to the vagaries of the approval process for the subdivision, development of the real property, placement of the subdivision's infrastructure, individual lot marketing, sale, and development, and Mr. Bradshaw's diligence in performing these activities. Thereafter, the Company would have an opportunity to begin receiving revenues to help defray the costs incurred to be able to provide service to an ultimate customer who eventually receives water service in the proposed subdivision. While numerous utilities have tariff provisions that attempt to address the costs and risks, and allocation of the costs and risks, associated with a utility's for possible future service in a developer's proposed development, Wilkinson Water does not have such provisions in its tariff. It is precisely this lack of pre-existing tariff terms and conditions that precipitated the parties' dispute. The Commission's prior Order discusses relevant considerations the Commission has made in the past, when addressing the reasonableness of the terms and conditions a developer and utility[(2)] face in this type of situation, but did not provide any resolution of the dispute in this particular case where Wilkinson Water has no applicable tariff provisions. In this regard, Wilkinson Water's existing water production and water storage capacities have some relevance. Where possible, future demand from individuals who may locate in Mr. Bradshaw's proposed subdivision make the Company's existing capacities appear to be inadequate, expansion may be reasonable. But the Company, and its existing customers, could be saddled with expanded plant, ready to provide service in Mr. Bradshaw's proposed development that may be slow to materialize, or never materialize, depending on Mr. Bradshaw's pace of activities and success. Mr. Bradshaw's request that the Company prepare to serve his multi-lot subdivision represents an increase of over ten percent in the Company's customer base and likely the same or greater increase in services demanded by this single project. The Commission believes that this scale is sufficiently significant for a small water utility and its existing customers to require the proposed subdivision's developer to participate in bearing the risks and costs of expanding a utility system to meet his project's needs.

Having reviewed the January 4, 2000, Order on reconsideration, the Commission concludes that there is no need to alter the previous findings or discussion. The Commission recognizes, however, the need to address and provide guidance on the specific dispute between the parties, i.e., what constitutes just and reasonable terms and conditions by which Wilkinson Water would be prepared to provide future service to customers who may locate in Mr. Bradshaw's proposed subdivision, when the Company has no applicable tariff provisions.

The record does not develop a reason to depart from the Commission's past practice of placing the financial responsibility upon the real estate developer, with the concomitant developer opportunity to recover these costs in the sale of the developed property lots. In resolving this dispute, one must consider the direct costs of additional facilities and equipment and costs of their construction or installation; the costs incurred in the temporal disparities from the timing of preparation to provide utility service and the time transpiring in real estate development, from concept to actual customer occupancy on developed land; and the allocation of these costs and risks associated with their incurrence and recovery. As indicated in the prior Order, the Commission has concluded that it is just and reasonable to have the real estate developer shoulder the financial burden and risks associated with his own development. Otherwise, a small water utility's customers must be exposed to the detritus of the developer's possible failure or lack of profitable success. Nothing in the existing record supports a departure when dealing with Mr. Bradshaw's proposed development.

This is not to say that the real estate developer must pay for any water plant facility conceived by the utility. The Commission places upon the developer the burden of his own development, but no more than what is reasonably attributable to providing service to his proposed development. The record developed in this case suggests that Wilkinson Water attempted to follow this approach in preparing to provide service to a real estate development undertaken by Mr. Babcock. Mr. Babcock was required to pay for the proportionate share of water plant that was installed in connection with the Company's preparation to serve Mr. Babcock's proposed subdivision. The Commission concludes that it is reasonable to require Wilkinson Water and Mr. Bradshaw (and any other multi-lot real estate subdivision developer) to follow the same course, until Wilkinson Water has Commission approved tariff provisions which address this type of land development situation.

Mr. Bradshaw will be required to pay for the proportionate share of water plant costs that are reasonably attributable to provide water service to his proposed subdivision. These costs include the physical water plant, which includes water source (new wells or upgrades for increased water production from existing wells), water storage tanks, water distribution facilities and equipment, and the costs incurred in planning for such plant and its construction and

installation. We recognize that utility plant development is not necessarily sized, engineered or built to provide service solely to one development. Deployment of utility plant takes into consideration the current and future uses of existing customers, potential customers that might locate in the proposed subdivision and potential customers that may locate elsewhere in the utility's service territory. As long as the overall deployment of additional water plant is reasonable in relation to the Company's reasonable operations, Mr. Bradshaw should provide for the recovery of a proportionate amount of the costs. The proportion should be based upon the capability or capacity of the plant installed and the capability or capacity reasonably needed to provide service to Mr. Bradshaw's proposed development. Wilkinson Water will bear the costs associated with water plant that is planned or put in place that exceeds the needs of Mr. Bradshaw's proposed development.

The Commission hopes that the parties can reach agreement on what constitutes reasonable plant deployment, reasonable costs to deploy such plant and Mr. Bradshaw's reasonable proportion of such plant and costs. Because of the parties' past intractability in reaching a mutually acceptable resolution, that hope may prove futile. While it would be helpful to provide greater detail in this order, the record does not provide support for many detailed instructions. The parties begin with widely varying views on even the initial aspects of determining the water service demand for the proposed subdivision. From the record testimony, it appears reasonable to assume that the irrigable acreage of a lot is sixty to seventy percent of its total size. However, Mr. Bradshaw has significant control over the calculation of the irrigable acreage, based upon the restrictive covenants he may impose upon the lots he intends to develop. The record also reflects that calculations of water needs based upon Division of Drinking Water recommendations and assumed water consumption does not mirror actual use for individual consumers. Mr. Bradshaw's own prolific water consumption, as a current customer of Wilkinson Water, is notable in comparison to the consumption of other customers.

Wilkinson Water complained that Mr. Bradshaw had not provided detailed engineering plans for the plant that is necessary to provide service to the proposed subdivision. It is not clear if these missing plans are for the distribution facilities (e.g., pipes) to be located in the proposed subdivision, or if they are for other types of plant, located inside or outside of the subdivision, needed, in conjunction with existing Company plant, to be able to provide service to the proposed subdivision (e.g., storage tanks). In the first instance, it is reasonable to have Mr. Bradshaw provide plans for the distribution facilities to be placed in the proposed subdivision. If the later case, however, we would be surprised if Mr. Bradshaw has access to needed information on the location, design and capacity of the Company's existing plant, in order to prepare plans for the integration of existing and new plant that even he thought was reasonably needed to provide service to his proposed subdivision. The Commission believes it more likely that Wilkinson Water would study and prepare plans to integrate Mr. Bradshaw's proposed subdivision into the Company's water system. Wilkinson Water did introduce estimates of costs for plant that it could install, but did not present sufficient or credible evidence that the specified equipment and other items are reasonably necessary to prepare to provide service in Mr. Bradshaw's proposed subdivision and what Mr. Bradshaw's reasonable portion might be.

Wherefore, based upon the record, our January 4, 2001, Order and the discussion herein, the Commission orders as follows:

1. Should David Bradshaw desire to proceed with his proposed development and obtain Wilkinson Water Company's commitment to provide water utility service in the proposed subdivision, he shall be required to provide for a proportionate share of reasonable costs of reasonably necessary water plant installed or required to provide utility service to the proposed subdivision.

2. This order represents our final order on reconsideration. We recognize that the parties may have future disputes in implementing this order. We direct the Division of Public Utilities to act as a mediator to facilitate resolution of future disputes between the parties.

3. To the extent that the parties are unable to reach mutually acceptable resolution of future issues, further proceedings may be conducted by the Commission. Parties will be required to submit an itemization of the aspects of an issue that continues to be disputed and pre-file evidence necessary to resolve the dispute. Scheduling of further proceedings will be set as needed.

Dated at Salt Lake City, Utah, this 26th day of February, 2002.

/s/ Sandy Mooy, Hearing Officer

Approved and Confirmed this 26th day of February, 2002, as the Report and Order of the Public Service Commission of Utah.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie P. Orchard
Commission Secretary

Gr#28221

[1] The written commitment is needed for Mr. Bradshaw to obtain preliminary approval for the proposed development from local government and zoning authorities.

[2] The consideration is not limited to the impacts upon the developer and the utility. We must also consider the impact the terms and conditions may have on the existing and future customers of the utility. See, U.C.A.§54-3-1. Costs and risks not allocated to the developer or utility owners end up being shouldered by the utility's customers.