IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION OF      )

UNITED WATER IDAHO INC. FOR APPROVAL)

OF  RATES AND CHARGES AND FOR A CERTI-)

FICATE OF PUBLIC CONVENIENCE AND   )

NECESSITY TO OPERATE AS A WATER  )

UTILITY IN THE STATE OF IDAHO)

(EUW-W-94-1).)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

IN THE MATTER OF THE APPLICATION OF       )

EAGLE WATER COMPANY, INC. FOR AUTHOR-)

ITY TO EXPAND ITS CERTIFICATED AREA &  )

AMEND ITS CERTIFICATE OF PUBLIC CON-)

VENIENCE & NECESSITY NO. 278)

(EAG-W-95-1). )

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EAGLE WATER COMPANY, INC.,                )

)     SUPREME COURT

          Applicant-Appellant on Appeal,)    APPEAL NO. 23250

                                         )

vs.                                       )

                           )    RESPONDENT’S BRIEF OF

IDAHO PUBLIC UTILITIES COMMISSION,        )    THE IDAHO PUBLIC

)    UTILITIES COMMISSION

          Respondent on Appeal,          )

                                         )

and                                       )

UNITED WATER IDAHO INC.,                  )

)

          Applicant-Respondent on Appeal,)

)

and                                       )

THE CITY OF EAGLE,                        )

)

          Respondent on Appeal,          )

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APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION

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City of Eagle

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STATEMENT OF CASE

Respondent, Idaho Public Utilities Commission (Commission; IPUC), believes that the Statement of Case set forth in the Brief of Appellant Eagle Water Company, Inc. (Eagle Water) is incomplete and offers its own Statement of Case as follows:

I.  Nature of the Case

This appeal concerns rival applications by regulated public utilities for Certificates of Public Convenience and Necessity to provide water service in the Eagle area of Ada County, Idaho.  Both United Water Idaho Inc. in Case No. EUW-W-94-1 and Eagle Water Company, Inc. in Case No. EAG-W-95-1 sought permission from the Commission to extend their services into uncertificated areas.  The two cases were consolidated for hearing by the Commission.  Although consolidated, the Commission issued separate Orders in each case certifying and authorizing United Water and Eagle Water to provide water service to specific areas in the Eagle area.  The Orders further identified areas within which neither utility is permitted to extend facilities without the prior approval of the Commission.  Eagle Water appeals from Commission Order Nos. 26337 and 26524 in Case No. EUW-W-94-1 and from Commission Order Nos. 26338 and 26525 in Case No. EAG-W-95-1.

II.  The Parties

The Appellant, Eagle Water Company, Inc. operates an integrated water system in Ada County, generally in the Eagle and surrounding area, and provides water service to approximately 1,240 customers.  Eagle Water is a water corporation and a public utility subject to state regulation under the Public Utilities Law, Chapters 1-7, Title 61, Idaho Code.  SeeIdaho Code §§ 61-104, -124, -125 and -129.

The Respondent, United Water Idaho Inc.  (United Water; UWI), provides general water service to approximately 56,000 customers and operates an extensive and largely integrated water system in Ada County.  United Water is a water corporation and a public utility subject to state regulation under the Public Utilities Law, Chapters 1-7, Title 61, Idaho Code.  See §§ 61-104, -124, -125 and -129.

The Respondent, City of Eagle, is a municipal corporation as defined in Title 50 of the Idaho Code and is located in Ada County, Idaho.

The Respondent, Idaho Public Utilities Commission, is the state agency with regulatory authority over Eagle Water and United Water under the Idaho Public Utilities Law and the Idaho Public Utilities Commission Rules of Procedure.  See Idaho Code §§ 61-501 et seq.; IDAPA 31.01.01.000 et seq.

III.  Course of Proceedings Below

The Course of Proceedings below in relevant portion, as taken from the Agency Record on Appeal, is as follows:

Filing Date

August 22, 1994

September 13, 1994

October 11, 1994

February 21, 1995

June 12, 1995

Document

Application (EUW-W-94-1)

Notice

Letter Request

Amendment to Application

Notice

Action

United Water (UWI) files

Application to amend

Certificate

Notice of Application

UWI requests stay of

proceedings

UWI amends Application

Amended Notice of

Application

July 18, 1995

August 8, 1995

August 8, 1995

September 18, 1995

November 27, 1995

January 5, 1996

January 5, 1996

January 10, 1996

January 24, 1996

January 24, 1996

January 24, 1996

March 5, 1996

March 26, 1996

April 2, 1996

Application (EAG-W-95-1)

Notice/Order No. 26113

 (EUW-W-94-1)

Notice (EAG-W-95-1)

Notice/Order No. 26170

 (EUW-W-94-1/EAG-W-95-1)

Notice

Statement

Statement

Hearing – Boise; Eagle

Brief

Brief

Brief

Order No. 26337 (EUW-W-94-1)

Order No. 26338 (EAG-W-95-1)

Petition for Reconsideration

 (EUW-W-94-1)

Cross-Petition for Reconsideration

 (EUW-W-94-1/EAG-W-95-1)

Eagle Water files Application to Amend Certificate

Prehearing Conference set for August 31, 1995

Notice of Application

Prehearing Conference set for August 31, 1995

Case Nos. EUW-W-94-1/

EAG-W-95-1 consolidated

for hearing.  Public hearing set for January 10, 1996

Notice of Parties

UWI files prehearing

Statement of Position

Eagle Water files prehearing

Statement of Position

UWI files post-hearing brief

IPUC Staff files post-hearing brief

Eagle Water files post-

hearing brief

Final Order

Final Order

UWI files Petition for

Reconsideration

City of Eagle files Cross-

Petition for Reconsideration

April 2, 1996

April 4, 1996

April 24, 1996

June 11, 1996

June 24, 1996

June 24, 1996

June 25, 1996

June 27, 1996

July 22, 1996

September 3, 1996

Cross-Petition for

Reconsideration/Statement

of Opposition

(EUW-W-94-1/EAG-W-95-1)

Answer

Order No. 26431 (EAG-W-95-1)

Order No. 26432 (EUW-W-94-1)

Financial Plan

Comments

Comments

Comments

Reply Comments

Order No. 26524

 (EUW-W-94-1)

Order No. 26525

 (EAG-W-95-1)

Notice of Appeal

(EUW-W-94-1/EAG-W-95-1)

Eagle Water files Cross-

Petition for Reconsideration

and Statement of Opposition

to UWI Petition for

Reconsideration

UWI files Answer to Eagle

Water Petition

Commission grants limited

reconsideration

Commission requires Eagle

Water to file financial plan

Financial plan submitted by

Eagle Water

IPUC Staff files comments

re: financial plan

UWI files comments re:

financial plan

Ashland Acres files

comments

Eagle Water files reply to

IPUC Staff Comments

Final Orders on

Reconsideration

Eagle Water files Notice of

Appeal

IV.  Statement of Facts

A.  The Applications and Proceedings Leading Up to the Hearing

On August 22, 1994, United Water Idaho, Inc. (formerly Boise Water Corporation) filed an Application with the Commission in Case No. EUW-W-94-1 to amend its Certificate of Public Convenience and Necessity and to expand its public utility operations into and near the City of Eagle.  R. Vol. I, pp. 1-81.  The proposed service area requested by United Water was uncertificated, but abutted the certificated service area boundary of the Appellant, Eagle Water.  R. Vol. I, p. 2.  United Water in its Application acknowledged that an unregulated affiliate–Engineering, Management and Maintenance, Inc. (EM²)–was presently operating and maintaining water systems adjacent to the proposed water service area.  R. Vol. I, pp. 2-3.

Proceedings in Case No. EUW-W-94-1 were subsequently stayed to allow United Water time to explore the possibility of establishing an integrated water system throughout the Eagle area, and to negotiate a purchase of the water system owned by Eagle Water.  R. Vol. I, pp. 101-103.

On February 21, 1995, United Water amended its Application to include additional territory, including areas where EM² operated and managed water systems.  R. Vol. I, p. 111.  The Commission granted intervenor status in Case No. EUW-W-94-1 to Eagle Water on March 3, 1995 (R. Vol. 1, pp. 122-23) and the City of Eagle on September 12, 1995 (R. Vol. I, pp. 133-34).

On July 18, 1995, Eagle Water filed an Application with the Commission in Case No. EAG-W-95-1 for authority to amend its Certificate of Public Convenience and Necessity No. 278 (Second Amended) and to expand its certificated area of service by enlarging and extending its boundaries.  R. Vol. I, pp. 135-42.  In its Application, Eagle Water represented that whereas in the past it requested expansions of its certificated service area on an individual request basis only, it had filed in this case a more comprehensive request for expanded area in response to United Water’s request to also provide water service in the Eagle area.  R. Vol. I, p. 136.

The Commission granted intervention status in Case No. EAG-W-95-1 to the City of Eagle on September 12, 1995, (R. Vol. I, pp. 148-49) and United Water on October 14, 1995 (R. Vol. I, pp. 157-58).

A prehearing conference of the parties in both cases was held on August 31, 1995.  Finding a significant overlap in the certificate areas requested by United Water and Eagle Water, the Commission found in subsequent Order No. 26170 that consolidation of the proceedings for hearing was appropriate for purposes of economy and efficiency and to avoid building redundant records. The consolidated cases were scheduled for a January 10, 1996 evidentiary hearing.  R. Vol. I, pp. 150-53.

Prehearing statements of position were filed by United Water (R. Vol. I, pp. 166-70) and Eagle Water (R. Vol. I, pp. 171-74).  United Water in its statement noted that the proposed certificate areas were not part of either the existing UWI system or the existing Eagle Water system.  R. Vol. I, p. 169. United Water suggested that the Commission in its Certificate analysis should consider two elements: (1) the technical ability of each utility to provide adequate and continuous service (present and future) to the proposed area; and (2) the financial ability of each utility to provide present and future service to the Eagle area.  R. Vol. I, pp. 168-69.

Eagle Water in its statement contended that granting United Water’s Application would strangle the existing Eagle Water  system and effectively eliminate any future opportunity for Eagle Water to grow.  R. Vol. I, p. 173.  Eagle Water characterized United Water’s Certificate Application in the following manner:

United Water Company has come to the Eagle area and expended large sums of money and installed major systems, all without IPUC approval.  Through the use of a subsidiary, EM², United Water Company has established water rates to customers without IPUC approval or review.  United Water Company now is seeking retroactive approval of its expansion into the Eagle area.

R. Vol. I, p. 174

B.  The Hearing Record and Resulting Orders

Public hearing in this matter was held on January 10, 1996.  Tr. Vol. II-IV, pp. 12-498.  Post hearing briefs were filed by United Water (R. Vol. I, pp. 175-80), the Commission Staff (R. Vol. I, pp. 181-86), and Eagle Water (R. Vol. I, pp. 187-99).

In Order Nos. 26337 (R. Vol. II, pp. 200-211) and 26338 (R. Vol. II, pp. 212-23), the Commission summarized the evidence and its findings as follows:

United Water

The certificated area requested by United Water is that area generally depicted in Tr. Exh. 101 and more particularly described in UWI Application Exhibits 1 and 1A.   See also Tr. Exh. 6.

United Water provides general water service to approximately 56,000 customers and  operates an extensive and integrated water system in Ada County, Idaho.  Tr. pp. 21, 35.  The service area requested in the Eagle area is not contiguous to United Water’s existing area of operation and will be operated as an isolated system for several years.  Tr. p. 36.  Part of the area requested by United Water abuts the authorized certificated service territory of Eagle Water Company.  United Water has received several requests for service within the Eagle area, both from approved and planned development, and also from existing water users.  Included are the Redwood Creek Subdivision in northern Eagle with 12 customers, and the Island Wood Subdivision in southern Eagle with 58 customers both of which presently receive water operation and management services from Engineering, Management and Maintenance, Inc. (EM²), an affiliate of United Water.  Tr. p. 36.  Neither system has reservoir or backup capability.  Tr. p. 39.  Also included within the requested area are the newly constructed Eagle Middle and High Schools, both of which receive water service now from EM². Tr. pp. 81, 86.

United Water owns four wells in the Eagle area, the two wells serving Island Woods, one well at Redwood Creek and the Floating Feather well.  Tr. pp. 44, 45.  United Water plans to utilize existing wells and distribution systems within the requested area to provide water, and fire protection services.  United Water also proposes to install remote monitoring equipment and backup capability for power outages.  Tr. pp. 189-191.  United Water believes the purchase, acquisition and construction of facilities in the Eagle area for the provision of water services should be considered a normal expansion of UWI, and not the creation of a new entity.  Tr. p. 132.  United Water represents that it is possessed of the financial resources required to provide quality water service to the area.  Tr. p. 159.  United Water contends that extension into this area is not only consistent with, but necessary in the ordinary course of business, and is required by the public convenience and necessity.

United Water estimates that its investment  in the Eagle area over the next five years will be $3.7 million.  This includes its existing investment of $1.47 million.  Tr. pp. 159, 193, Tr. Exh. 106.  United Water states that it will meet its need for capital by utilizing internal funds either generated by operations or donated by customers or developers.  Tr. p. 124.  Should its proposed service area be approved, United Water anticipates immediate revenue from the approximately 70 existing customers within United Water’s proposed certificated area and the two schools.  Based on Ada County Planning and Zoning Commission and Eagle Sewer District projections, United Water estimates a growth in customer base over the next five years of between 200 and 250 customers per year in the Eagle area.  Tr. p. 194; Tr. Exh. 1 p. 5.  The reasonableness of the Company’s expectation that it will realize or capture all the actual Eagle area growth for itself was disputed by Eagle Water.  Tr. pp. 204, 258, 276.  Testimony of Eagle City and Eagle Water reflects that the number of actual new hookups and rate of growth may be affected by zoning density, the availability of sewer, and the City’s ability to treat and/or dispose of waste water.  Tr. pp. 197, 248, 249, 276.

Commission Staff, based on an analysis of project economics, area growth and projected revenue, characterizes United Water’s investment in the Eagle area as speculative.  Tr. pp. 334, 335.

In United Water’s most recent general rate case, the Commission determined the Company had a rate base of $67,218,005 and a capital structure that was 52% debt, 8% minority interest and 40% common equity.  Tr. p. 367. . . . United Water uses budgets to account for needed capital, planned maintenance and system improvements.  United Water has the apparent ability to finance facility improvements or expansion with or without developer participation.  There is no indication, Staff states, that United Water . . . has any debt problems.  Tr. pp. 340, 367, 368. . . .

Order No. 26337 R. Vol. II, pp. 201-203; Order No. 26338 R. Vol. II, pp. 213-15.  (emphasis added).

Eagle Water

The certificated area requested by Eagle Water is that area generally depicted in Tr. Exh. 102 and more particularly described in ¶ 1 of Eagle Water’s Application.

Eagle Water Company, Inc. operates an integrated water system in Ada County, Idaho, generally in the Eagle and surrounding area and provides water service to approximately 1240 customers.  Tr. pp. 275, 338.  With present wells and water supply Eagle Water has the supply capability of adequately serving about 2500 customers.  Tr. pp. 269, 270, 295, 326, 338.  There remain approximately 382 undeveloped lots in the Company’s present certificated area.  Tr. p. 295.  The area requested by Eagle Water expands and is generally contiguous to its existing area of operation.  Eagle Water has received several requests for service for planned development within its requested area.  Although Eagle Water has historically requested expansion of its certified area on an individual service request basis only as a result of growth, not in anticipation of growth, its Application in EAG-W-95-1, it explains, is more comprehensive and was prompted by the certificate request of United Water to extend into and also provide water service in the Eagle area.  Tr. p. 283.  Eagle Water states that its requested expansion will permit it to provide for future, natural and logical growth, will permit it to expand in an efficient manner and will enable it to protect existing customers.  Tr. p. 268.  Eagle Water, as in the case of many small water companies, must rely on contract labor for engineering, planning and technical expertise.  Tr. pp. 88, 340.   To address future expansion, increased fire flow capability and provide additional reservoir backup, Eagle Water explained its plans to drill two additional wells.  The Company contends it already has funds on hand for this purpose.  Tr. p. 291.  It also plans to construct a one-million gallon gravity feed reservoir.  Tr. pp. 252, 253, 271, 272, 327.

Although Staff recommends that Eagle Water be allowed some ability to expand, Staff questions whether Eagle Water has the financial capability to serve the entire area requested.  Tr. p. 334.  Based on a limited audit of 1994 financial data, Staff reports that Eagle Water has a negative rate base of $65,499.  Tr. Exh. 112, Tr. p. 369.  Records reviewed reflect Eagle Water’s capital structure consists of unsecured long-term debt, notes payable and long-term debts secured by a surcharge hook-up fee in the total amount of $146,818; and common equity, like its rate base, in a negative position of approximately $47,400.  Tr. p. 369.  Staff contends that without rate base or equity and with its credit history, Eagle Water may find it difficult to obtain conventional financing for capital improvements, extraordinary replacement or maintenance.  Tr. p. 370.  Eagle Water, Staff contends, is undercapitalized and has no internal way of raising funds to continue expansion.  Tr. pp. 338, 373.  The Company’s ability to obtain financing capital for expansion, replacement or repair without increasing rates is seemingly dependent on continued growth, developer contributions, and related hook-up fee surcharges. Tr. pp. 270, 296.  When growth slows or stops, Staff contends that Eagle Water Company may be challenged to find sources of capital for needed repairs and replacement.  Tr. pp. 358, 373.  Staff recommends that Eagle Water develop a financial plan for replacing existing facilities.  Tr. p. 334.  Eagle Water states that it has never refused to provide water service (Tr. pp. 269, 270), and has expanded cautiously, in a manner approved by the Commission and the Staff, and without cost to existing ratepayers.  Tr. p. 280.

Order No. 26337 R. Vol. II, pp. 204, 205; Order No. 26338 R. Vol. II, pp. 216-17.  (emphasis added).

Public Testimony

The City of Eagle, a formal party to the proceedings, through its witness, expressed on behalf of the City Council, a preference for United Water as service provider to the Eagle area.  Tr. pp. 219-229.  In making its choice, the City stated that it focused not on rates, but the need for a gravity feed backup reservoir, system quality and the financial capabilities of the provider to cope with area growth, unforeseen circumstances and emergencies.  Tr. pp. 241, 242.

The Chamber of Commerce representing 93 Eagle area businesses expressed concern about United Water entering the Eagle area and supported the Application of Eagle Water.  The Chamber cautioned against severely limiting the growth potential of Eagle Water and severely restricting if not eliminating Eagle Water’s future ability to address and alleviate problems.  Tr. pp. 453-455.

Both utilities have the backing of individual developers.  The great majority of those testifying were customers of Eagle Water and favored the Application of Eagle Water.

Order No. 26337 R. Vol. II, p. 204; Order No. 26338 R. Vol. II, pp. 217-18.  (emphasis added).

On March 5, 1996, the Commission issued final Order No. 26337 in Case No. EUW-W-94-1  (R.  Vol. II, pp. 200-211) and Order No. 26338 in Case No. EAG-W-95-1 (R. Vol. II, pp. 212-23) certifying and authorizing United Water and Eagle Water to provide water service to separate and specific areas in and around the City of Eagle.  In doing so, the Commission made the following express findings:

Commission Findings

Both United Water and Eagle Water request amended Certificates of Convenience and Necessity pursuant to the provisions of Idaho Code §§ 61-526 and 61-528, and the Commission’s  Rules of Procedure, IDAPA 31.01.01.112.  We find that the respective filings and records satisfy the underlying statutory and procedural requirements for certificate applications.  Our decision, with respect to which areas should be certified to United Water and Eagle Water is based on a review of the filings of record, including the transcript of proceedings and post-hearing briefs.

The Commission recognizes, as Staff concludes, that United Water is the more financially and technically capable of the two companies before us seeking certificates.  Tr. p. 334.  We have every reason to believe that United Water can provide quality water service in every sense of the term, that it has the ability to serve present and future growth in the Eagle area, that it has the ability to address critical water supply issues such as fire protection and backup capability, and that it has the ability and wherewithal to accommodate unforeseen circumstances and emergencies.

The Commission further finds, however, that Eagle Water is a provider of satisfactory and adequate water service, and indeed, we find that the quality of its service has improved significantly over the last few years.  Eagle Water Company is a small water company that has long provided service to the Eagle area.  This Commission has a duty to ensure that the present and future viability of Eagle Water is not threatened or impaired.  Although we find that Eagle Water’s capability to fund future expansion, replacement repair and maintenance, and unforeseen circumstances and emergencies may continue to present it with creative challenges, we also recognize that Eagle Water has achieved some degree of success in rising to and meeting that challenge.  The prospect of area growth slowing or flattening dictates that Eagle Water develop a financial plan for repairing and replacing existing facilities.

While the preference of individual customers, school districts and the community is to be given some weight in the choice of a service provider, we do not find it controlling.  Nor do we find it controlling or significant that United Water through an unregulated affiliate has a presence in the area.  A regulated water  utility is at risk in extending into, acquiring property and investing in noncontiguous areas without a prior certificate.  The risk is greater when it encroaches on the service territory of another provider.  The public interest, convenience and necessity is the determinate of which utility capable of providing adequate service should be allowed to serve.  Between two competing utilities, as in this case, the present and future ability to provide adequate and satisfactory service at reasonable rates is the major consideration.

Our decision in this case about which company should serve starts with a recognition that Eagle Water has an established presence in the Eagle area and that United Water’s request for the area south of the Boise River has not been challenged.  While the disparity in company size and technical and financial capability is not controlling, it is nevertheless a factor for consideration.  We find that the presence of United Water in the Eagle area and the many services it provides may indirectly benefit the community as a whole.

We find it reasonable to allow Eagle Water some contiguous area for continued growth and expansion beyond the undeveloped areas in its present certificated area.  It is also reasonable to  permit United Water to provide exclusive regulated water service in a portion of the Eagle area south of the Boise River (including Island Woods Subdivision) and north of the Boise River (including Redwood Creek Subdivision and the Eagle Middle and High Schools).  The certificated areas of service for Eagle Water and United Water that we find necessary to grant for present and future public convenience and necessity are those areas generally described and reflected in Attachment 1 to this Order.

Those areas currently served by the municipal water system are specifically excluded from the area granted to either utility.  Also excluded, are two presently uncertified buffer areas more particularly described as follows:

The uncertificated area north of Floating Feather Road and west of Eagle Road and generally described as the east half of Section 5, Township 4 North, Range 1 East, Boise Meridian.

The uncertificated area south of Floating Feather Road and east of Ballantine Lane extended and generally described as the east quarter of Section 7, Township 4 North, Range 1 East, Boise Meridian.

We find it reasonable not to certificate these areas between the United Water and Eagle service areas where service has not yet been requested.  Leaving this “buffer zone” will allow the service provider decision for these areas to be made in the future when specific requests for service are pending and better information will be available to use in determining which company should serve.

Our determination in this case of certificated areas for United Water and Eagle Water acknowledges our finding that the present and future public convenience and necessity requires such an award of service areas.

Order No. 26337 R. Vol. II, pp. 206-208; Order No. 26338 R. Vol. II, pp. 218-20.  (emphasis added).

C.  Petitions for Reconsideration and Appeal

On March 26, 1996, United Water filed a Petition for Reconsideration in both cases.  R. Vol. II, pp. 224-26.  On April 2, 1996, Cross-Petitions for Reconsideration were filed by Eagle Water (R. Vol. II, pp. 230-34) and the City of Eagle (R. Vol. II, pp. 227-29).

As set forth in Commission Order Nos. 26431 and 26432, the party positions on reconsideration can be summarized as follows:

On March 26, 1996, United Water filed a Petition for Reconsideration in Case Nos. EUW-W-94-1 and EAG-W-95-1.  United Water contends that the Commission’s Order is not in conformity with law to the extent it awards any additional certificated area to Eagle Water without making express findings of Eagle Water’s present and future financial ability to serve the new areas awarded to Eagle Water.  United Water contends that the Commission’s Order is unreasonable to the extent it awards any certificated area to Eagle Water, especially north of Floating Feather Road, and the area immediately surrounding the Eagle municipal water system.

On April 2, 1996, Cross-Petitions for Reconsideration were filed by Eagle Water [R. Vol. II, pp. 230-34]  and the City of Eagle [R. Vol. II, pp. 227-29].

Eagle Water disputes the contentions of United Water that the record is devoid of evidence demonstrating that Eagle Water can maintain and expand its system.   . . .

Eagle Water rejects United Water’s arguments for awarding United Water the area north of Floating Feather Road and disputes the significance of EM2’s water service contract with the City of Eagle.

Eagle Water by way of “cross-petition” asserts that some identified areas awarded to United Water should logically and naturally remain uncertificated buffer zones (i.e., uncertificated area west of Eagle Road between Floating Feather Road and Beacon Light Road should be extended further west to Ballantine Road; some of the area immediately south of the Boise River).

The City of Eagle believes the service territory north of Floating Feather Road should be left uncertificated.  In this way, it states, the ability to serve, financial ability, the necessity for additional service in the community, and the desires of future customers in the uncertificated territory can be taken into account at the time a certificate is applied for.

Expressing continued concern about the financial ability of Eagle Water to provide service, the City of Eagle requests that the Commission specifically require an adequate and competent financial plan for all areas to be served by Eagle Water.  Alternately the City requests that the area north of Floating Feather Road be left uncertified until such time as Eagle Water provides to the Commission an adequate and competent financial plan demonstrating its financial ability to serve the area.

On April 4, 1996, United Water by way of clarification stated that the intent of United Water’s Petition for Reconsideration, “is to have the Commission reconsider the area north of Floating Feather Road and east of Eagle Road which surrounds Lexington Hills and the City of Eagle municipal system.”  If the Commission were so inclined, United Water contends that designation of that area as a buffer zone would be appropriate. Reference United Water Answer to Eagle Water’s Cross-Petition [R. Vol. II, pp. 235-37].

Order No. 26431 R. Vol. II, pp. 238-43; Order No. 26432 R. Vol. II, pp. 244-49.

In its Orders on Reconsideration, Order Nos. 26431 and 26432, the Commission specifically found that Eagle Water’s proposal to enlarge the uncertificated buffer areas and decrease the certificated area awarded to United Water was an untimely request for reconsideration and beyond the permissible scope of cross-petition for reconsideration.  IDAPA 31.01.01.331.02 (Cross-Petition for Reconsideration).  Eagle Water’s petition in this regard was dismissed and reconsideration was accordingly denied.  Order No. 26431 R. Vol. II, p. 242; Order No. 26432 R. Vol. II, p. 248.

The Commission granted reconsideration solely as to the appropriateness of the Commission’s Order certificating to Eagle Water the area north of Floating Feather Road and east of Eagle Road which surrounds Lexington Hills and the City of Eagle municipality system.  Order No. 26431 R. Vol. II, p. 241; Order No. 26432 R. Vol. II, p. 247.  In addition, the Commission stated that it would also consider the appropriateness of allowing the area to remain uncertified pending further application. Order No. 26431  R. Vol. II, p. 241; Order No. 26432 R. Vol. II, p. 247.  On reconsideration, Eagle Water was directed to file a detailed financial plan demonstrating its ability and wherewithal to provide future water service including extension, replacement, repair and maintenance.  Order No. 26431 R. Vol. II, p. 241; Order No. 26432 R. Vol. II, p. 247.

Eagle Water’s Financial Plan

On June 11, 1996, Eagle Water filed its financial plan with the Commission.  R. Vol. II, pp. 257-318.  Eagle Water asserted that its filed financial plan demonstrated its ability and wherewithal to provide future water services, including extension, replacement, repair and maintenance.  R. Vol. II, p. 258.  Reply comments were filed by United Water (R. Vol. II, pp. 332-35), Ashland Acres Subdivision (R. Vol. II, pp. 336-43) and Commission Staff (R. Vol. II, pp. 319-31).  Eagle Water thereafter filed a response to the comments of the Commission Staff.  R. Vol. II, pp. 344-46.

In its final Orders on Reconsideration, Order No. 26524 (R. Vol. II, pp. 347-64), and Order No. 26525 (R. Vol. II, pp. 365-82), the Commission summarized the evidence regarding Eagle Water’s Financial Plan as follows:

United Water

United Water concludes that Eagle Water’s financial plan fails to demonstrate either present or future financial ability to serve.  A Company may be very good in many technical ways, UWI contends, but fail to meet the public convenience and necessity solely because of an inability to pay for maintenance and expansion.  Public interest, United Water states, is served where financial ability establishes that adequate service will not be limited by growth and other economic factors over which the applicant has no control.

United Water contends that Eagle Water’s filing only raises concerns rather than puts them to rest.

Order No. 26524 R. Vol. II, pp. 351-54; Order No. 26525 R. Vol. II, pp. 369-71.

Commission Staff

Staff reviewed Eagle Water’s financial plan and performed a limited audit of the Company’s 1995 accounting records. Staff prepared and submitted a pro forma balance sheet, income statement and cash flow for Eagle Water for the 1996-1999 forecasting period together with a statement of basic assumptions.

Staff’s comments contain the following observations and recommendations:

∙Staff’s financial projection shows that with continued growth, continued collection of the surcharge hook-up fees and only small increases in expenses, Eagle Water should be able to meet its financial obligations.  If growth does not occur or if expenses have major increases the Company will continue to have the same financial problems it has experienced in the past.  Without growth, increases in expenses will require Eagle Water to file a rate case to cover its revenue requirement.

∙Surcharges collected to date by the Company, on an after income tax basis, have exceeded the costs of the well and water report they were intended to pay.  Staff contends the Company should be ordered to justify the continued collection of surcharge fees.

∙Because the balance sheet shows that Eagle Water has a negative utility plant in service balance and a negative owners equity, Staff concludes that the Company is over earning.

∙The balance sheet shows that Eagle Water Company will continue to have a negative net utility plant in service due to contribution of plant and depreciation.

∙Staff’s original opinion that the Company must have continued growth to be viable and that without this growth the Company would have trouble generating cash to cover emergency repairs, debt and interest payments is still valid.

Order No. 26524 R. Vol. II, pp. 354-57; Order No. 26525 R. Vol. II, pp. 372-75.

Ashland Acres Subdivision

Kathryn McCallum, the owner and developer of Ashland Acres Subdivision in Eagle, Idaho submitted comments regarding the financial ability of Eagle Water Company. . . .

McCallum’s concern is that she will be required to pay up front the full cost of construction . . . McCallum understands that one of the significant financial differences between United Water and Eagle Water, as it impacts developers, is the financing of the construction of facilities.  While both companies require a developer to pay 100% of the cost of new facilities, United Water allows a developer to amortize and repay these costs over a multiple year period.  Eagle Water, on the other hand, requires the developer to pay all capital costs of construction up front.

Order No. 26524 R. Vol. II, pp. 357-58; Order No. 26525 R. Vol. II, pp. 375-76.

Commission’s Final Orders on Reconsideration

After reviewing the record in both cases, the Commission found it reasonable and in the public interest to grant a portion of the relief requested by United Water, and the City of Eagle and to modify its prior Order Nos. 26337 and 26338.  In its final Orders on Reconsideration, Order Nos. 26524 and 26525, the Commission determined that the unserved areas north of Floating Feather Road and east of Eagle Road should be uncertified, and prohibited either utility from extending facilities into the identified uncertificated areas without prior application to and authorization from the Commission.  Order No. 26524 R. Vol. II, p. 361; Order No. 26525 R. Vol. II, pp. 378-79.

In its Orders, the Commission made the following findings:

The financial plan filed by Eagle Water does not provide the Commission with regulatory assurance or confidence that at the present time we can find that Eagle Water is the best positioned financially or physically to provide expanded service to the unserved areas north of Floating Feather Road and east of Eagle Road.  We recognize and the record reflects that it was the perceived intrusion of United Water into the Eagle area that prompted Eagle Water to attempt to define and expand its service territory in a manner quite different from its prior pattern of growth.  The Commission itself believed that the competing certificate applications required that most all of the territory be divided, with small buffer areas established for separation.  After considered reflection we find that we are no longer of that belief.  While we do not wish to encourage nor will we permit a checkerboard and/or uneconomic pattern of service to develop, we now believe that it is wise to wait for the actual pattern of planned development in this area before determining which entity should be the provider of water service.

Eagle Water is a small  company.  United Water is a large company.  Those are just the facts.  They are fundamentally different utilities.  Eagle Water experiences many of the challenges associated with being small, not the least of which in this case is a financial profile that more resembles a customer-owned utility heavily dependent on contribution and operating day-to-day on a skeletal income-in expense-out basis.  The economic and operational challenges that small water companies face require a great deal of resourcefulness.

Eagle Water’s ability to expand beyond its prior certificated area, however, must be closely monitored.  The public interest demands no less.

Rather than assigning the unserved areas north of Floating Feather Road and east of Eagle Road to Eagle Water as we did in Order Nos. 26337 and 26338, we find a more reasonable approach is to leave the area uncertificated at the present time.  Accordingly the general description of new areas certificated to Eagle Water Company in Attachment 1 to Order Nos. 26337 and 26338, has been amended and is attached to this Order.  Eagle Water retains the area previously certificated to it described as the SW 1/4 of the NW 1/4 of Section 4, T4N, R1E (Bighorn Subdivision and LDS Church).  We find that the public interest is better served by this approach.  As in the “buffer zones” we previously established, we will make the service provider decision(s) for this unserved area in the future when specific requests for service are pending and better information is available to us to determine which company should provide service.  As we stated before, while the preference of individual customers and the community is to be given some weight in the choice of service provider, we do not find it controlling.  Nor do we find it controlling or significant that United Water through an unregulated affiliate already has a presence in the area.  Neither utility is permitted to extend facilities into the uncertificated areas without prior application to and authorization from this Commission.  Installation of facilities into such areas without prior certification and approval will be viewed as a violation of this Order subjecting the utility to the imposition of statutory penalties.

Order No. 26524 R. Vol. II, pp. 359-61; Order No. 26525 R. Vol. II, pp. 377-79.  (emphasis added).

Eagle Water appeals from the Commission’s Order Nos. 26337 and 26524 in Case No. EUW-W-94-1 and Order Nos. 26338 and 26525 in Case No. EAG-W-95-1.  R. Vol. II, pp. 383-86.

ISSUES ON APPEAL

The Respondent Idaho Public Utilities Commission addresses the following procedural and legal/substantive issues on appeal:

A.  Procedural Issue

Is Eagle Water in failing to file a Petition for Reconsideration with the Commission procedurally barred from challenging United Water’s certificate on appeal?

B.  Legal/Substantive Issues

I.  Are the Commission’s Orders granting United Water an amended certificate to provide water service in the Eagle area supported by substantial and competent evidence demonstrating a present or future need for service?

II.In granting United Water a certificate area adjacent to Eagle Water, was the Commission required to make a finding that Eagle Water was unable to provide adequate service to the area?

III.Is the Commission precluded from awarding a certificate to United Water for a service area in which the utility or its affiliate provided uncertificated operations, if the public interest requires otherwise?

IV.Before permitting United Water to provide water service to an area adjacent to and surrounding Eagle Water’s existing certificated area, was the Commission required to find that such action would not interfere with Eagle Water’s operations and future viability?

V.Does the Commission have the statutory authority under Idaho Code §§ 61-526 and -528 to require that Eagle Water obtain Commission approval before extending its lines into contiguous areas beyond its certificated service area?

STANDARD OF REVIEW

The standard of review on appeal from an Order of the Commission is well settled.  Article V, Section 9 of the Idaho Constitution provides that the Supreme Court shall have jurisdiction to review on appeal any Order of the Commission.  An issue not presented to the Commission for rehearing will not be considered on appeal.  Idaho Code §§ 61-626 and 61-629; Key Transp., Inc. v. Trans Magic Airlines Corp., 96 Idaho 110, 112-13, 524 P.2d 1338, 1340-41 (1974).  Idaho Code § 61-629 defines the scope of the Supreme Court’s limited review and states in relevant part:

The review on appeal shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the Order appealed from violates any right of the Appellant under the Constitution of the United States or of the State of Idaho.

Seealso Rosebud Enterprises, Inc. v. Idaho Pub. Util. Comm’n,  128 Idaho 609, 618, 917 P.2d 766, 775 (1996); A.W. Brown Company v. Idaho Power Company, 121 Idaho 812, 815, 828 P.2d 841, 844 (1992).  Eagle Water has not asserted that the Commission violated any of its Constitutional rights.  Consequently, the question on appeal is whether the Commission “regularly pursued its authority.”

The Idaho Supreme Court most recently in 1996 recognized the degree of deference that must be given to decisions of the Commission.  In Rosebud Enterprises, Inc. v. Idaho Pub. Util. Comm’n, 128 Idaho 624, 631, 917 P.2d 781, 788 (1996), the Court stated that review of Commission decisions as to questions of law is limited to a determination of whether the Commission has regularly pursued its authority and whether the constitutional rights of the Appellant have been violated. Regarding questions of fact, the Court stated that where the Commission’s findings are supported by substantial, competent evidence in the record, the Court must affirm those findings and is obligated to affirm its decision.  See also A.W. Brown, 121 Idaho at 815-16, 828 P.2d at 844-45;and Empire Lumber Co. v. Washington Water Power, 114 Idaho 191, 193, 755 P.2d 1229, 1231 (1987), cert. denied, 488 U.S. 892, 109 S.Ct. 228, 102 L.Ed.2d 218 (1988).

The Commission’s findings of fact are to be sustained unless it appears that the clear weight of the evidence is against its conclusion or that the evidence is strong and persuasive that the Commission abused its discretion.  A.W. Brown, 121 Idaho at  816, 828 P.2d at 845; Utah-Idaho Sugar Co. v. Intermountain Gas Co., 100 Idaho 368, 376, 597 P.2d 1058, 1066 (1979).  This Court will not displace the Commission’s findings of fact when faced with conflicting evidence, even though the Court would have made a different choice had the matter been before it de novo.  Rosebud, 128 Idaho at 618, 828 P.2d at 785; Application of Hayden Pines Water Company, 111 Idaho 331, 336, 723 P.2d 875 (1986).  Thus the Commission’s findings of fact in this case are entitled to a presumption of correctness and the burden is on Eagle Water to show that those findings are unsupported by the evidence.  Nez Perce Roller Mills v. Pub. Util. Comm’n., 54 Idaho 696, 34 P.2d 972 (1934).

The Commission’s findings need not take any particular form so long as they fairly disclose the basic facts upon which the Commission relies and support the ultimate conclusions.  What is essential are sufficient findings to permit the reviewing Court to determine that the Commission has not acted arbitrarily.  Rosebud, 128 Idaho at 624, 917 P.2d at 781;  Boise Water Corp. v. Idaho Public Util.Comm’n, 97 Idaho 832, 840, 555 P.2d 163, 171 (1976).

ARGUMENT

A.  Procedural Issue

In failing to file a Petition for Reconsideration with the Commission, Eagle Water is procedurally barred from challenging United Water’s certificate on appeal.

The first four issues raised by Eagle Water were never timely raised or perfected on reconsideration before the Commission and are therefore not subject to appeal.  Idaho Code §§ 61-626; 61-627; Key Transp., Inc. v. Trans Magic Airlines Corp., 96 Idaho 110, 524 P.2d 1338 (1974).  In its Petition for Reconsideration, United Water challenged only the certificate granted to Eagle Water.  Eagle Water did not file a Petition for Reconsideration, but later filed a Cross-Petition challenging United Water’s certificate.  Idaho Code § 61-626 states that cross-petitions for reconsideration may be filed only “in response to any issue raised in any petition for reconsideration.”  The Commission’s Procedural Rule 331.02 provides similar language.  See Appendix B.  Accordingly, Eagle Water’s Cross-Petition challenging United Water’s certificate and the service area awarded to United Water addressed issues outside of the Petition for Reconsideration.  Eagle Water therefore did not perfect its procedural right to appeal on those issues.

In Order Nos. 26431 and 26432 the Commission specifically found that Eagle Water’s proposal to enlarge the uncertificated buffer areas and decrease the certificated area awarded to United Water was an untimely request for reconsideration and beyond the permissible scope of cross-petition for reconsideration.  IDAPA 31.01.01.331.02 (Cross-Petition for Reconsideration) in Appendix B.  Eagle Water’s petition in this regard was dismissed and reconsideration was accordingly denied.  Order No. 26431 R. Vol. II, p. 242; Order No. 26432 R. Vol. II, p. 248.

The first four issues raised by Eagle Water on appeal pertain to the certificated area awarded to United Water.  The Commission’s Orders in this regard are presumptively correct and have not been challenged.  Nez Perce Roller Mills v. Pub. Util. Comm’n., 54 Idaho 696, 34 P.2d 972 (1934).  Issues not presented to the Commission for rehearing are not to be considered on appeal.  Key Transp., Inc. v. Trans Magic Airlines Corp., 96 Idaho 110, 524 P.2d 1338 (1974).  The Commission’s Orders in this regard have become final and conclusive and Eagle Water should not be permitted to now collaterally attack them.  Idaho Code § 61-625; Utah-Idaho Sugar Co. v. Intermountain Gas Co., 100 Idaho 368, 597 P.2d 1058 (1979).

Assuming arguendo however that Eagle Water is not procedurally barred on appeal from challenging United Water’s certificate and the service area awarded to United Water, the Commission makes the following arguments on the substantive and legal issues raised by Eagle Water.

B.  Legal/Substantive Issues

I.  The Commission’s Orders granting United Water an amended certificate to provide water service in the Eagle area are supported by substantial and competent evidence demonstrating a present or future need for service and are reasonably based in both fact and law.

Eagle Water’s contention that the Commission’s decision to award an amended certificate to United Water is not supported by adequate findings of fact.  This argument is belied by a review of the record and the resultant Orders.  In these cases the Commission was required to determine whether United Water presented sufficient evidence that it should be granted an amended certificate pursuant to the certification requirements contained in Idaho Code §§ 61-526 and -528.  See Appendix A. The Commission concluded that the present and future public convenience and necessity required the issuance of a certificate to United Water.  The Commission’s ordering paragraphs are preceded by a recitation of the relevant evidence and the parties’ respective positions.  When viewed in context, the Commission’s findings and conclusions of law are well supported.

The Legislature has the power to regulate and supervise public utilities and has delegated to the Public Utilities Commission the power to determine what public utility shall be certficated for the public convenience and necessity.  Application of Kootenai Natural Gas Company, 78 Idaho 621, 623, 308 P.2d 593, (language omitted) (1957). The authority “to determine whether a Certificate of Convenience and Necessity should be issued and the privilege of selecting between rival applicants lies with the Commission, it is not for the Court to decide.”  Washington Water Power Co. v. Idaho Public Util. Comm’n, 84 Idaho 341, 343, 372 P.2d 409, (language omitted) (1962).

Idaho Code § 61-526 and Rule 112 of the Commission’s Rules of Procedure (IDAPA 31.01.01.112) establish the applicable filing requirements for an amended Certificate of Public Convenience and Necessity by an existing utility.  See Appendix A and B.  The standard is the same for all certificate filings, i.e., the public interest.  This Court has stated that the term “public interest” is not susceptible of precise definition.  Browning Freight Lines, Inc. v. Wood, 99 Idaho 174, 180, 579 P.2d 120, 126 (1978).  In general, where the Commission is required to consider the “public interest,” it must look to “the interest of the public, their needs and necessities and location and, in fact, all the surrounding facts and circumstances . . . to the end that the people be adequately served.”  Id.

Eagle Water contends that there was no evidence that a need for water service presently existed or would reasonably exist in the near future.  Appellant Brief at 24.  In establishing “public need”, it has been held that it is not necessary to prove absolute necessity or present demand for service in every point of territory proposed, but merely that such service is reasonably necessary for accommodation and convenience of the public.  Dutchland Tours, Inc. v. Pa. Cmwlth., 337 A.2d 922, 923 (Pa. 1975); Hartwig v. Pugh, 97 Idaho 236, 242, 542 P.2d 70, 76 (1975).  Under the particular facts and circumstances of this case, there is substantial and competent evidence to support the Commission’s determination that existing and future needs of the public required an award of the certificated area to United Water.

In its recitation of facts as set forth in Order Nos. 26337 and 26338, the Commission noted that the record revealed evidence specifically addressing the present and future need for water service.  Regarding actual present and future requests for service, the Commission noted that United Water had received several requests for service within the Eagle area, both from approved and planned development, and also from existing water users.  Order No. 26337 R. Vol. II, p. 201; Order No. 26338 R. Vol. II, p. 213.  The Commission observed that United Water had received several requests for future services from real estate developers with approved or planned developments and for present services from existing homeowners in Redwood Creek (12 customers) and Island Woods (58 customers) subdivisions.  Tr. p. 36.  In addition, the Commission observed that United Water had received a request from the local school district to provide water service for the newly constructed Eagle Middle School and Eagle High School.  Tr. pp. 81, 86.  Order No. 26337 R. Vol. II, p. 201; Order No. 26338 R. Vol. II, p. 213.  The Commission further noted that the City Council for the City of Eagle expressed a preference for UWI as service provider to the Eagle area.  In making its choice, the City stated that it focused not on rates, but the need for a gravity feed backup reservoir, system quality and the financial capabilities of the provider to cope with area growth, unforeseen circumstances and emergencies.  Order No. 26337 R. Vol. II, p. 205; Order No. 26338 R. Vol. II, p. 217.

Regarding growth projections for the area, the Commission observed that based on Ada County Planning and Zoning Commission and Eagle Sewer District projections, United Water estimated projected growth in the Eagle Area of between 200 and 250 customers per year over the next five years.  Tr. pp. 194; Tr. Exh. 1 p. 5; Order No. 26337 R. Vol. II, p. 202; Order No. 26338 R. Vol. II, p. 214.

The certificate area requested by United Water is that area generally depicted in Tr. Ex.101 and more particularly described in UWI Application Ex.1 and 1A.  See also Tr. Ex.6.  Order No. 26337 R. Vol. II, p. 201; Order No. 26338 R. Vol. II, p. 218.  In its description of present and planned facilities in the Eagle area, the Commission noted that United Water owned four wells in the Eagle area, the two wells serving Island Woods, one well at Redwood Creek and the Floating Feather well.  Tr. pp. 44-45.  The Commission further noted that United Water planned to utilize existing wells and distribution systems within the requested area to provide water and fire protection services, and that United Water also proposed to install remote monitoring equipment and backup capability for power outages.  Tr. pp. 188-191.  Order No. 26337 R. Vol. II, p. 201; Order No. 26338 R. Vol. II, pp. 213-14.  A simple joining of the locations of the existing areas requesting and requiring service from United Water (Island Woods, Redwood Creek, Eagle Middle School and Eagle High School) and the already acquired and related facilities form a reasonable basis for the area certificated to United Water.  See related map Tr. UWI Exh. No. 6.  Joining the areas together also enables the Commission to address the stated public interest in preventing “checkerboard and/or uneconomic patterns of service to develop.”  Order No. 26524 R. Vol. II, p. 360; Order No. 26525 R. Vol. II, p. 377.

The Commission’s decision to award an amended certificate to United Water, as reflected above, was supported by substantial, competent evidence.  In authorizing and granting United Water an amended certificate, the Commission was acting within its discretion and expertise.  The Commission in its Orders made the following specific findings:

The respective filings and records in [Case Nos. EUW-W-94-1 and EAG-W-95-1] satisfy the underlying statutory and procedural requirements for Certificate Applications.

United Water is the more financially and technically capable of the two companies seeking certificates.

We have every reason to believe that United Water can provide quality water service in every sense of the term, that it has the ability to serve present and future growth in the Eagle area, and that it has the ability and wherewithal to accommodate unforeseen circumstances and emergencies.

Order No. 26337 R. Vol. II, p. 206; Order No. 26338 R. Vol. II, p. 218.

A review of the record also reveals that United Water was offering the public more than mere competition, but rather a better or broader service.  McFayden v. Public Utilities Consol. Corp., 50 Idaho 651, 657, 299 P. 671, 673 (1931).

The Commission’s recitation and discussion of the relevant and specific facts and evidence related to United Water’s Application for an amended certificate is set out in the Commission’s Order No. 26337.  The Order contains substantial, competent evidence to support the Commission’s award of an amended certificated service area to United Water, and to support a conclusion by the Court that the Commission’s actions were “reasonably based in both fact and law.”  Rosebud Enterprises, 128 Idaho at 624, 917 P.2d at 781.

II.  In granting United Water an amended certificate to provide water service in the Eagle area, the Commission was not required to make a specific finding that Eagle Water was unable to provide adequate service to that area.

Eagle Water next contends that prior to granting United Water an amended certificate for a service area adjacent to Eagle Water’s service area, the Commission was required to find that Eagle Water was unable to provide adequate service to the area.  Relying upon McFayden, 50 Idaho at 656, 299 P. at 673, Eagle Water asserts that as the utility already in the field, it should have received a preference as to areas contiguous to its certificate area.   However, McFayden does not support Eagle Water’s contention.  The Court in McFayden was speaking of companies “with like ability to furnish like service.”  McFayden, 50 Idaho at 656, 299 P. at 673.  In this case the Commission was clear to not equate the service provided by both utilities, but found that United Water was qualified to provide better service than Eagle Water.  As reflected in Order Nos. 26337 and 26338, the Commission found:

●United Water is the more financially and technically capable of the two companies before us seeking certificates.

●We have every reason to believe that United Water can providequality water service in every sense of the term, and that it has the ability to serve present and future growth in the Eagle area, that it has the ability to address critical water supply issues such as fire protection and backup capability, and that it has the ability and wherewithal to accommodate unforeseen circumstances and emer-gencies.

●The Commission finds that Eagle Water is a provider ofsatisfactoryand adequate water service.

●We find that Eagle Water’s capability to fund future expansion, replacement, repair and maintenance, and unforeseen circumstances and emergencies may continue to present it with creative challenges. . . .The prospect of area growth slowing or flattening dictates that Eagle Water develop a financial plan for repairing and replacing existing facilities.

●The public interest, convenience and necessity is the determinate of which utility capable of providing adequate service should be allowed to serve.  Between two competing utilities, as in this case, the present and future ability to provide adequate and satisfactory service at reasonable rates is the major consideration.

●We find that the presence of United Water in the Eagle area and the many services it provides may indirectly benefit the community as a whole.

●Our determination in this case of certificated areas for United Water and Eagle Water acknowledges our finding that the present and future public convenience and necessity requires such an award of service areas.

R. Vol. II, pp. 206-208; R. Vol. II, pp. 218-19.  (emphasis added).

In Order Nos. 26524 and 26525, the Commission further found:

■The financial plan filed by Eagle Water does not provide the Commission with regulatory assurance or confidence that at the present time we can find that Eagle Water is the best positioned financially or physically to provide expanded service to the unserved areas north of Floating Feather Road and east of Eagle Road.

■Eagle Water is a small company.  United Water is a large company.  Those are just the facts.  They are fundamentally different utilities.

■Eagle Water experiences many challenges associated with being small, not the least of which in this case is a financial profile that more resembles a customer-owned utility heavily dependent on contribution and operating day-to-day on a skeletal income-in expense-out basis.  The economic and operational challenges that small water companies face require a great deal of resourcefulness.

■Eagle Water’s ability to expand beyond its prior certificated area must be closely monitored.  The public interest demands no less.

R. Vol. II, pp. 359-60; R. Vol. II, pp. 377-78.

As the Court observed in Kootenai Natural Gas Company, 78 Idaho at 626-27 308 P.2d at 596, where other considerations are in equipoise in competing applications for a certificate, local ownership and control, priority and extent of preparation, priority and filing of applications, and the preference of communities to be served are proper factors to be considered: but the public interest is the paramount consideration.  Accord Washington Water Power Co. v. Idaho Public Util. Comm’n, 84 Idaho 341, 344, 372 P.2d 409, (language omitted) (1962). In Cambridge Telephone Co. v. Pine Telephone, 109  Idaho 875, 879, 712 P.2d 576, 580 (1985), the Court addressing a utility’s willingness and ability to provide service held:

Some jurisdictions have held that an unserved area previously certified to a utility may not be revoked when the certified utility is ready, willing and able to extend adequate service at reasonable rates.

—The rule in Idaho is the same, except where the record clearly shows that “public convenience and necessity does not require”. . .

The Court in Cambridge also concurred with the analysis of the Utah Supreme Court, in Empire Elec. Ass’n v. Public Service Comm’n, 604 P.2d 930, 933-934 (Utah 1979).  In Empire Electric the Utah Court held that it cannot be assumed that the grant of a certificate is permanent and exclusive.  The concept of “public convenience and necessity,” the Utah Court stated, is one that may be considered and reexamined in light of current and changing circumstances.  Of further significance, the Utah Court held that “it is not necessary to make findings that the present certificate holder is not performing its utility obligations when another applicant is awarded the right to serve an area.”  Id. at 944 citing Utah Light & Traction Co. v. Public Service Comm’n, 101 Utah 99, 113-14, 118 P.2d 683, 690 (1941).

Whether there should be competition in any given field, and to what extent, is largely a matter of policy committed to the sound judgment and discretion of the Commission.  Kootenai, 78 Idaho at 623, 308 P.2d 621, (language omitted) (1957); Application of Trans-Northwest Gas, 72 Idaho 215, 221, 238 P.2d 1141, 1144-45 (1951).  In this case, the ability or willingness of Eagle Water to provide service in adjacent uncertificated areas was not the controlling factor—the controlling factor was the public interest.  In this case the Commission found that United Water was the better qualified utility to serve.  The “power to determine whether a Certificate of Convenience and Necessity should be issued and the privilege of selecting between rival applicants lies with the Commission, it is not for the Court to decide.”  Washington Water Power Co. v. Idaho Public Util. Comm’n, 84 Idaho 341, 343, 372 P.2d 409 (1962).

III.  The Commission is not precluded from awarding a certificate to United Water for a service area in which the utility or its affiliate provided uncertificated operations, if the public interest requires otherwise.

It is Eagle Water’s contention that Engineering, Management and Maintenance, Inc. (EM²), an unregulated affiliate of United Water, was unlawfully providing uncertificated water service within the certificated area awarded to United Water.  Because of a sameness of identity, Eagle Water contends that the unlawful actions of EM² should be attributed to United Water.  United Water, it is argued, should not have been allowed to benefit from its uncertificated operations.  Instead Eagle Water contends that the Commission should have directed United Water to withdraw from the area.  Appellant Brief p. 32.  Despite Eagle Water’s argument, the public interest and the securing of adequate service for the public is the paramount consideration of the Commission in awarding a certificate for service.  Kootenai Natural Gas, 78 Idaho at 622, 308 P.2d at 594 (1957).  Although bad acts are to be taken into consideration, they are not controlling.  In Order No. 26337 and Order No. 26338 the Commission acknowledges that United Water had received requests for service from existing water users.  The Commission stated:

included are the Redwood Creek Subdivision in northern Eagle with 12 customers, and the Island Woods Subdivision in southern Eagle with 58 customers, both of which presently receive water operation and management services from Engineering, Management and Maintenance, Inc.  (EM²), an affiliate of United Water.  Tr. p. 36.

Also included within the requested area are the newly constructed Eagle Middle and High Schools, both of which receive water services now from EM².  Tr. pp. 81, 86.

Order No. 26337 R. Vol. II, p. 201; Order No. 26338 R. Vol. II, p. 213.

In its initial Orders granting United Water and Eagle Water additional certificated areas, the Commission states:

While the preference of individual customers, school districts and the community is to be given some weight in the choice of a service provider, we do not find it controlling.  Nor do we find it controlling or significant that United Water through an unregulated affiliate has a presence in the area.  A regulated water utility is at risk in extending into, acquiring property and investing in non-contiguous areas without a prior certificate.  The risk is greater when it encroaches on the service territory of another provider.  The public interest, convenience and necessity is the determinate of which utility capable of providing adequate service should be allowed to serve.  Between two competing utilities, as in this case, the present and future ability to provide adequate and satisfactory service at reasonable rates is the major consideration.

Order No. 26337 R. Vol. II, p. 206; Order No. 26338 R. Vol. II, pp. 218-19.

Assuming arguendo that the nature of some of the services provided by EM² required a certificate prior to operation, and that its unauthorized activities could be imputed to United Water, the Commission still has reasonable discretion in determining the suitability of an applicant to choose which utility, under the particular facts and circumstances, will best serve the public interest.  Browning Freight Lines, Inc. v. Wood, 99 Idaho 174, 180, 579 P.2d 120, 126 (1978); Washington Water Power Co. v. Idaho Public Util. Comm’n, 84 Idaho 341, 343, 372 P.2d 409 (1962).  Eagle Water has presented no authority which would require and dictate that a certificate be denied to a utility providing services without a certificate, should the weight of evidence establish the public interest to be otherwise served.  In this case the Commission weighed the relative financial and technical capabilities of the two applicants, found United Water to be the more financially and technically capable, and found that the present and future public convenience and necessity required an award of service area to United Water.  Order No. 26337 R. Vol. II, pp. 206-208; Order No. 26338 R. Vol. II, pp. 218-220.

IV.  Before permitting United Water to provide water service to an area adjacent to Eagle Water’s existing certificated area, the Commission was not required to make a specific finding that Eagle Water’s operations and future viability would not be harmed.

Eagle Water contends that before the Commission could grant an amended certificate to United Water in Case No. EUW-W-94-1, the Commission was required to find that such a certificate would not interfere with Eagle Water’s existing or future operation.  Idaho Code § 61-526.  Eagle Water asserts that granting United Water a certificated area contiguous to the certificated area of Eagle Water will interfere with the future operation of the Eagle Water system.  The record does not support a finding that Eagle Water’s operations would be harmed by granting a certificate to United Water.

In the cases on appeal the Commission was determining which utility was better able to provide water service within the requested certificate areas, i.e., which applicant could best serve the public convenience and necessity.  The Commission’s Orders reveal that the Commission in its analysis was apprised of, considered and applied the factors enumerated in McFayden, 50 Idaho 651, 229 P. 671 (1931) and Kootenai Natural Gas, 78 Idaho 621, 308 P.2d 593 (1957), both cases involving competing applications to provide utility service to areas previously uncertified.  See post-hearing briefs R. Vol. I, pp. 175-90; see Arguments in Sections I-III of this brief.  As this Court has clearly enunciated, the primary consideration in cases involving competing applications for certificate is the public interest and securing adequate service for the public.  The interests of the companies themselves, and even protecting existing investments from wasteful competition must be treated as secondary.  Kootenai Natural Gas, 78 Idaho at 622; 308 P.2d at 594; McFayden, 50 Idaho at 657, 299 P. 671 at 673.

Eagle Water argues that the Commission has taken away the Company’s ability to grow in the future.  App. Brief p. 33.  The record does not support this contention.  Eagle Water chooses to ignore the additional areas certificated to Eagle Water in this case, the area south to the Boise River, an area to the east and miscellaneous in-fill areas.   Order No. 26524 R. Vol. II, pp. 363-64; Order No. 26525 R. Vol. II, pp. 381-82.  Additionally, the Commission left uncertificated the designated buffer areas and the area north of Floating Feather Road and east of Eagle Road.  Order No. 26337 R. Vol. II, p. 207; Order No. 26338 R. Vol. II, p. 219.  Eagle Water estimates that 80% of near term projected Eagle area growth will occur within areas previously certificated to the Company.  Tr. pp. 258, 259.  At the time of hearing, it was estimated that there were approximately 382 undeveloped lots in the Company’s prior certificated area.  Tr. p. 295.

Furthermore, it is not clear that continued area for growth and expansion is necessary in order to assure the present and future viability of Eagle Water and its continued ability to provide satisfactory and adequate water service.  What is clear is that some change is required.  Without growth, Eagle Water can still continue to provide water service including replacement, repair, and maintenance.  It can still be viable.  Although the Commission concluded that Eagle Water has the financial profile of a customer-owned utility (Order No. 26524 R. Vol. II, p. 360; Order No. 26525 R. Vol. II, p. 378), the Company is still able to recover authorized “operating expenses.”  Idaho Code §§ 61-502, -503.  If Eagle Water incurs and wishes to recover its increased operating expenses, approved costs can be passed on to utility ratepayers.  Eagle Water need only file a rate case.  R. Vol. II, p. 320.

V. Idaho Code §§ 61-526 and 61-528 provide the Commission with the statutory authority to require that Eagle Water obtain Commission approval before extending into contiguous areas beyond its certificated service area.

On appeal Eagle Water challenges the Commission’s statutory authority to prohibit its extension of facilities and service into contiguous and uncertificated areas without prior application, approval and certification.  Order No. 26525, R. Vol. II, pp. 378, 379.  Eagle Water contends that Idaho Code § 61-526 allows it to extend into contiguous areas without first applying to the Commission.  Appendix A.  It is quite clear, however, from a reading of statute and case law that Eagle Water’s willingness and ability to extend beyond its certificated area is not the sole criterion in deciding whether it should be allowed to do so.  The Commission’s primary consideration in deciding rival applications is not the interest of either of the applicants, but the rights and interest of the public.  Application of Intermountain Gas Company, 77 Idaho 188, 202, 289 P.2d 933, 942 (1955).

The Legislature has the power to regulate and supervise public utilities and has delegated to the Commission the power to determine what public utility should be certified for the public convenience and necessity.  Idaho Code § 61-526; Kootenai Natural Gas, 78 Idaho at 623, 308 P.2d 593 at (language omitted) (1957); Idaho Power Company v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914).  A certificate is subject to and conditioned upon statutory conditions, regulations and restrictions, including the express limitation set out in Idaho Code § 61-526:

“If public convenience and necessity does not require . . . .”

Cambridge Telephone Co. v. Pine Telephone, 109 Idaho 875, 879, 712 P.2d 576, 580 (1985).  The Commission may “rescind, alter or amend” (Idaho Code § 61-624), a certificate previously issued for an unserved area upon a showing that the “public convenience and necessity” does not require the extension.  Under the authority of Idaho Code § 61-526, the Commission may “make such Order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reasonable.”  Cambridge, 109 Idaho at 879, 712 P.2d at 580.  The applicable statutory law became a part of Eagle Water’s certificate.   Just as the Commission has jurisdiction to approve, deny, rescind or revoke extension of services into an unserved area within an already certificated area , so too, if circumstances require, can it condition extension of service into contiguous and uncertificated areas.

Eagle Water’s certificate is also subject to the limitation set out in Idaho Code § 61-528:

Certificate of convenience and necessity—conditions— . . . The commission shall have power, after hearing involving the financial ability and good faith of the applicant and necessity of additional service in the community to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the construction of any portion only of the contemplated . . . line, plant or system or extension thereof, or for the partial exercise only of said right or privilege, and may attach to the exercise of the rights granted by said certificate, such terms and conditions as in its judgment the public convenience and necessity may require.  (emphasis added).

After a hearing and record involving the financial ability and good faith of Eagle Water and the necessity of additional service in the community, the Commission in Order Nos. 26524 and 26525 made the following ultimate findings regarding what was required by the public interest:

The financial plan filed by Eagle Water does not provide the Commission with regulatory assurance or confidence that at the present time we can find that Eagle Water is the best positioned financially or physically to provide expanded service to the unserved areas north of Floating Feather Road and east of Eagle Road.

While we do not wish to encourage nor will we permit a checkerboard and/or uneconomic pattern of service to develop, we now believe that it is wise to wait for the actual pattern of planned development in this area before determining which entity should be the provider of water service.

Rather than assigning the unserved areas north of Floating Feather Road and east of Eagle Road to Eagle Water as we did in Order Nos. 26337 and 26338, we find a more reasonable approach is to leave the area uncertificated at the present time.  . . .We find that the public interest is better served by this approach.

As in the “buffer zones” we previously established, we will make the service provider decision(s) for this unserved area in the future when specific requests for service are pending and better information is available to us to determine which company should provide service.

Eagle Water experiences many of the challenges associated with being small, not the least of which in this case is a financial profile that more resembles a customer-owned utility heavily dependent on the contribution and operating day-to-day on a skeletal income-in expense-out basis.  The economic and operational challenges that small water companies face require a great deal of resourcefulness. . . .

Eagle Water’s ability to expand beyond its prior certificated area, however, must be closely monitored.  The public interest demands no less.

Order No. 26524 R. Vol. II, pp. 359-61; Order No. 26525 R. Vol. II, pp. 377-78.

Based on its analysis of what the public interest required the Commission pursuant to its authority under Idaho Code §§ 61-526 and -528 restricted utility expansion into the designated uncertificated areas, stating that “neither utility is permitted to extend facilities into the uncertificated area without prior application to and authorization from this Commission.  Installation of facilities into such areas without prior certification and approval will be viewed as a violation of this Order subjecting the utility to the imposition of statutory penalties.”  Order No. 26524 R. Vol. II, p. 361; Order No. 26525 R. Vol. II, pp. 378-79.

CONCLUSION

The Commission in the cases on appeal regularly pursued its authority and properly considered the public interest.  The Commission’s Orders certifying and authorizing United Water and Eagle Water to provide water service to specific areas in the Eagle area, and further identifying areas within which neither utility is permitted to extend facilities without the prior approval of the Commission are based on substantial and competent evidence.  The Commission prays that Order Nos. 26337 and 26524 in Case No. EUW-W-94-1 and Order Nos. 26338 and 26525 in Case No. EAG-W-95-1 be affirmed.  Idaho Code § 61-629.

Respectfully submitted this            day of February 1997.

Scott D. Woodbury

Deputy Attorney General

Attorney for Respondent

Idaho Public Utilities Commission

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this            day of  February 1997, served  two copies of the within and foregoing Respondent’s Brief of the Idaho Public Utilities Commission, by United States Mail, postage prepaid to:

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Secretary

APPENDIX A

Idaho Code

I.C. § 61-526 Certificate of convenience and necessity—No . . . water corporation, shall henceforth begin the construction of a . . . line, plant, or system or of any extension of such . . . line, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction: provided, that this section shall not be construed to require such corporation to secure such certificate for an extension within any city or county, within which it shall have theretofore lawfully commenced operation, or for an extension into territory whether within or without a city or county, contiguous to its . . . line, plant or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it necessary in the ordinary course of its business: and provided further, that if any public utility in constructing or extending its lines, plant or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, or if public convenience and necessity does not require or will require such construction or extension, the Commission on complaint of the public utility claiming to be injuriously affected, or on the Commission’s own motion, may, after hearing, make such order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reasonable. . . .  (emphasis added).

I.C. § 61-528   Certificate of convenience and necessity—conditions— Before any certificate of convenience and necessity may issue, a certified copy of its articles of incorporation, or charter, if the applicant be a corporation, shall be filed in the office of the commission.  The commission shall have power, after hearing involving the financial ability and good faith of the applicant and necessity of additional service in the community to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the construction of any portion only of the contemplated . . . line, plant or system or extension thereof, or for the partial exercise only of said right or privilege, and may attach to the exercise of the rights granted by said certificate, such terms and conditions as in its judgment the public convenience and necessity may require.  (emphasis added).

APPENDIX B

Commission Rules of Procedure (IDAPA 31.01.01.000 et seq.)

Applications for Certificate of Convenience and Necessity

Rule 112 Form and Contents—Existing Utility

Existing utilities applying for the issuance of or the amendment of a Certificate of Convenience and Necessity under § 61-526, Idaho Code, (other than a motor carrier) must submit the following data (where relevant):

(a) A statement or prepared testimony and exhibits explaining why the proposed construction or expansion is or will be in the public convenience and necessity.

(b) A full description of the proposed construction or expansion, including the manner of construction or expansion, and if an expansion, the names of all public utilities, corporations, or persons with whom the expanded utility is likely to compete.

(c) A map of suitable scale showing the location of the construction or expansion in relation to other public utilities in the area(s) that offer or provide similar utility service.

(d) A statement of the manner in which the applicant proposes to finance the construction or expansion, the time when the applicant proposes to begin the construction or expansion, and the time when the applicant proposes to complete the construction or expansion.

(e) Estimates of the cost of the construction or expansion, the number of additional customers to be served by the construction or expansion, the revenues to be derived from the construction or expansion, and of the effects of the construction or expansion on revenue requirements.

IDAPA 31.01.01.112

Reconsideration

Rule 331 Petitions and Cross-petitions for Reconsideration

01.  Petition for Reconsideration.  Within twenty-one (21) days after the service date of issuance of any final order or rule, any person interested in a final order or rule of the Commission may petition for reconsideration.  Petitions for reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or rule is unreasonable, unlawful, erroneous or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted.  See section 61-626, Idaho Code.

02.  Cross-Petition for Reconsideration.  Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration in response to any issues raised in the petition for reconsideration.  Cross-petitions for reconsideration must set forth specifically the ground or grounds why the cross-petitioner contends that the order or rule is unreasonable, unlawful, erroneous or not in conformity with the law, and a statement of the nature and quantity of evidence or argument that the cross-petitioner will offer if reconsideration is granted.  See section 61-626, Idaho Code.  (emphasis added).

IDAPA 31.01.01.331