

NM PUBLIC
REGULATION
COMMISSION

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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**In the Matter of a Petition by
New Mexico Water Service Company
For a Declaratory Order**

Utility Case No. 08-00177-UT

PETITION FOR DECLARATORY ORDER

New Mexico Water Service Company ("NMWSC") hereby submits this Petition for Declaratory Order ("Petition") to address the meaning and intent of the Final Order entered by the Commission on May 23, 2006 in Case No. 05-00208 UT and Case No. 05-00305 UT consolidated ("Final Order" or "Order").¹ The Order is attached hereto as Exhibit A. In that Order, among other things, the Commission determined that upon NMWSC's acquisition of Independent Utility Company ("IUC"), IUC's water rights should remain wholly with the utility upon transfer of assets and become fully the utility property of NMWSC, and that no portion of the water rights should be retained by IUC for later sale or conveyance to NMWSC or others.

NMWSC is filing this Petition because some existing customers of NMWSC are claiming that in making a determination that the water rights remain with the utility, the Commission intended after the acquisition, that the water rights be limited solely to serving specific customers within a limited portion of NMWSC's service area (only to customers residing in the Sandia Knolls subdivision – a fraction of NMWSC's service area) and that NMWSC is perpetually precluded from utilizing its utility property to fulfill its obligations to serve customers within the entirety of its service area. Such an interpretation of the Order is contrary to the plain language of the Order, Commission policy, and applicable law. Indeed, such a determination was not before the Commission and the imposition of such a condition on the acquisition would impose

¹ References to the Final Order include the Commission's adoption of the April 20, 2006 Recommended Decision of the Hearing Examiner, as stated in the Final Order.

on NMWSC a condition that did not exist vis-à-vis IUC prior to the acquisition. Moreover, such an interpretation would preclude NMWSC from expanding and improving its infrastructure and service to the benefit of its existing customers. Nonetheless, because of the questions which have been raised by some existing customers, NMWSC files this Petition to address the meaning and intent of the Order as it relates to the Commission's determination regarding water rights in the context of the acquisition of IUC by NMWSC.

As grounds for this Petition and as more fully set forth in the accompanying Brief, NMWSC provides the Affidavit of Paul D. Risso, General Manager of NMWSC, and states as follows:

1. On May 12, 2005 NMWSC filed an application with the Commission for the purpose of acquiring the assets of IUC. The case was docketed by the Commission as Utility Case No. 05-00208. Affidavit of Paul D. Risso, ¶ 2.
2. IUC had a plant, lines and system service area, which at the time of acquisition included two subdivisions, Juan Tomas and the Sandia Knolls, as well as areas contiguous to the subdivisions and within a half mile of existing infrastructure. Affidavit of Paul D. Risso, ¶ 3.
3. At the time, IUC was in bankruptcy, the entirety of the utility system was in disrepair and service was substandard. Affidavit of Paul D. Risso, ¶ 4.
4. On July 21, 2005 IUC filed an application with the Commission for a rate increase, which was docketed by the Commission as Utility Case No. 05-00305 and consolidated with Utility Case No. 05-00208. Affidavit of Paul D. Risso, ¶ 5.
5. In the agreement for acquisition, Asset Purchase and Sale Agreement, IUC requested and NMWSC agreed to endeavor to obtain Commission approval for IUC to retain some of the 325 acre-feet of water rights held by IUC under New Mexico State Engineer Permit

No. S-1 et al. (denoted for purposes of the Asset Purchase and Sale Agreement as “surplus water rights”), and that such water rights would not pass as a utility asset to NMWSC (“S-1 Water Rights” or “water rights”). Rather, IUC proposed to retain them as a non-regulated utility entity and sell them back to NMWSC under certain conditions. Accordingly, with regard to water rights, the question before the Commission in Case No. 05-00208 was limited to whether any part of the water rights then available to the utility for use within its service area could be severed from the utility upon acquisition. Affidavit of Paul D. Risso, ¶ 6.

6. The S-1 Water Rights have a place of use defined by the New Mexico State Engineer as located in Township 11 North, Range 6 East, encompassing 160 acres in the E ½ of Section 20; all of Section 21; 160 acres in the NW ¼ of Section 22; and 40 acres in the SW ¼ of Section 22. The permitted place of use for the water rights includes but is not limited to the Sandia Knolls subdivision, and includes several hundred acres outside of Sandia Knolls including portions of Campbell Ranch Phase I. Affidavit of Paul D. Risso, ¶ 13; Exhibit B.

7. Prior to NMWSC’s acquisition of IUC, a portion of the S-1 Water Rights was utilized to serve all existing customers within the IUC service area inclusive of Sandia Knolls and contiguous areas. Affidavit of Paul D. Risso, ¶ 7.

8. In the event the Commission determined there were no surplus water rights for purposes of allowing rights to be retained by IUC and sold to NMWSC, the S-1 Water Rights would pass to NMWSC as a utility asset to be included in rate base and to be utilized by NMWSC as a utility asset. Affidavit of Paul D. Risso, ¶ 8.

9. The Commission approved the acquisition but declined to approve the retention of any water rights by IUC, instead determining that all the water rights were a utility asset and

should pass with the utility as a utility asset for use by NMWSC. Affidavit of Paul D. Risso, ¶ 9; Recommended Decision at 56, 59-60, ¶¶ 6-8.

10. In making such determination the Commission found that there was Commission policy and precedent against severing water rights from utility ownership. Recommended Decision at 55 (“The Commission’s policy in sale and acquisition cases is that water rights should remain with the utility to serve the utility’s customers.”)

11. The Commission was also concerned that the ability of IUC to hold the water rights for sale to NMWSC could be impeded by IUC’s pending bankruptcy. Recommended Decision at 56.

12. The Commission’s decision was not premised on a determination that the water rights were to be utilized in perpetuity solely for the benefit of customers only residing within Sandia Knolls, representing only a part of NMWSC’s service area. Rather, the determination was limited to the question of whether some of the water rights should be severed as a utility asset or whether the water rights should pass with the utility. Affidavit of Paul D. Risso, ¶ 9; Recommended Decision at 56, 59-60 ¶¶ 6-8.

13. Following the entry of the Order, NMWSC acquired all the assets of IUC, inclusive of all S-1 water rights. Affidavit of Paul D. Risso; ¶ 10; Recommended Decision at 61, ¶ C.

14. Since the acquisition NMWSC has made numerous improvements to the former IUC system including resolution of significant water quality issues, upgrading of wells and booster stations, initiation of implementation of SCADA, and installation of surge protection and a lightning arrestor at the well site. NMWSC has continued to serve its existing customers in Sandia Knolls, Juan Tomas and contiguous areas. Numerous additional improvements should be made, including the replacement of storage facilities. Such additional improvements would

necessitate rate increases for NMWSC customers on the order of 25-30% subject to Commission approval. Affidavit of Paul D. Risso, ¶ 11.

15. Consistent with its obligations to serve customers within its service area NMWSC entered into a line extension agreement, Sandia Knolls Water System Improvement and Water Line Extension Agreement (“Agreement”), on March 18, 2008 with Campbell Ranch Communities, LLC (“Campbell”) for purposes of providing service to Phase I of Campbell Ranch (“Phase I”). The Agreement is attached hereto as Exhibit C. Affidavit of Paul D. Risso, ¶ 14.

16. Phase I is part of NMWSC service area because it is immediately contiguous to NMWSC’s existing service area, lies within one half mile of existing NMWSC infrastructure and is partially within the described place of use for the water rights held by NMWSC under New Mexico State Engineer Permit No. S-1 et al. No other utility is currently providing similar service, nor is any utility capable of providing timely and cost effective service to Phase I without duplication and economic waste. Affidavit of Paul D. Risso, ¶ 14.

17. The Agreement provides for significant benefits to the existing NMWSC system and customers. The Agreement provides for Campbell to construct the necessary infrastructure to provide for extension of service to Phase I and also obligates Campbell to pay for various system improvements in connection with NMWSC’s existing system and infrastructure. The system improvements include an additional well to allow for redundancy and a 1.5 million gallon storage tank. Additionally, the connection of the existing system to the distribution system which will serve Phase I, will provide the basis for upgrading the backbone of the system, now in excess of 40 years old, as well as fire hydrants for the benefit of existing customers. All construction and improvements will be at no cost to existing customers and the system

improvements provided by the Agreement would obviate the need for any rate increases to existing customers for the improvements, which would be necessary for the existing system.

Affidavit of Paul D. Risso, ¶ 15.

18. The Agreement provides that NMWSC will provide 160 acre-feet per annum of water to Phase I subject to availability and obligations to existing customers. Affidavit of Paul D. Risso, ¶ 16.

19. NMWSC filed the Agreement with the Commission on April 1, 2008 pursuant to Rule 440, NMAC 17.5.440.10. Rule 440 requires utilities to file line extensions with the Commission for notification purposes, but does not require or provide for any Commission approvals of line extensions.

20. In the course of filing the Agreement, some existing customers within the Sandia Knolls subdivision, through the Sandia Knolls Neighborhood Association, raised questions regarding the provision of utility service to Campbell and the meaning and intent of the Commission's Order in Case No. 05-00208. See Letter to Commissioner David King attached hereto as Exhibit D.

21. As a result of these questions, NMWSC has filed this Petition for purposes of the Commission addressing the following question:

Whether the Commission's decision in Case No. 05-00208 at the time of NMWSC's acquisition of IUC that IUC could not retain any utility water rights and that all water rights should pass with the utility as part of the acquisition was intended to perpetually restrict NMWSC to utilizing those water rights in only a limited portion of its service area and in contravention of State Engineer permits for the water rights?

22. NMWSC requests the Commission address the issue raised herein to eliminate any uncertainty regarding its use of its water rights and to enable it to continue to provide timely and reliable service to the entirety of its service territory.

23. Pursuant to NMAC 17.1.2.24 a list of persons who may have an interest in this

Petition are as follows:

Sue Neustel, Treasurer SKNA
26 Longview
Sandia Park, NM 87047

John Helmich
P.O. Box 644
Sandia Park, NM 87047

Denise Turner, Secretary to SKNA
29 Camino Alto
Sandia Park, NM 87047

Barbara Herrington
23 Canyon Road
Sandia Park, NM 87047

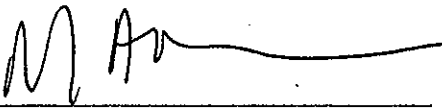
Janet Winchester-Silbaugh
51 Pinon Heights Road
Sandia Park, NM 87047

Kathy McCoy, Vice President
SKNA
P.O. Box 1488
Cedar Crest, NM 87008

Pat Fleming, President SKNA
55 Pinon Height Road
Sandia Park, NM 87047

WHEREFORE, for the reasons set forth herein and in the accompanying brief, NMWSC requests the Commission enter an order clarifying that the Commission's May 23, 2006 Final Order in Case No. 05-00208 UT and Case No. 05-00305 UT consolidated, does not restrict NMWSC to use of its utility water rights to only a limited portion of its service territory and the permitted place of use of its water rights, or otherwise preclude use of the water rights of the utility to service the entirety of its service area including Phase I of Campbell Ranch.

Respectfully submitted,

By: 

Maria O'Brien

Attorneys for New Mexico Water Service Company.
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
P.O. Box 2168
Albuquerque, New Mexico 87103-2168
(505) 848-1800
(505) 848-9710

CERTIFICATE OF SERVICE

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I hereby certify that a true and correct copy of the foregoing was mailed to each of the following parties on May 30, 2008.

Cydney Beadles
NM Public Regulation Commission
224 E. Palace Avenue
Santa Fe, New Mexico 87501

Joan T. Ellis
NM Public Regulation Commission
224 East Palace Avenue
Santa Fe, New Mexico 87501

Steven D. Schwebke
NM Public Regulation Commission
224 E. Palace Avenue
Santa Fe, New Mexico 87501

Phyllis Stevens
NM Public Regulation Commission
224 E. Palace Avenue
Santa Fe, New Mexico 87501

Robert Y. Hirasuna, Esq.
General Counsel
NM Public Regulation Commission
224 E. Palace Avenue
Santa Fe, New Mexico 87501



Maria O'Brien