

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

RECEIVED

IN THE MATTER OF THE APPLICATION)
OF KOOTENAI HEIGHTS WATER)
SYSTEM, INC. FOR A CERTIFICATE OF)
PUBLIC CONVENIENCE AND NECESSITY)

CASE NO. KHW-W-05-01 JAN 11 2007

ORDER NO. 30219

DEPARTMENT OF
WATER RESOURCES

The Idaho Public Utilities Commission (Commission) issued final Order No. 30122, granting Kootenai Heights Water System Inc.'s (Kootenai Heights, Company) request for a Certificate of Public Convenience and Necessity authorizing it to operate as a public utility in the State of Idaho. Order No. 30138. The Company filed Comments and Objections filed to that order on September 22, 2006. It objected to the Commission's assertion of jurisdiction over it stating that it is not a public utility. *Id.* at 1.

On October 3, 2006 the Commission granted reconsideration solely on the issue of whether Kootenai Heights is a public utility as defined by Idaho Code and thus subject to the jurisdiction of the Commission. *Id.* at 2. Because this reconsideration involves issues of law only, the parties were directed to file legal briefs and/or memoranda regarding the issue of Commission jurisdiction. *Id.* With this Order the Commission affirms its assertion of jurisdiction in Order No. 30122 as more fully set forth below.

FACTS

The following facts are derived from the Company's filings with the Commission. These facts are undisputed.

Kootenai Heights filed an Application on August 22, 2005 seeking a Certificate of Public Convenience and Necessity from the Commission. The Company stated, "Please issue a Certificate of Public and Convenience and Necessity authorizing Kootenai Heights Water System, Inc. to operate as a public utility in the state of Idaho, and to serve the geographical area requested." Kootenai Heights Application Cover letter, p. 1.

The Company submitted various supplemental documents with its Application including: a map of the proposed service area, a Water Service Agreement and Easement form, documents evidencing the incorporation of the Company, a copy of the contract with its Certified Operator, a copy of a Clarification-Modification of the Plat for Kootenai Heights, and a letter

from the Department of Environmental Quality (DEQ) evidencing conditional approval of the as-built plans.

At the time of the Application the water system was currently in service with six residential customers connected to the system. Application at 2. The Company stated that the system would ultimately serve 11 residential customers. *Id.* The requested service area for the water system consists of Lots 7-18 of Kootenai Heights, with the well located on Lot 10. Application at 1. The Company stated that the cost to construct the system was \$83,500 including the value of Lot 10. Application at 2. It stated that average monthly consumption for the entire system is 31,000 gallons, and that billing would start on October 1, 2005. *Id.* The Application stated that proposed rates and charges, rules and forms are all contained within the Water Service Agreement submitted with the Application. *Id.*

The Water Service Agreement and Easement (WSA, Agreement) states that the system was developed to provide water “to certain Lots in Kootenai Heights and for further development of additional land and lots in the sole discretion of the Water Provider.” WSA at 1. The WSA further provides that each lot shall pay a hook-up fee of \$5,000, and that rates will be \$40 per month up to 10,000 gallons, and \$4 per thousand gallons used over 10,000 gallons per month. WSA at 2. Each customer will be metered, with the cost of the meter and its installation paid by the Company. *Id.* The Agreement states that monthly rates will not be increased for the first five years. WSA at 2-3. Additionally, the Agreement states that monthly bills will not be sent, and the lot owner shall pay the monthly fee on the 1st day of each month. WSA at 3. Billings will be sent to customers twice a year, on or about May 1 and October 1, for the purpose of computing and billing any excess water usage over the allowed 10,000 gallons per month. WSA at 3-4.

DISCUSSION

I. The Commission's Jurisdiction

The sole issue is whether Kootenai Heights Water System, Inc. is a public utility under the jurisdiction of the Commission. The Commission is vested with the power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of Title 61, Idaho Code. *Idaho Code* § 61-501. *Idaho Code* § 61-129 defines the term “public utility” and states that entities meeting that definition will be subject to the jurisdiction, control, and regulation of the Commission.

The term “**public utility**” when used in this act includes every . . . **water corporation** . . . as those terms are defined in this chapter and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and the provisions of this act . . .”

Idaho Code § 61-129 (emphasis added).

The term “**water corporation**” when used in this act includes every corporation or person, their lessees, trustees, receivers or trustees, appointed by any court whatsoever, owning, controlling, operating or managing any **water system** for compensation within this state.

Idaho Code § 61-125 (emphasis added). A corporation does not include a municipal corporation, a mutual non-profit or cooperative, or any other public utility organized and operated for service at cost and not for profit. *Idaho Code* § 61-104.

The term “**water system**” when used in this act includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other **real estate, fixtures and personal property, owned, controlled, operated or managed** in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic or other beneficial use **for hire**.

Idaho Code § 61-124 (emphasis added).

A water corporation (as defined above) is a public utility subject to the jurisdiction, control, and regulation of the Commission where the service is performed and the commodity delivered to the public or some portion thereof for compensation within the state of Idaho. *Idaho Code* § 61-129.

Shortly after the legislative enactment of Idaho’s Public Utilities Laws, and just after the turn of the 20th century, there were several cases that challenged the constitutionality of Idaho’s public utility regulatory scheme, as well as the Commission’s jurisdiction. *See Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 141 P. 1083 (1914); *Stoer v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921); *Humbird Lumber Co., v. Public Utilities Commission of State of Idaho*, 39 Idaho 505, 228 P. 271 (1924).

The *Natatorium* and the *Humbird Lumber* cases both address the Commission’s jurisdiction in relation to water companies. In *Humbird Lumber* the lumber company had constructed and installed complete water systems at its plants for use in its operations and for fire

protection. *Humbird Lumber*, 39 Idaho 505, 228 P. 271, 272 (1924). Northern Pacific Railway Company had its own depots, roundhouses, cattle pens, office, etc. . . . adjoining to the plants of the lumber company. *Id.* The railroad had its own water system installed, and received its water from the Sandpoint Water & Light Company, a public utility. *Id.* The railroad discontinued its service from Sandpoint Water & Light and connected its system with that of the Lumber Company. *Id.* The lumber company thereafter supplied the railroad with water under contract. *Id.* It was stipulated that the lumber company never furnished water to any other person, company, or corporation, did not intend to engage in the utility business, and did not offer to and did not intend to offer to engage in the utility business in any manner whatsoever. *Id.* The Court concluded that: (1) the evidence did not justify the conclusion that the lumber company was “operating” its water system “for compensation” because the primary purpose was always to provide fire protection for its sawmills, and the supply to the railroad was incidental to that primary purpose; and (2) furnishing water to one person or corporation, under contract, does not constitute a delivery of water to the public or some portion thereof. *Id.*, 228 P. at 272-73.

Similarly, in *Stoer v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921), it was stipulated that:

The said hot water was not developed and acquired for the purpose of sale to the general public, and neither the Natatorium Company nor any of its predecessors in interest have ever held it open to use or purchase by the general public but at all times since its original discovery it was, and now is, intended for use primarily for the said natatorium for sanitary and bathing purposes.

The primary purpose of the Natatorium’s water was to supply itself with natural hot springs water for bathing and sanitary service, and similar to that in *Humbird Lumber* was never intended or held out to be a utility. The people who received hot water at their homes for heating did not rely upon the Natatorium’s service for potable, drinking water.

Today, the Commission’s jurisdiction is viewed as a combination of the definitions from statute set out above and a “totality of circumstances” approach that the Idaho Supreme Court and the Commission have taken in the past. For example, in 1995, Falls Water Company, Inc. changed its corporate status from “for profit” to “not for profit” with the Idaho Secretary of State. *See* Order No. 26443, Case No. FLS-W-95-1. Falls Water then sought to surrender its Certificate of Public Convenience and Necessity No. 236, believing that changing its corporate

status to non-profit would permit it to operate free of the Commission's jurisdiction, control, and regulation. However, Commission Staff took the position that in order for a non-profit corporation to avoid regulation it must be structured in such a manner that the customers, not the developer, have ultimate control of the Company, its operations and management, and the pricing of its water and related services. This position is consistent with *Idaho Code* § 61-104, as well as the regulatory compact meant to prevent monopoly exploitation.

Consequently, in addition to the Company's corporate, or business entity, definitional status there are other factors that are relevant to the question of whether the Commission has jurisdictional authority over the regulation of the Company. These factors include: the primary purpose for the Company's operation; whether the Company intended or held itself out to be a utility; whether the Company provides service to the public or some portion thereof that is larger than a single customer; whether the Company's customers have any control over the operation, management, and rates of the Company; and whether customers have any alternatives or choice in their service provider. *See Humbird Lumber Co., v. Public Utilities Commission of State of Idaho*, 39 Idaho 505, 228 P. 271 (1924) (examining primary purpose for operation and requiring more than one customer); *Stoer v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921) (examining primary purpose for operation and holding self out as a utility); *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 141 P. 1083 (1914) (discussing regulatory compact and purpose for regulation of public utilities); *Idaho Code* § 61-104 (requiring a non-profit to be a mutual non-profit or cooperative, organized and operated for service at cost and not for profit); Order No. 26443, Case No. FLS-W-95-1 (stating that for a non-profit corporation to avoid regulation it must be structured in such a manner that the customers, not the developer, have ultimate control of the company, its operations and management, and the pricing of its water and related services).

Turning to the particular facts of this case, Kootenai Heights is organized as a for-profit general business corporation and registered as such with the Idaho Secretary of State. Kootenai Heights clearly is not a municipal, a cooperative, nor a mutual non-profit organized and operated at cost and not for profit. *See* Minutes of the Combined Organizational Meeting of the Board of Directors, Articles of Incorporation, p. 2, (filed with the Company's Application). The Company owns, controls, operates, and manages the well, the well lot, the pressure tanks, meters, pipes, and all other necessary property and fixtures required to provide potable water

service to its customers. The Company's rates, charges, and fees are set forth in the Water Service Agreement. Consequently, since it cannot be denied that Kootenai Heights owns, controls, operates, and manages a water system for compensation within the state of Idaho, it is a water corporation as that term is defined in Title 61 of the Idaho Code.

Kootenai Heights Water was specifically created, organized, incorporated, and managed to provide potable water to customers in a specific geographic region, who have no other viable option for obtaining this service. The Company always intended itself to offer a public utility service – providing water – to residents in the Kootenai Heights subdivision. The Company filed an Application with the Idaho Public Utilities Commission asking that it be granted a Certificate of Public Convenience and Necessity to operate as a public utility in its specified geographic region. The Company stated in its Application, "Please issue a Certificate of Public and Convenience and Necessity authorizing Kootenai Heights Water System, Inc. to operate as a public utility in the state of Idaho, and to serve the geographical area requested." Kootenai Heights Application cover letter, p. 1. Additionally, the Company states in its Water Service Agreement (WSA) that the system was developed to provide water "to certain Lots in Kootenai Heights and for further development of additional land and lots in the sole discretion of the Water Provider." WSA at 1. The owners of the Company indicated to Staff that they own additional property adjacent to the service area and are considering combining/extending the water system to serve the additional development. The customers are individually metered. WSA at 2. The WSA further states that each customer will receive a monthly charge for water service, and must pay a hook-up fee. Clearly, the Company intended itself to operate as a utility and holds itself out as such.

Here we have a true "monopoly" situation. The customers of Kootenai Heights Water have no choice other than to receive water from the Company if they want to have running, potable water at their homes. The Department of Water Resources would not allow individual wells, nor would they allow an arrangement where every two lots shared a well. Kootenai Heights Water Memorandum, pp. 3-4. Additionally, the City of Sandpoint, which provides water service to other areas of the Kootenai Heights subdivision, refuses to extend its service to these lots. Comments and Objections, p. 2. Customers have no say or input into what rates they are charged or how the Company is managed or operated. *See* Water Service

Agreement. Public policy requires that the Commission regulate companies where their relationship with customers is such as that existing here.

Kootenai Heights is a for-profit general business corporation, organized and incorporated for the purpose of providing potable water utility service to customers in the Kootenai Heights subdivision who were not allowed to take service from the City of Sandpoint, nor from their own wells. The Company owns, controls, operates, and manages a water system for compensation within the state of Idaho. It is a water corporation that provides service and a commodity to the public, or that portion of the public who resides in the designated service area of Kootenai Heights subdivision. The Company is a public utility as defined under Idaho law and as such falls under the regulatory jurisdiction of the Idaho Public Utilities Commission.

II. Private Contracts Between the Utility and its Customers

In addition to generally objecting to the Commission's jurisdiction and stating that it is not a public utility, the Company alleged that, "The Commission has no jurisdiction to interfere or create 'beaches' [sic] of the contract." Kootenai Heights Water Memorandum, p. 5. The Company also stated, "The Company enjoys the constitutional right of freedom of private contract. For the Commission to change the Contract, it would create a breach of contract with potential damages resulting." Comments and Objections to Proposed Order, p. 2.

"Private contracts with utilities are regarded as entered into subject to reserved authority of the state to modify the contract in the public interest." *Agricultural Products Corporation v. Utah Power & Light Co.*, 98 Idaho 23, 29, 557 P.2d 617, 623 (1976). In fact the Public Utilities Commission may annul, supersede, or abrogate a contract and/or contractual rates between utilities and their customers if doing so is found to be in the public interest. *Id.* The Commission has the express, statutory authority to determine whether the rates, charges, rules, regulations, practices, and contracts of a public utility are just, reasonable, preferential, discriminatory, or in any way in violation of any provision of law, and may fix the same by Order. *Idaho Code* § 61-502.

However, the Commission has not yet issued a final Order regarding the rates, charges, rules, and regulations that are set forth by the Company in its Water Service Agreement contract with its customers. The Commission issued a Proposed Order regarding these matters on September 1, 2006. Pursuant to the Commission's Rules of Procedure, a Proposed Order is not an Order of the Commission unless later adopted by Order. IDAPA 31.01.01.312. Approval

or modification of the Company's Water Service Agreement with its customers will be addressed in further proceedings before this Commission as set forth below.

III. Due Process

The Company also alleged that it was not afforded due process in the Commission's proceedings, and attempted to withdraw its Application, after issuance of the Commission's final Order granting it a Certificate of Public Convenience and Necessity. The Company alleged that there had been no evidentiary proceeding, and that there is, "no record below, no notice, and no reasonable opportunity to examine, cross-examine, or contest. . . . In short, 'due process' is lacking." Kootenai Heights Water Memorandum, pp. 1-2. Additionally, the Company states, in the last two sentences of its Memorandum, "The Company only applied to the Commission because the Idaho Department of Water Resources said it was required which was probably incorrect. In hindsight, the 'Application' is WITHDRAWN." *Id.*, p. 5.

A record does exist in this case. The record consists of the Company's Application, along with the numerous documents and attachments that the Company submitted with its Application including: A map of the proposed service area, a Water Service Agreement and Easement form, documents evidencing the incorporation of the Company, a copy of the contract with its Certified Operator, a copy of a Clarification-Modification of the Plat for Kootenai Heights, and a letter from the Department of Environmental Quality (DEQ) evidencing conditional approval of the as-built plans. The record also contains the comments filed by Commission Staff on March 9, 2006, the comment/protest deadline from the Second Notice of Application and Modified Procedure, Order No. 29960.

The Company, despite what appears at the end of its Memorandum, has not withdrawn its Application. "A party desiring to withdraw a pleading must file a notice of withdrawal of the pleading with the Commission and serve all parties with it." Rule 68, IDAPA 31.01.01.068. The Company never filed a notice of withdrawal of pleading, and moreover, withdrawal of a petition after the Commission issues a final Order is improper. Even if the Company's petition were considered withdrawn, it makes little difference in the ultimate outcome and decision of this Commission and this Order, as the Commission is vested with the authority to pursue such matters on its own motion and volition. *Idaho Code* §§ 61-501, 61-502, 61-503.

The Company was afforded ample notice and opportunity to submit evidence before the Commission, to file any objections and/or protests to the Commission's actions, to request a formal hearing, and to otherwise be heard fully in this matter. The Commission issued an official Notice of Application, not once, but twice. Order Nos. 29877 and 29960. Along with each Notice of Application, the Commission issued a Notice of Modified Procedure and commenced a comment/protest period that extended, in the case of the Second Notice, from January 27, 2006 to March 9, 2006. The Commission's Notice clearly sets forth the procedure on Modified Procedure, including citation to and explanation of each provision of Modified Procedure. *See* Order Nos. 29877 and 29960; IDAPA 31.01.01.201-204. Kootenai Heights did not file a protest to the Commission's use of Modified Procedure. The Company did not request a hearing. The Company did not submit any comments or additional evidence. After the Commission issued its final Order No. 30122 granting the Company's request for a Certificate, and issued a Notice of Proposed Order regarding the rates, charges, rules, and regulations of the Company the Company objected to the Commission's jurisdiction.

The Company has been afforded ample notice and opportunity to be heard – due process. The Company chose not to file comments, protests, objections, or anything until after all deadlines had passed, and the Commission had ruled upon its Application. The Commission, by issuing its Order regarding rates, charges, rules, and regulations in the form of a Proposed Order and by granting reconsideration of its final Order No. 30122 has extended an even greater level of due process than that which the Company was entitled to.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Kootenai Heights Water System, Inc. is a water corporation providing water service to the public within the state of Idaho, *Idaho Code* §§ 61-124, 61-125, and is operating as a public utility, *Idaho Code* § 61-129.

The Commission has jurisdiction over Kootenai Heights Water System, Inc. and this matter as authorized by Title 61 of the Idaho Code, and more particularly *Idaho Code* §§ 61-129, 61-501, 61-502, 61-503, 61-520, and 61-523.

The Commission should authorize and approve just and reasonable rates, charges, customer rules, and regulations regarding the provision of water service by Kootenai Heights Water System, Inc. to its customers. *Idaho Code* §§ 61-301, 61-302, 61-303, 61-502, 61-503, and 61-623.

ORDER

IT IS HEREBY ORDERED that Order No. 30122, granting Kootenai Heights Water System, Inc. a Certificate of Public Convenience and Necessity, is affirmed.

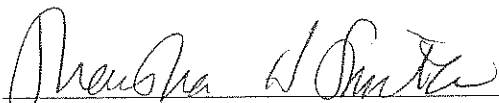
IT IS FURTHER ORDERED that the Proposed Order issued on September 1, 2006, regarding the rates, charges, rules, and regulations of the Company has not been adopted by the Commission as a final Order, and shall remain proposed pending further proceedings in this case as outlined below.

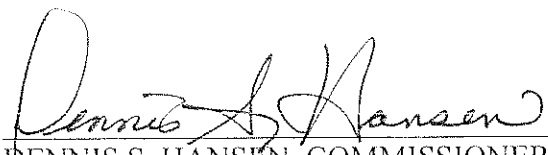
IT IS FURTHER ORDERED that the parties shall meet and conduct an informal prehearing conference where they shall discuss the remaining issues relating to rates, charges, rules, and regulations exploring any possibilities for agreement. If the parties cannot resolve the remaining issues, then they shall submit a proposed schedule for the submission of prefiled direct testimony, rebuttal, and an evidentiary hearing pursuant to the Commission's Rules of Procedure.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders issued in this Case No. KHW-W-05-01 may appeal to the Supreme Court of Idaho pursuant to Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

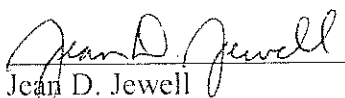
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 10th
day of January 2007.


PAUL KJELLANDER, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


DENNIS S. HANSEN, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

O:KIIW-W-05-01_dw8_Final Reconsider

