

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Formal Complaint of )  
Nicole McMillian, *et al* against Wilkinson ) DOCKET NO. 09-019-01  
Cottonwood Mutual Water Company ) ORDER DENYING MOTION TO DISMISS  
) AND NOTICE OF SCHEDULING  
) CONFERENCE  
)  
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ISSUED: February 28, 2011

By The Commission:

This matter is before the Commission on Wilkinson Cottonwood Mutual Water Company's (Company) Motion to Dismiss, filed on or about January 11, 2010. The Company contends the Commission lacks jurisdiction over it because it "serves water only to its shareholders and, therefore, does not qualify as a public utility." Alternatively, it argues this Complaint should be dismissed because the Company "qualifies for, and has been granted, an exemption from regulation." *Company Motion to Dismiss*, p.1. The petitioner filed her opposition on or about February 3, 2010, arguing generally that she had raised sufficient allegations for the Commission to deny the Motion, investigate the matter, and determine whether the Company's exemption was properly obtained and properly maintained.

On February 22, 2010, the Commission issued an Order wherein it found that the parties disputed a key allegation upon which Commission jurisdiction lies. *February 22, 2010 Report and Order (February 2010 Order)*. It noted that the Complaint, on its face, alleged<sup>1</sup> the Company "has failed to issue shares to its members" and alleged that it had "yet to issue shares

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<sup>1</sup> A motion to dismiss for lack of jurisdiction is made under the Utah Rules of Civil Procedure, R.12(b)(1) (subject matter jurisdiction) or 12(b)(2) (jurisdiction over the person). When considering the Motion to Dismiss and in ascertaining the facts needed to establish jurisdiction, the Commission must "'accept the factual allegations in the complaint as true and consider all reasonable inference to be drawn from those facts in a light most favorable to the plaintiff.'" *Ho v. Jim's Enters.*, 2001 UT 63, ¶ 6 (quoting *Prows v. State*, 822 P.2d 764,766 (Utah 1991)).

to its members” and is providing water to “over 200 homes and is obligated to provide water service to an existing elementary school.” The Commission ordered a limited investigation by the Division of Public Utilities (Division) to “determine if any of the 200 homes or the existing elementary school, or any other party, receives water without being issued any share in the Company. That is—whether the Company serves those who are not members, and could be considered members of the general public.” *Id. at p.2. See Cf. Anderson v. American Soc’y of Plastic Surgeons*, 807 P.2d 825, 827 (Utah 1990) (holding that when jurisdiction is at issue, the adjudicative body may “under Rule 12, . . . determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing.”) The Commission granted the Division 30 days from the issuance of the Order to issue its findings to the Commission.

In March 2010 the Division requested 60 additional days to review data provided it by the Company before issuing a recommendation, stating that there were volumes of information that needed to be reviewed. The Commission granted the extension of time. In May 2010, the Division requested additional time to review and verify remaining and further information provided it by the Company before making a recommendation to the Commission. The Commission granted the extension. In June 2010, the Division submitted its initial recommendation and found that the Company was serving customers who were not shareholders. In August 2010, the Commission granted the Company’s requested extension to address issues raised in the Division initial recommendation, and to address what it characterized as clerical or administrative errors. In September 2010 the Company requested additional time which the Commission granted. Also in September 2010, the Commission ordered the Division to review

additional information provided by the Company and submit an amended recommendation, specifically addressing whether it still maintained the Company was serving non-shareholder or non-members. In October 2010, the Company filed its response to the Division, generally arguing that it was not serving any non-shareholders/non-members, disputing the Divisions initial findings. In October 2010, the petitioner requested until November 2010 to respond to the Company and the Division, which request the Commission granted. The petitioner filed its response to the Company and the Division, and generally argued that the Motion should be denied, as the issue of whether the Company properly obtained and maintained its exemption was not yet resolved by the findings presented by the Division and allegations raised by the Company. It requested the Commission continue with a formal investigation. The Division asked for additional time to review the Company's information, as ordered by the Commission's September 2010 Order. The Commission granted the Division until January 2011 to submit its amended recommendation. The Division filed its amended recommendation on January 2011. It recognized that the Company had corrected several clerical errors, but found that ultimately, on the face of the evidence provided to the Division, the Company was serving non-shareholders, that the Commission should deny the Motion, and proceed with a formal hearing on the Complaint.

The Administrative Law Judge of the Commission held a hearing on Wednesday, February 2, 2011. Wendy Bowden Crowther was counsel for the petitioner. Matthew Jensen was counsel for the Company. Patricia Schmid, assistant attorney general, was counsel for the Division.

The Commission finds that the petitioner has sufficiently alleged that the Company has improperly obtained and/or maintained its exemption. The Division's limited investigation into the circumstances serving as a basis for the Commission's jurisdiction, at the very least, disputes the Company's claims that it is not subject to Commission jurisdiction and that it is entitled to an exemption. The initial findings before the Commission show that there is a basis for the Commission to assert jurisdiction sufficient to further investigate the Complaint, deny the Company's Motion, and proceed with a formal investigation of the Complaint. *These findings are not a final order<sup>2</sup> on any of the allegations in the petitioner's Complaint, including allegations the Company is or is not entitled to an exemption.* This Order merely denies the Motion to Dismiss, and establishes the commencement of the formal investigation. The Commission will establish a scheduling order, where—after an appropriate period of discovery, the filing of any dispositive motions will be scheduled, including any related to the continuing jurisdiction of the Commission.

ORDER

The Company's Motion to Dismiss is denied.

NOTICE OF SCHEDULING CONFERENCE

Notice is hereby given that a scheduling conference in the above entitled matter will be conducted by the Administrative Law Judge of the Public Service Commission of Utah on **Monday, March 14, 2011 at 9:00 a.m., Fourth Floor Room 401**, Heber M. Wells State Office building, 160 East 300 South, Salt Lake City, Utah.

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<sup>2</sup> The denial of a motion to dismiss is not a final order. *See Heber Light and Power v. Public Serv. Comm'n*, 2010 UT 27, ¶¶ 7, 12.

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Individuals wishing to participate by telephone should contact the Public Service Commission two days in advance by calling (801) 530-6716 or call toll-free 1-866-PSC-UTAH (1-866-772-8824). Participants attending by telephone should then call the Public Service Commission five minutes prior to the conference to ensure participation.

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during any proceeding should notify Julie Orchard, Commission Secretary, at 160 East 300 South, Salt Lake City, Utah 84111, (801) 530-6716, at least three working days prior to the hearing.

DATED at Salt Lake City, Utah, this 28<sup>th</sup> day of February, 2011.

/s/ Ruben H. Arredondo  
Administrative Law Judge

Approved and confirmed this 28<sup>th</sup> day of February, 2011, as the Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary  
G#71308