



servicing some undefined need and whether its certificate should be amended, the Commission based its decision on matters outside the scope of the Commission's enumerated powers and authority as provided in Idaho Code, Title 61, i.e., whether a municipality has the authority to provide services outside its municipal boundaries. Further, the Commission's focus on the issue of a municipality's authority presents an issue of statewide relevance and significance likely needing resolution by the Idaho Supreme Court.

**I. Statement of the Case.**

On April 26, 2006, United Water Idaho Inc. ("United Water"), filed an Application with the Public Utilities Commission for Authority to Amend and Revise its Certificate of Public Convenience and Necessity No. 143 authorizing it to serve an area known as the Trailhead Community. Trailhead is a proposed development located north of the City of Eagle in Ada County with one-hundred forty acres within the City's area of impact. On or about May 10, 2006 the City objected to United Water's Application requesting the Commission deny the application. The City objected to United Water's assertion that there are "no known public entities, persons or corporations with whom the expansion is likely to compete". The City contended that it was capable of servicing the proposed area and had planned and intended to do so. Thus, the only question presented before the Commission, pursuant to Idaho Code §61-526, was whether United Water's certificate should be amended, not issues regarding the plenary powers of a municipality over which the Commission has no jurisdiction. The City believes the case before the Commission was whether United Water's certificate should be amended, not whether the City could not serve due to the Commission's perspective on municipal authority.

Resolving the question of whether United Water could serve Trailhead requires clearly defined needs provided by the developer, and a demonstration by United Water that it has the capacity and the resources to satisfy that need. The Commission failed to properly consider the issue before it.

## **II. Issues**

1. Did the Commission err in prematurely amending the certificate of United Water in light of the absence of any information about the needs of the development and United Water's capacity and resources to satisfy that unidentified need?
2. Did the Commission exceed its statutorily enumerated powers in ruling that a municipality cannot serve an area partially within and partially outside its area of impact?

## **III. Argument**

The Commission is a governmental entity of limited, enumerated powers codified in Title 61, Idaho Code. The Commission does not have the statutory authority to determine the jurisdiction and authority of a municipality. In this instance, the Commission is limited to determining whether a regulated water service company possesses the capability to provide service to a specific development in a specific area. The Commission did not analyze the capability of the regulated entity, United Water, to serve clearly defined needs of the development, but rather opined as to its view of the powers of a municipality based solely on Title 50, Chapter 3 Idaho Code. Further, the Commission acted prematurely as Trailhead, at the time of filing of the application, had not provided any evidence upon which United Water could

demonstrate that it had the capacity and resources to satisfy Trailhead's needs in a cost effective manner.

Providing water services outside the corporate limits of a city through the municipality's contractual powers is frequently done depending upon the circumstances of a given case. Such contractual powers are judicially recognized throughout Idaho and the United States to such an extent that the Supreme Court has even compelled cities to provide water service outside of city boundaries. 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]. Further, the City would submit that the scope of municipal powers is an issue for the judiciary to determine, not the Commission.

**A. The Commission exceeded the scope of its authority in opining on the contractual power and authority of a municipality.**

In its order, the Commission stated that:

"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."

Besides the error of not focusing on the City's authority and not United Water's capability to provide service, the Commission incorrectly opined as to a municipality's authority to provide water service outside its municipal boundaries. The Commission does not have the authority pursuant to Title 61 to rule on the jurisdictional powers of another governmental entity. The scope of municipal power lies squarely in the purview of the legislature as interpreted by the judiciary, not the Commission. The Commission, as an administrative agency, is a creature of legislation without inherent or common law powers. Neil v. Public Utils. Commission, 32 Idaho

44, 178 P. 271 (1919). As such, any power it exercises is limited to those powers expressly conferred by statute or by necessary implication. U.S. v. Utah Power & Light Co., 98 Idaho 665, 570 P.2d 1353 (1977); Codd v. McGoldrick Lumber Co., P.U.C.I. Case F606, Order 1083, P.U.R. 1928A, 545. Such powers are to be construed narrowly. Gardner v. Ewing, 88 F. Supp. 315 (S.D. Ohio 1950), judgment aff'd, 185 F.2d 781 (6th Cir. 1950), judgment rev'd in part on other grounds, 341 U.S. 321, 71 S. Ct. 684, 95 L. Ed. 968 (1951). Idaho Mut. Ben. Ass'n v. Robison, 65 Idaho 793, 154 P.2d 156 (1944).

The Commission derives its powers from Idaho Code Title 61, Chapter 5. Idaho Code 61-526 enables the Commission to make determinations as to which regulated entity has the capability to provide service to a particular area through issuance of a Certificate of Convenience and Necessity. This enabling statute in no way enables the Commission to limit, expand, or determine a municipality's contractual powers, but rather addresses the capability and approval of service by regulated entities.

**B. A municipality may provide services beyond its corporate boundary and area of impact.**

Municipalities throughout the state frequently extend services to areas outside their corporate boundaries and areas of impact through their general powers to contract. This is typically done based on the unique circumstances of a given case. Pursuant to Idaho Code 50-323, it is undisputed that municipalities have the power to provide services within city limits. See also Alpert v. Boise Water Corp., 118 Idaho 136, 795 P.2d 298. However, throughout the United States, such services routinely are extended outside city limits. Albee v. Judy, 136 Idaho 226, 31 P.3d 248 (2001); Omaha Water Co. v. City of Omaha, 162 F. 225 (C.C.A. 8th Cir. 1908), aff'd, 218 U.S. 180, 30 S. Ct. 615, 54 L. Ed. 991 (1910). The majority of the case law in

this arena generally concerns whether a city can be compelled to provide service outside the city limits. Courts generally find that a municipality may be required to extend its services to areas outside its boundaries if it has agreed to do so by contract. Allen's Creek Properties, Inc. v. City of Clearwater, 679 So. 2d 1172 (Fla. 1996). The very fact that courts consider the obligation to extend services outside city boundaries shows that the authority to serve exists. Generally, courts are reluctant to interfere with the terms of a contract freely entered into by a municipality and an extraterritorial user. Fairway Manor, Inc. v. Board of Com'rs of Summit County, 36 Ohio St. 3d 85, 521 N.E.2d 818 (1988).

Idaho Code 50-222 specifically provides that in regard to residents located outside the municipal boundaries “[c]onsent shall be implied for the area of all lands connected to a water or wastewater collection system operated by the city... .” This demonstrates that the legislature envisions that a municipality’s ability to “contract and be contracted with” pursuant to Idaho Code §50-301 extends to providing services outside the city, which is logical given the need for the orderly planning and development of future municipal services to a growing area.

The Commission also failed to consider the implication of having two water systems within the same development. It is uncontroverted that one-hundred forty acres of the Trailhead Community is currently located within the established City area of impact. See Direct Testimony of Thomas Fassino, P.2,L.19; Direct Testimony of Nichoel Baird Spencer, P.2,L.6-8. The City’s comprehensive plan applies within the City’s area of impact which includes the City’s Urban Service Planning Area Boundary Map. Id. 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. Affidavit Bruce M. Smith, Exhibit A & B filed concurrently herewith. Thus, Ada County has acknowledged the applicability of the City’s comprehensive plan within its

jurisdiction. 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". Id. at Exhibit B. Pursuant to the Local Land Use Planning Act, it is clear that cities must plan and provide for municipal services expansion. Idaho Code §67-6508(h). By necessity, this requires that a municipality have the authority to contract for services with developers located outside municipal boundaries.

#### **IV. 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. This determination requires the Commission to consider whether United Water has the current capability to provide cost-effective water service to Trailhead. The Commission, however, failed to undertake this analysis in that there was no information before the Commission addressing the needs of Trailhead. The Commission acted prematurely as United Water could not possibly address its ability to satisfy the needs of Trailhead in a cost-effective manner without information on the development's needs. Instead, the Commission exceeded its limited enumerated powers by opining on a non-regulated municipality's power to provide services outside its municipal boundaries.

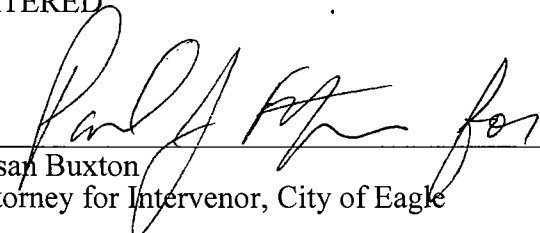
The City submits that the application filed by United Water requested a ruling on whether United Water could serve and should serve Trailhead based upon its capability and resources balanced against the demands of the development which, as noted, have never been defined. The Commission erred by failing to properly focus on the amendment of United Water's

certificate and instead based its ruling on the Commission's opinion of municipal contractual authority. The City of Eagle respectfully suggests that this is incorrect as a matter of law. The City of Eagle respectfully requests that the Commission reconsider its ruling and, if necessary, hold an evidentiary hearing on the issue of whether United Water could serve Trailhead based on the needs and demands of Trailhead.

Dated this 24 day of August, 2007

MOORE SMITH BUXTON & TURCKE,  
CHARTERED

By: \_\_\_\_\_

  
Susan Buxton  
Attorney for Intervenor, City of Eagle

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24 day of August, 2007 I served a true and correct copy of the foregoing document via the method indicated below to:

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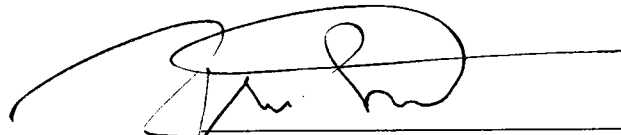
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