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2007 AUG 31 A 11:44

August 31, 2007

IDAHO PUBLIC
UTILITIES COMMISSION

VIA HAND DELIVERY

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington St.
Boise, Idaho 83720

Re: Case No. UWI-W-06-04

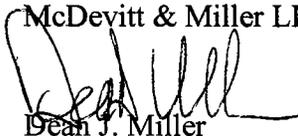
Dear Ms. Jewell:

Enclosed for filing in the above matter please find the original and seven (7) copies of United Water Idaho Inc.'s Answer to Petition for Reconsideration.

An additional copy of the document and this letter is included for return to me with your file stamp thereon.

Very Truly Yours,

McDevitt & Miller LLP



Dean J. Miller

DJM/hh
Attach.

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2007 AUG 31 A 11: 44
IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF UNITED WATER IDAHO INC., TO AMEND AND REVISE CERTIFICATE OF CONVENIENCE AND NECESSITY NO 143)))))	CASE NO. UWI-W-06-04 ANSWER TO PETITION FOR RECONSIDERATION
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COMES NOW United Water Idaho Inc., (“United Water”), pursuant to RP 331.05, and
Answers the City of Eagle’s Petition to Reconsider dated August 24, 2007, as follows, to wit:

INTRODUCTION AND STANDARD OF REVIEW

On August 3, 2007, the Commission entered its Order No. 30367 (the “Order”) approving
United Water’s Application to Amend its Certificate of Public Convenience and Necessity to
provide water service to the Trailhead Community (“Trailhead”).

On August 24, 2007, the City filed a Petition to Reconsider (“Petition”). The Petition
advances two arguments:

- The needs of Trailhead are undefined and the Commission did not analyze the capability
of United Water to serve the undefined needs. (Petition, Pg. 3);
- The Commission improperly engaged in a legal determination of the City’s authority to
provide service. (Petition Pg. 3).

A Petition for Reconsideration must set forth “specifically the ground or grounds why the petitioner contends that the order...is unreasonable, unlawful, erroneous or not in conformity with the law”. The Petition must contain a “...statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted.” (RP 331.01).

The City’s first argument presents a factual issue of whether the Order is “unreasonable” or “erroneous” and the City’s second argument presents a legal issue of whether the Order is “unlawful” or “not in conformity with law.” As will be demonstrated herein, the Order is both reasonable and in conformity with law. Consequently, the Petition should be denied.

ARGUMENT

The Order Assessed the Needs of Trailhead and the Ability of United Water to Meet Them

The City’s argument that the Commission “did not analyze the capability of the regulated utility, United Water, to serve clearly defined needs of the development” (Petition Pg. 3), ignores the plain text of the Order. The Order recites:

“This Commission finds that United Water has adequately planned for and has a fully integrated water system with sufficient and multiple sources of supply and is capable of providing safe and reliable water service to the 520 acres of Trailhead Community property located north of Homer Road and outside the City of Eagle's area of impact boundary. Tr. pp. 22, 24, 61, 62, 82, 84, 126. Under the Company's existing line extension rules, we find that the cost of additional facilities required to serve Trailhead will be contributed by the developer without refund. Tr. pp. 22, 23. Any booster stations and storage reservoirs that may be required will be constructed pursuant to a Special Facilities Agreement and a developer advance with related refund eligibility. Tr. pp. 84-86. We find that service to Trailhead by United Water will be in the public interest and that the same can be provided without adversely affecting the Company's other water customers”.

Based on the record developed at hearing, the Commission made factual findings necessary to approve United Water's Application. As set forth above the Commission found:

- United Water has adequately planned for and has a fully integrated water system with sufficient and multiple sources of supply and is capable of providing safe and reliable water service to the 520 acres of the Trailhead Community;
- The cost of the additional facilities required to serve Trailhead will be contributed by the developer without refund;
- Any booster stations and storage reservoirs that may be required will be constructed pursuant to a Special Facilities Agreement;
- Service to Trailhead can be provided without adversely affecting the Company's other customers.

In light of the Order's specific factual findings, the City's contention that the Commission did not analyze United Water's ability to serve is unsupported.

The Order's Findings Are Supported by Substantial Evidence

If the City's "failure to analyze" argument is more in the nature of a contention that the Order's findings are not supported by substantial evidence that, too, is unavailing.

The Order's finding that United Water has sufficient source of supply is supported by the testimony of Scott Rhead, United Water's Director of Engineering:

"Q. Does United Water have a comprehensive approach for planning to meet future demands?

"A. Yes. United Water prepares a Water System Master Plan ("Plan") which is updated approximately every five years. The most current version is for the period 2005-2010. The Plan projects likely demand over a multi-year period and identifies source of supply resources necessary to meet the demand. The numbers of customers to be added by the Trailhead development over time are within the planning parameters of the Plan.

Q. Based on the foregoing discussion, in your professional opinion, does United Water have adequate source of supply resources to serve the Trailhead development?

A. Yes. In my professional opinion United Water has adequate source of supply resources to serve the Trailhead development. As the numbers of customers within the Trailhead development grows over time, that growth is within the growth levels projected by the Plan.” Tr. Pg. 84. *See also*, Tr. Pgs. 22, 24, 61, 62, 82, 84.

Testimony provided by Gregory P. Wyatt, United Water’s General Manager, supports the Order’s finding that the cost of mainline extensions will be born by the developer without refund:

Q. Will United Water’s existing ratepayers be in anyway burdened by United Water’s service to the Trailhead Development?

A. No. As explained in Mr. Rhead's testimony, the additional facilities required to serve the development consist of extension of a 12 inch mainline from United Water's existing transmission main through rights of way along Eagle Road. Under United Water's Rules and Regulations Governing Water Main Extensions the cost of this mainline will be contributed by the developer without refund from United Water.” Tr. Pg. 22.

The Order’s finding that booster stations and storage reservoirs will be funded through Commission approved Special Facilities Agreements is supported by Mr. Rhead’s Testimony:

Q. Please describe the cost of responsibility for booster and storage facilities.

“A. Under United Water's Rules and Regulations these can be considered Special Facilities and the developer will be required to execute a Special Facilities Agreement ("SFA"). The standard terms of the Commission-approved SFA require the developer to advance the cost of construction and related costs. The developer becomes eligible for refunds as customers are connected and are providing new revenue to support the investment. In this way, United Water's other customers are insulated from speculative risk.” Tr. Pg. 85-86.

Mr. Wyatt’s testimony and the Staff Comments also support the Order’s finding that service can be provided to Trailhead without adversely affecting the Company’s other water customers:

“Q. Does the Commission Staff agree with this assessment (that other customers will not be burdened)?

A. I believe so. In its written Comments filed June 1, 2006, Staff said:

“United Water is also capable of serving the development. As long as United Water follows its established line extension rules, other customers of United Water should not be adversely affected by the addition of Trailhead”. (Staff Comments, pg. 3).” Tr. Pg. 23).

It is well settled that the Supreme Court will not overturn Commission findings that are supported by substantial evidence. *Grindstone Butte Mut. Canal Company v. Idaho Public Utilities Commission*, 102 Idaho 175, 627 P.2d 804 (1981). As demonstrated above, the Order’s findings clearly satisfy that test.

While the Commission May Not Exercise Judicial “Powers” It May Exercise the Judicial “Function” of Determining What the Law Is

The Petition argues that “The Commission does not have the authority pursuant to Title 61 to rule on the jurisdictional powers of another governmental entity.” (Petition Pg. 4). The Petition cites a number of Idaho Supreme Court cases referencing the well-known rule that the Commission is a creature of statute and exercises only those powers conferred by the legislature. (Petition Pg. 4—5). As discussed below, these cases and the general rule for which they stand do not address the question presented here, which is the ability of the Commission to determine what the law is.

In answering that question, a review of a series of Supreme Court decisions decided shortly after the enactment of the Public Utilities Law is instructive. In these cases¹, the Commission sought to regulate companies—mostly water companies—that appeared to be providing public utility service. The companies resisted regulation and argued the Commission did not have the authority to determine their legal status as public utilities because, the

¹ *Neil v. Public Utilities Commission*, 32 Idaho 44, 178 P. 281 (1919); *Humbird Lumber Company v. Idaho Public Utilities Commission*, 32 Idaho 80, 178 P. 284 (1919); *Natatorium Company v. Erb*, 34 Idaho 209, 200 P. 348 (1921).

companies claimed, to do so would be to exercise a judicial function that was solely the province of courts. To resolve these cases, the Court drew a distinction between “judicial functions” and “judicial powers” and held that while the Commission can not exercise judicial powers—awarding damages or issuing injunctions—the Commission can exercise judicial functions of ascertaining the law and the legal status of parties that come before the Commission. As the Court stated in *Natatorium Co. v. Erb*:

“Conceding that the question of whether plaintiff is a public utility is a judicial question, and must be determined as such by a court of competent jurisdiction, nevertheless the commission, in exercising the powers conferred upon it by the legislature, must necessarily pass upon its own jurisdiction in the first instance, and in doing so it exercises a judicial function, but not a judicial power. While its decision is not a final adjudication of the question of jurisdiction, yet in every case before the Public Utilities Commission, it must in the first instance determine from the evidence before it whether the utility with which it is seeking to deal is a public utility, for unless it be a public utility, the commission is without any jurisdiction over it whatsoever, and this determination can only be made by the exercise of judicial functions.

Judicial functions may be exercised by bodies possessing no judicial power whatever”.
34 Idaho at 209.

Since the time of these early cases, it has become well-settled that while the Commission is not a court with the ability to exercise judicial powers, the Commission may exercise judicial functions of ascertaining the law and determining the legal status of parties that come before it. *See e.g. McNeal v. Idaho Public Utilities Commission*, 2006 Idaho 31844 (2006).

Further, it should be remembered that the City, of its own volition, intervened in this proceeding, claiming it was ready willing and able to serve Trailhead. (*See* Testimony of Vern Brewer: “The City can serve this amount and can do so immediately. Based on consideration of the facts outlined in my testimony, I believe it is in the public interest to allow the City to serve this area.” Tr. Pg. 238). It is inconsistent for the City to say, on one hand, it is able to serve, but, on the other, to assert the Commission has no authority to examine its legal ability to serve.

Order No. 30367 Correctly Ascertained the Limits of Municipal Authority

At the outset, it is important to clarify what this case is not about. It does not involve a contract or agreement between a willing landowner and a city to provide water service outside municipal boundaries. The question presented here is whether a city may compel an unwilling landowner outside its boundaries to accept water service from the city.

The cases cited in the City's Petition² all relate to circumstances involving contractual relations between a city and a willing extra-territorial landowner. The only Idaho case cited in the Petition, *Albee v. Judy*, involved the city's obligations after the city purchased a water company outside the city boundary that was regulated by the Commission. Whatever may be the law governing relations between consenting extra-territorial landowners and a city, it is inapplicable to the circumstance presented here, in which the city seeks to thrust itself upon an unwilling landowner.

Firmly adopted in Idaho law is a principle known as Dillon's Rule, which is a limitation on municipal authorities. The Rule, endorsed in numerous Supreme Court cases is:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d (1956), *See Also, City of Grangeville v. Haskins*, 116 Idaho 535, 777P.2d 1208 (1989).

² *Allen's Creek Properties, Inc. v. City of Clearwater*, 679 So. 1172 (Fla. 1996), *Fairway Manor v. Board of Comr's*, 521 N.E.2d 818 (1988), *Albee v. Judy*, 136 Idaho 226, 31 P3d 248 (2001)

A corollary to Dillon's Rule is Art. VII sec 2 of the Idaho Constitution which limits a City's authorities to within its municipal boundaries:

“Any county or incorporated city or town may make and enforce, *within its limits*, all such local, policy, sanitary and other regulations as are not in conflict with its charter or with the general laws.” (Emphasis added).

Reading Dillon's Rule in conjunction with the separate sovereignty provisions of Art. VII sec. 2, the Idaho Supreme Court has frequently invalidated City's attempts to exercise extra-territorial powers. For example in *City of Boise v. Bench Sewer District*, 116 Idaho 25, 773 P.2d 642 (1989), the court invalidated a Boise City Municipal Ordinance that attempted to collect sewer connection fees from residents outside the city. “A municipal ordinance must be confined to the jurisdiction of the governmental body that enacting it. Here, as we have explained, the ordinance as applied to the District residents is in excess of the City's municipal jurisdiction”. *Id. at* 116 Idaho 34.

Because, as discussed above, a city has no inherent powers other than that conferred by statute, a city's authority to operate a water system must have a statutory basis. Idaho Code 50-323 is the source of municipal authority to operate water systems. It provides:

Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems; provide for domestic water from wells, streams, water sheds or any other source; provide for storage, treatment and transmission of the same *to the inhabitants of the city*; and to do all things necessary to protect the source of water from contamination. (Emphasis Added).

The phrase “to the inhabitants of the city” serves to make Idaho Code 50-323 consistent with the separate sovereignty provision of the Idaho Constitution—it limits the City's authority to operate a water system to within its municipal boundaries.

The Petition (Pg. 6) calls the Commission's attention to a portion of Idaho Code 50-222 dealing with annexations. Idaho Code 50-222(4) provides in part, "Consent (to annexation) shall be implied for the area of all lands connected to a water...system operated by a City..." The Petition asserts that from this code section a power to provide extra-territorial water service may be implied. Decisions of the Idaho Supreme Court, however, hold that the concept of implied powers is narrowly construed. For example, in *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989) the Court held that while a city had the power to collect charges for water service, that power did not carry with it an implied power to impose liens for unpaid charges.

The Court said:

This Court has repeatedly held that municipalities may exercise only those powers granted to them or necessarily implied from the powers granted. *E.g.*, *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517 (1980); *Hendricks v. City of Nampa*, 93 Idaho 95, 98, 456 P.2d 262. If there is a fair, reasonable, substantial doubt as to the existence of a power, the doubt must be resolved against the city. *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 320, 303 P.2d 672 (1956); *Oregon Short Line Railroad Co. v. Village of Chubbuck*, 83 Idaho 62, 65, 357 P.2d 1101 (1960). This is especially true where the city is exercising proprietary functions instead of governmental functions. The operation of a water system, a sewer system and a garbage collection service by the city is a proprietary function, not a governmental function. *Schmidt v. Village of Kimberly*, 74 Idaho 48, 60, 256 P.2d 515 (1953).

In light of the express limitation of Idaho Code 50-323, limiting the provision of water service to the inhabitants of the city, it cannot be said that Idaho Code 50-222(4) creates, by implication, a power to compel an unwilling landowner outside the municipal boundary to accept water service.

The adoption of a Comprehensive Plan within an approved Area of Impact does not change this result. Idaho's Local Land Use Planning Act, Idaho Code 67-6501 *et. Seq.* authorizes the creation of Areas of Impact (Idaho Code 67-6526)³ and the adoption of

³ 67-6526 AREAS OF CITY IMPACT -- NEGOTIATION PROCEDURE.

Comprehensive Plans within those areas (Idaho Code 67-6508)⁴. The creation of an Area of Impact and adoption of a Comprehensive Plan do not, however, authorize a city to exercise municipal powers or authorities within the Area of Impact.

This was made clear by the Idaho Supreme Court in *Blaha v. Board of Ada County Commissioners*, 134 Idaho 770, 9P.3d 1236 (2000). There, the Ada County Commissioners approved a plat located within the City of Eagle's Area of Impact. Neighbors who objected to the approval appealed, claiming approval of the City was also required. The Court held that creation of the Area of Impact did not create any right of the City to exercise approval authority within the area and that its role was only advisory to the county:

Beyond the corporate limits of a city, the county has jurisdiction by statute to accept and approve subdivision plats. *See* I.C. § 50-1308.(fn8) For the City of Eagle to be allowed to

(a) The governing board of each county and each city therein shall adopt by ordinance following the notice and hearing procedures provided in section 67-6509, Idaho Code, a map identifying an area of city impact within the unincorporated area of the county. A separate ordinance providing for application of plans and ordinances for the area of city impact shall be adopted. Subject to the provisions of section 50-222, Idaho Code, an area of city impact must be established before a city may annex adjacent territory. This separate ordinance shall provide for one (1) of the following:

- (1) Application of the city plan and ordinances adopted under this chapter to the area of city impact; or
- (2) Application of the county plan and ordinances adopted under this chapter to the area of city impact; or
- (3) Application of any mutually agreed upon plan and ordinances adopted under this chapter to the area of city impact.

Areas of city impact, together with plan and ordinance requirements, may cross county boundaries by agreement of the city and county concerned if the city is within three (3) miles of the adjoining county.

⁴ **67-6508 PLANNING DUTIES.**

It shall be the duty of the planning or planning and zoning commission to conduct a comprehensive planning process designed to prepare, implement, and review and update a comprehensive plan, hereafter referred to as the plan. The plan shall include all land within the jurisdiction of the governing board. The plan shall consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for each planning component. The plan with maps, charts, and reports shall be based on the following components as they may apply to land use regulations and actions unless the plan specifies reasons why a particular component is unneeded.

exercise co-equal jurisdiction with Ada County in the impact area lying beyond the city limits would not only be in conflict with the statute but also inconsistent with constitutional limitations placed on a city's powers. Article XII, § 2 of the Idaho Constitution provides that any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws. This Court has held that the power of cities and counties only exists within the sovereign boundaries of the cities and the counties respectively. *See Clyde Hess Distributing Co. v. Bonneville County*, 69 Idaho 505, 210 P.2d 798 (1949) (valid county regulation enforceable so far as territory embraced in county was concerned, exclusive of municipalities where the regulation was without force and effect); *Boise City v. Blaser*, 98 Idaho 789, 572 P.2d 892 (1977) (To give effect to a county permit within city limits would be to violate the separate sovereignty provisions of Idaho Const., art. XII, § 2.); *Hobbs v. Abrams*, 104 Idaho 205, 657 P.2d 1073 (1983) (ordinance or regulation must be confined to the limits of the governmental body enacting the same). Therefore, any reading of the implementing ordinances granting the City the power to restrict development in the impact area by denying approval of a subdivision application made to the County would be an extraterritorial exercise of jurisdiction by the City and an infringement on the constitutional right of the County. 134 Idaho at 777.

The *Blaha* decision makes it clear that within an Area of Impact, a city may plan for the future and it may provide advice to the county. It may not, however, exercise municipal authorities or provide municipal services.

In this case, the evidence established that the Trailhead development is outside the City's Area of Impact, although the City desired to expand the Area of Impact to include the development. Even if that were accomplished it would not, as demonstrated above, authorize the provision of water service.

The Petition Should be Denied

As discussed in this Answer, the Order's necessary findings for approval of United Water's Application are supported by substantial evidence. The Commission did not exceed its authority in determining the scope of the City's authorities. The Commission correctly assessed the scope of the City's authorities.

The City's Petition concludes with a request that the Commission "...if necessary hold an evidentiary hearing on the issue of whether United Water could serve Trailhead based on the needs and demands of Trailhead". As discussed above, the Commission has already made record-based findings on this issue. And, the Petition does not contain a statement of the "nature and quantity of evidence the petitioner would offer if reconsideration is granted," as required by RP 331.01.

The request for hearing and the Petition should be denied.

DATED this 31 day of August, 2007

Respectfully Submitted

UNITED WATER IDAHO INC.

By: 
Dean J. Miller
Attorney for United Water Idaho Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2007, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

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