

Bruce Smith, ISB No. 3425
Susan Buxton, ISB No. 4041
Paul Fitzer, ISB No. 5675
MOORE SMITH BUXTON & TURCKE, CHARTERED
950 W. Bannock Street, Suite 520
Boise, ID 83702
Telephone No.: (208) 331-1800
Facsimile No: (208) 331-1202
bms@msbtlaw.com

RECEIVED
2007 SEP 10 AM 11:32
IDAHO PUBLIC
UTILITIES COMMISSION

*Attorneys for Intervenor,
City of Eagle*

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

_____)
IN THE MATTER OF THE)
APPLICATION OF UNITED WATER)
INC., TO AMEND AND REVISE)
CERTIFICATE OF CONVENIENCE AND)
NECESSITY NO. 143)
)
)
)
)
)
)
_____)

Case No. UWI-W-06-04
**CITY OF EAGLE'S REPLY
BRIEF**

COMES NOW the City of Eagle and submits its Reply Brief to United Water Idaho Inc.'s ("United Water") Answer to Petition for Reconsideration.

A. Introduction

In the City's Petition for Reconsideration, the City contended that the Idaho Public Utilities Commission ("Commission") erred by focusing on jurisdictional limitations of a municipality rather than whether United Water's certificate should be amended based upon an analysis of United Water's capability to serve Trailhead's clearly defined and immediate needs.

B. The Commission may properly determine whether United Water’s Certificate should be amended based upon substantial evidence.

If the Commission based its Order entirely on a finding that there is substantial evidence that United Water has the capability to serve Trailhead’s clearly defined needs, and thus that United Water’s certificate should be amended, the City recognizes this as being within the province of the Commission. While the City may disagree that those needs are immediate or have been clearly defined, or that United Water provided sufficient information to show it could serve, the City recognizes that the Commission can decide whether to amend the certificate. The City believes and requests that in considering whether United Water’s certificate should be amended, the Commission should give deference to a municipality with specific planning efforts to service an area. Ada County has specifically provided that the City’s comprehensive plan shall apply in the area of impact, and the City has planned for such.¹ Since a portion of the development is located within the municipal area of impact, the City submits that deference should be given to the City to serve Trailhead in its entirety.

If, however, the Commission based its decision solely on the jurisdictional limitations of a municipality to serve outside City boundary, the City maintains its objection to the Commission’s Order.

C. The Commission erred in Opining that the City does not have the statutory authority to provide municipal services outside its municipal boundaries.

United Water argues that the City’s cited cases all involve circumstances involving contractual relations between a city and a *willing* extra-territorial landowner.² They assert that

¹ Ada County Code 9-2-3(A) provides that Ada County shall require that the City’s comprehensive plan shall apply within the City’s area of impact. The City’s comprehensive plan, chapter 4, paragraph 4.6 clearly states that the City’s objective is to “[d]evelop an interconnected water system owned and operated by the City” and “[e]nsure that all development within the Western Planning Area connects to municipal services”.

² See *Albee v. Judy*, 136 Idaho 226, 31 P.3d 248 (2001) [Supreme Court held that a city resolution which prohibited water service outside city limits except for properties abutting or adjoining mains installed under the city’s water extension contract required the city to extend water service outside city limits].

the City is compelling Trailhead to utilize City services. Besides being factually incorrect,³ it is irrelevant as the Commission did not make such a finding as a basis for amending the certificate. The City's objection is merely the Commission's focus on a municipality's alleged jurisdictional limitations to provide extra-territorial service instead of addressing Kastera's clearly defined needs, the ultimate cost to the consumer, and United Water's ability to satisfy such needs.⁴ A city's power to contract for services is not defined by city boundaries. United Water, in arguing that the City's cited cases all involve contractual relations between a city and a willing extra-territorial landowner indirectly concedes this foundational issue: that a municipality does, in fact, have the contractual authority to provide extra-territorial service. Whether Kastera ultimately wishes to be served by the City or United Water is an unresolved fact that did not serve as the basis for the Commission's Order.

United Water's analysis of judicial function vs. judicial powers is also misplaced. United Water cites Natatorium Co. v. Erb, 34 Idaho 209, 200 P. 348 (1921), a case that involved a determination of whether the plaintiff was a public utility. The City is not a public utility. United Water is, and thus the case is not on point. The City is not asserting that the Commission may not examine a provider's ability to serve. However, a municipality's statutory and contractual power is a judicial question, and there is no provision in Title 61 enabling or implying that the Commission may rule on such an issue. The Commission, however, is free to examine the *evidence* to determine whether United Water and the City have the ability to serve Kastera's needs. Nevertheless, the Commission's order instead focuses on the municipality's

³ Evidence in the record indicates that Kastera has considered both the City and United Water as its service provider. Direct Testimony, Wayne Forrey, p. 5, L.4-9.

⁴ The Commission concluded:

“We make no determination regarding the City's physical capability to provide service nor the related costs of providing such service. Our decision regarding the City's ability to provide water service is based on the City's area of municipal authority.”

power. The City is requesting the Commission reconsider its Order to properly address these legitimate factual issues.

D. Conclusion

The Commission has the jurisdiction to determine whether United Water's certificate should be amended by the procedures provided in Idaho Code §61-526. The application filed by United Water requested a ruling on whether United Water could serve and should serve Trailhead based upon its capability and resources balanced against the actual demands of the development. If the Commission is basing its decision solely on a determination that United Water has the current capability to provide cost-effective water service to Trailhead's clearly articulated and immediate needs, the certificate should be amended notwithstanding the City's plans and efforts to serve the area; then the Commission acted within its statutorily enumerated powers. The City contends, however, that the Commission's Order suggests that the Commission exceeded its limited enumerated powers by opining on a non-regulated municipality's power to provide services outside its municipal boundaries. United Water's argument acknowledges that municipalities do in fact provide extra-territorial services, but alleges such services are appropriate only with a willing recipient. The issue presented was whether United Water should be allowed to serve the area planned for service by the City. However, the Commission did not address the City's ability to serve nor even that customers will pay more for United Water service.

The Commission erred by failing to properly focus on the amendment of United Water's certificate and instead based its ruling on the Commission's opinion of municipal authority. The City of Eagle respectfully suggests that this is incorrect as a matter of law and that the Commission reconsider its ruling based upon the evidence presented before it.

Dated this 10th day of September, 2007

MOORE SMITH BUXTON & TURCKE,
CHARTERED

By: 
Susan E. Buxton
Attorney for Intervenor, City of Eagle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 10th DAY OF SEPTEMBER, 2007, SERVED THE FOREGOING **REPLY BRIEF** IN CASE NO. UWI-W-06-4, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

Dean J. Miller, Esq.
McDevitt & Miller LLP
420 West Bannock Street
PO Box 2564
Boise, ID 83701

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, ID 83720-0074

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

Scott Woodbury
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, ID 83720-0074

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile



Susan E. Buxton
Attorney for Intervenor - City of Eagle, Idaho