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ATTORNEY FOR RESPONDENT

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

DONALD SORRELLS,	)	Case No. GNR-U-22-03
	)	
Complainant,	)	
	)	
v.	)	<b>SUNNYSIDE PARK UTILITIES'</b>
	)	<b>REPLY COMMENTS</b>
	)	
SUNNYSIDE PARK UTILITIES,	)	
INC.,	)	
	)	
Respondent.	)	
_____	)	

COMES NOW the Respondent, by its counsel of record, Paul L. Fuller, and submits the following comments in response to Comments from Commission Staff, dated October 13, 2022 (hereafter "Staff Comments"). These comments are supported by the Declaration of Doyle H. Beck submitted herewith.

1. STAFF CRITERIA

In the Staff Comments, five criteria were identified by Staff as considerations for determining the jurisdiction of IPUC over Sunnyside Park Utilities. These criteria are as follows:

- A. Is the Company a Non-Profit or a Co-op?
- B. Does the Company operate for the service of the customers and not for profit?
- C. Is the Company owned by the water users?
- D. Do the customers have control of the rates that the Company charges?
- E. Do the customers have control of the operations and capital expenditures of the Company?

See Staff Comments, p. 2. Staff does not identify the source of these criteria, or any legal basis for IPUC to apply these to its jurisdictional analysis of Sunnyside Park Utilities. Based upon Staff's comments submitted on May 12, 2022, it appears that this list of criteria was simply created by the Staff, without any reference to statutory authority. See Reply Comments of the Commission Staff, p. 3.

The sole issue before the Board is whether the IPUC may exercise jurisdiction over Sunnyside Park Utilities. This Commission has previously recognized that its "jurisdiction and authority over water systems derives from statute." See Commission Case JHW-W-04-01, Order No. 29526, p. 1. Specifically, IPUC jurisdiction is governed by Idaho Code Section 61-104, which defines the term "corporation" for purposes of IPUC jurisdiction. Under this statute, the term "corporation" is clearly defined in Idaho law to **not** include "a municipal corporation, or mutual nonprofit or cooperative gas, electrical, water or telephone corporation or any other public utility organized and operated for service at cost and not for profit, whether inside or outside the

limits of incorporated cities, towns or villages." If SPU is a (1) mutual nonprofit water corporation, (2) cooperative nonprofit water corporation, or (3) any other public utility organized and operated for service at cost and not for profit, then SPU is **not** a corporation subject to IPUC jurisdiction. IPUC Staff and the Commission do not have the authority to add criteria to the statute to extend IPUC jurisdiction.

Under Idaho Code Section 61-104, the only relevant criteria applied by the Staff are A (is the company a non-profit or co-op?) and B (does the company operate for the service of customers and not for profit?). Consideration of who owns SPU (Criteria C), who controls the rates (Criteria D), and who controls operation of SPU (Criteria E), are not appropriate considerations under Idaho Code Section 61-104. Including new criteria in the definition of what constitutes a "corporation" is the responsibility of the legislature, not the Staff or this Board. This Board must follow Idaho law as written by the Legislature, or request a change to increase Board jurisdiction.

SPU believes that the only relevant jurisdictional question before the Board is whether SPU is a corporation as defined by Idaho Code Section 61-104. SPU has established that it is organized as a nonprofit and operates at cost. See Amended Answer to Formal Complaint, paras. 1 and 11, and Exhibits A, B, C, and D. These facts were not disputed by Mr. Sorrells or the Staff. No

consideration should be given to Staff imposed criteria which are beyond the scope of I.C. § 61-104. Because SPU is a nonprofit, it is not a corporation under I.C. § 61-104, meaning the IPUC does not have jurisdiction over SPU.

In the event the Board disagrees with SPU's interpretation of the statutory limitation of IPUC jurisdiction, SPU will also address other issues raised in the Staff Comments.

## 2. SPU BOARD GOVERNANCE

Staff identifies various concerns indicating that there is a **potential** for abuse of the customers by SPU. These concerns mirror the concerns the customers addressed in PKS-W-15-01, which was referenced in the Staff Comments. In Order 33603, the Board rejected these same potential abuse concerns, and stated as follows:

We appreciate various customers' concerns that the Company's directors could self-deal and discriminate against Company members, but find these comments disregard provisions in the Idaho Nonprofit Corporation Act that would guard against this. For example, directors and officers must act in good faith (Idaho Code §§ 30-30-618 and -623), may not be involved in an unfair, conflict of interest transaction with the Company (Idaho Code § 30-30-619), or obtain loans or guarantees from the Company that are not similarly available to all other customers/members (Idaho Code § 30-30-620). In addition, the Company's customers/members have a right to inspect the Company's records, including minutes, resolutions, and financial statements (Idaho Code §§ 30-30-1101 through -1105), and to remove any offending directors (Idaho Code § 30-30-610).

See Order 33603, p. 6. SPU's Board is likewise governed by the

Idaho Nonprofit Corporation Act, which mitigates the potential abuse concerns expressed by the Staff. Customers can seek protection from SPU officer and director malfeasance under the Idaho Nonprofit Corporation Act.

Additionally, Staff expresses concern that the customers are not directly involved in the election of SPU's Board Members. Under Idaho Nonprofit Corporation Act, nonprofits may be organized as nonprofits with members, or nonprofits **without** members. See Idaho Code Section 30-30-604. SPU is a non-member nonprofit organization. Under I.C. § 30-30-604(2), a non-member nonprofit's directors are elected as provided in the Bylaws, and if no Bylaws exist, directors are elected by the Board. Nothing in Title 61, Idaho Code, distinguishes between a member and a non-member nonprofit, and treats all nonprofits the same.

Staff states that Staff would recommend against regulation by the Commission "[i]f the Company were to change the bylaws so that every **customer** would be a member of the non-profit and have the ability to vote on members of the Board..." See Staff Comments, p. 3. (Emphasis added). SPU believes that this is a totally unreasonable and unconstitutional request for government agency staff to make. Essentially, Staff is requesting that SPU give itself away to its customers in order to avoid IPUC regulation. While SPU was willing to convert to nonprofit status, given the fact that SPU was always designed to be operated at cost and

without a profit, asking SPU to gift the entire value of the entity and its infrastructure to customers would constitute a redistribution of SPU to the customers without compensation. Customers include tenants who are not even owners of parcels within the subdivision, who may cease such tenancy at the end of their lease term. Compelling SPU to take this course of action would constitute a governmental taking and a taxable gift to every customer. Some customers may refuse such an unrequested gift and the risk coming from owning a water company. SPU believes Staff's recommendation to require transfer of ownership to the customers in order to avoid IPUC regulatory jurisdiction does not fully evaluate significant unintended consequences.

Notwithstanding the fact that SPU's customers are not entitled to any control of SPU as a nonprofit, SPU has entered into an Agreement which identifies the process of enacting rate changes which allows customer involvement. This satisfies Criteria D which Staff seeks to impose. The satisfying of Criteria D was previously recognized by Staff in their original Staff Comments, dated May 12, 2022, p. 4. In its own comments, Staff stated that it "believes that the customers do have significant control over the rates SPU charges." *Id.* Nothing has changed in regards to the Agreement giving significant customer control over SPU rate changes, as already acknowledged by Staff. Staff gives no explanation for this significant change of position. During SPU's

twenty years of operation since 2002, Mr. Sorrells is the first complaint filed by a customer, and even Mr. Sorrells makes no complaints regarding the rates charged by SPU. Declaration of Doyle Beck, para. 6. Staff's suggestion that SPU must communalize its business in order to avoid IPUC regulation must be rejected.

### 3. WATER CORPORATION

Even if the Board determines that Sunnyside Park Utilities is a corporation under Idaho Code Section 61-104, the Board must also determine that SPU is a "Water Corporation" under Section 61-125. This Section was originally adopted in 1913, and was reenacted in 1915. No changes have been made to the definition of "Water Corporation" in over 100 years. In 1921, the Idaho Supreme Court addressed Idaho Code Section 61-125 in *Stoehr v. The Natatorium Co.*, 34 Idaho 217, 200 Pac. 132 (1921), in a case where William Stoehr was demanding that The Natatorium provide natural hot water to heat Mr. Stoehr's home. The question addressed by the *Stoehr* Court was whether The Natatorium was a public utility. The Idaho Supreme Court decided that "[t]o hold that a water corporation is a public utility, because it receives compensation for water owned by it and furnished to a limited number of the inhabitants of Boise, within a limited area, would be an unreasonable interpretation of [Idaho Code Section 61-125, then identified as C.S., Sec. 2392]." *Id.* at p. 221. Additionally, "[s]uch a construction may involve the question of the constitutionality of

the statutes." *Id.* at p. 221. "In determining whether a corporation is a public utility, we must not lose sight of the basic principles underlying governmental control of business, nor fail to appreciate and respect constitutional limits." *Id.* at p. 221. To order a nonprofit entity to provide services to a non-customer would be a taking, requiring compensation by the government board making such a ruling.

The *Stoehr* Court stated that a corporation is only subject to regulation as a public utility, "when and to the extent that the business of such corporation becomes devoted to a public use." *Id.* at p. 221. The devotion to public use must be voluntarily assumed, even where a monopoly exists. *Id.* at p. 221. "To hold that property has been dedicated to a public use is 'not a trivial thing' (*San Francisco v. Grote*, 120 Cal. 60, 65 Am. St. 155, 52 Pac. 127, 41 L.R.A. 335), and such dedication is never presumed 'without evidence of unequivocal intention' (*Niles v. Los Angeles*, 125 Cal. 572, 58 Pac. 190)." *Stoehr*, 34 Idaho at 222; citing *Allen v. Railroad Commission*, 179 Cal. 68, 85, 175 Pac. 466, 8 A.L.R. 249, 259. SPU has not become devoted to a public use, and does not intend to dedicate any of its infrastructure to the service of the general public. See Declaration of Doyle Beck, para. 7.

At no point in the Staff Comments, or any comments provided by Mr. Sorrells, has there ever been "evidence of unequivocal intent" on the part of SPU to be a public utility. SPU serves a



limited number of customers within a single commercial/industrial subdivision, and serves only 63.3% of the lots and less than 60% of the acreage within the subdivision. See Declaration of Doyle Beck, para. 4 and Exhibit "A". SPU has declined to serve property outside the subdivision. See Declaration of Doyle Beck, para. 5, filed herewith. SPU has not become devoted to any public use, and does not intend to dedicate any of its infrastructure to the service of the general public. See Declaration of Doyle Beck, para. 7. Nothing in the record establishes the unequivocal, voluntary intent of SPU to dedicate its water system to the public, and this public use issue should not be treated as trivial. Absent evidence of unequivocal, voluntary intent to become a utility devoted to public use, SPU is not a Water Corporation under Idaho Code Section 61-125, as interpreted by the Idaho Supreme Court, and is not subject to IPUC jurisdiction.

#### **CONCLUSION**

The IPUC must not lose sight of the basic principles underlying governmental control of business, nor fail to appreciate and respect its constitutional and statutory limits. SPU is **not** a Corporation under Idaho Code Section 61-104 because it is a nonprofit entity organized and operating at cost. SPU is **not** a Water Corporation under Idaho Code Section 61-125, as interpreted by the Idaho Supreme Court because SPU has **never** expressed clear, unequivocal intent to dedicate itself to public

use. Further, all potential abuse concerns raised by Staff are mitigated by the provisions of the Idaho Nonprofit Corporation Act, which imposes specific duties on SPU's Board of Directors designed to protect the customers from abuse by the Directors. None of the issues raised by Staff of **potential** abuse are based upon customer complaints and Staff has already conceded that SPU customers have significant control over SPU's rate changes. It is therefore requested that the Idaho Public Utility Commission determine that it does not have jurisdiction over the water system operated by Sunnyside Park Utilities and dismiss Mr. Sorrells' Complaint.

DATED this 20th day of October, 2022.

/s/ Paul L. Fuller  
Paul L. Fuller  
Attorney for Sunnyside Park Utilities, Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the persons listed below on this 20th day of October, 2022:

Document Served: SUNNYSIDE PARK UTILITIES' REPLY COMMENTS

Persons Served:

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