

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**DONALD SORRELLS,** )  
 ) **CASE NO. GNR-U-22-03**  
**COMPLAINANT,** )  
 )  
**vs.** ) **ORDER NO. 35645**  
 )  
**SUNNYSIDE PARK UTILITIES, INC.,** )  
 )  
**RESPONDENT.** )  
\_\_\_\_\_ )

On March 9, 2022, Donald Sorrells (“Complainant” or “Sorrells”) filed a complaint (“Complaint”) against Sunnyside Park Utilities, Inc. (“Company” or “SPU”), an un-regulated small water company, with the Idaho Public Utilities Commission (“Commission”). Sorrells alleged that SPU had notified him that it intended to terminate his water service pursuant to violations of IDAPA 31.21.01.302, and Sorrells requested the Commission prohibit SPU from doing so. Sorrells further requested the Commission find that SPU was a regulated utility under the regulatory authority of the Commission.

At the March 29, 2022, decision meeting, Commission Staff (“Staff”) recommended the Commission accept the Complaint but hold it in abeyance until the Commission could investigate whether SPU should be regulated by the Commission. The Commission agreed. On that same date a Summons was issued to SPU requesting:

1. an explanation, to include documentation, explaining the Parties’ belief that the Idaho Public Utilities Commission (“Commission”) has jurisdiction over this dispute. Please include the Court Order directing the Parties to file this dispute with the Commission.
2. a copy of Mr. Sorrells’ contract with Sunnyside Park Utilities.
3. an explanation, to include any documentation, of why Sunnyside Park Utilities desires to terminate water service to Mr. Sorrells.
4. an explanation, to include any documentation, of how Mr. Sorrells is currently wasting water provided through improper equipment.
5. an explanation, to include any documentation, of why Sunnyside Park Utilities failed to apply for a Certificate of Convenience and Public Necessity with the Commission to deliver water to its current customers.

Summons at 1-2.

SPU was given twenty-one (21) days in which to file an answer to the Complaint, and the Summons provided that Staff would have twenty-one (21) days after the answer was filed to file reply comments. On April 21, 2022, SPU filed its answer (“Answer”) to the Summons and Complaint, and on May 12, 2022, Staff filed its reply comments.

### **THE COMPLAINT AND ANSWER**

Sorrells presented multiple issues in the Complaint, and requested relief as follows:

1. A determination that Respondent SPU is a regulated utility under the regulatory authority of the IPUC pursuant to Idaho Code Title 61 and Idaho Admin. Code r. 31.21.01. *et seq*;
2. A determination that Applicant has not provided information that is materially false or materially misrepresents Applicant’s status;
3. An interpretation of the term “access” under Idaho Admin. Code r. 31.21.01.302.01(e);
4. A determination that Applicant has not denied or willfully prevented SPU’s access to the subject water meter;
5. An interpretation of the phrase “willfully wasting or interfering with service” under Idaho Admin. Code r. 31.21.01.302.01(f);
6. A determination that Applicant has not willfully wasted or interfered with water service;
7. Alternatively, a determination that any alleged violations of Idaho Admin. Code r. 31.21.01.302 have been cured or satisfied;
8. A determination that Respondent SPU lacks sufficient grounds to terminate Applicant’s water services and therefore is not authorized to terminate water services to the subject real property; and
9. Any other determinations and/or interpretations that are deemed proper and appropriate.

Complaint at 7-8. In its Answer, SPU requested an order from the Commission:

- a. Denying Sorrells Formal Complaint and dismissing this proceeding for the reason that Sorrells does not own the Subject Property and has no standing to pursue this action.
- b. Declaring that Sorrells is a persistent and continuing violator of the Rules and Regulations applicable to the Subject Property.
- c. Declaring that Sorrells is in violation of IPUC Rules by reason of (1) material misrepresentations, (2) failure of The Trust to apply for SPU’s services, (3) obtaining, diverting or using SPU’s services without SPU’s knowledge or authorization, (4) interference with SPU’s access to SPU’s water meter, (5) failure to comply with pertinent legal requirements during construction of buildings on the Subject Property, and/or (6) by willfully wasting of water provided by SPU.

- d. Declaring that SPU is authorized to terminate water services to Lot 4, Block 4, Sunnyside Industrial and Professional Park.
- e. Granting SPU such further relief as the IPUC deems just and proper.

Answer at 17.

### **INITIAL STAFF COMMENTS**

Staff reviewed Sorrells' Complaint and SPU's Answer to evaluate whether SPU should be a regulated utility. Additionally, Staff reviewed whether SPU would be justified to terminate service under Utility Customer Relation Rules ("UCCR") (IDAPA 31.21.01), if the Commission determined that SPU should be regulated. Staff believed the Commission should find that SPU was a public utility that was subject to the Commission's authority. In making its recommendation, Staff reviewed several similar Commission cases and orders dealing with small water company regulation,<sup>1</sup> and Staff compiled a list of non-exclusive factors it believed the Commission might consider when reaching its final determination in this case:

- 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?

After considering each factor, Staff believed: (1) that SPU was not recorded as a not-for-profit organization with the Secretary of State; (2) that the "Third Party Beneficiary Utility Agreement" ("Agreement") between SPU and Sunnyside Park Owners Association, Inc. provided no protections that would prevent shareholders from receiving a dividend or paying the owners for services rendered; (3) that the evidence showed that there was no ownership stake granted to the customers; (4) that the customers did have significant control over the rates SPU charges; and (5) there was no place in the Agreement that allowed the customers to have any influence on the operations or capital expenditures of the Company.

Staff recommended the Commission find:

- (1) SPU is a regulated utility under the regulatory authority of the IPUC pursuant to Idaho Code Title 61;
- (2) Sorrells meets the definition of a customer under Rule 5.02, IDAPA 31.21.01.005.02;

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<sup>1</sup> Staff reviewed Case No. PKS-W-15-01, Order No. 33603; Case No. CCH-W-15-01, Order No. 33384; and Case No. MUR-W-14-01, Order No. 33351.

- (3) Sorrells has not provided information that is materially false or materially misrepresents Sorrells' status;
- (4) Sorrells has prevented SPU's access to the water meter;
- (5) Sorrells has willfully wasted water;
- (6) Sorrells has not cured or satisfied the alleged violations of Rules 302.01(e) and (f), IDAPA 31.21.01.302.01(e), (f); and
- (7) SPU is authorized to terminate water service.

### **ADDITIONAL COMPANY FILINGS AND COMMUNICATIONS**

On May 23, 2022, Sorrells filed a Notice of Compliance and Demand for Determination of Water Rate ("Notice"). The notice provided:

We are writing this letter as notice of Donald Sorrells's compliance with Commission rules as identified in the Reply Comments of the Commission Staff dated May 12, 2022 ("the Comments"). As explained in the Comments, SPU is not authorized to terminate water services as long as the following steps are taken: (1) Mr. Sorrells's lock is removed from the water meter; (2) SPU regains unimpeded access to the water meter; (3) all known leaks are fixed; and (a) Mr. Sorrells's account is paid up to date. All steps have been satisfied. Mr. Sorrells has removed the lock from the water meter, SPU may access the meter as defined under the Comments, all leaks have been repaired, and the account is paid up to date. Where the steps are satisfied, we believe the Commission has supported a finding that SPU is not authorized to terminate water services at this time.

Additionally, as per the Comments, a proper water rate must be established to bill for "excessive use." To date, none of the invoices received by Mr. Sorrells have identified the base water rate to calculate usage or, by extension, excessive use of water services. Thus, we ask that SPU provide the water rate on all invoices moving forward, as well as provide the supporting documents, measurements, and other materials used to determine the water rate upon which previous determinations of "excessive use" were billed.

In light of the foregoing, we believe that this matter has been resolved with regard to water services. Please advise as to your client's plans to establish a proper water rate and provide amended invoices demonstrating usage against such rate.

*Notice at 1-2.*

In response, SPU filed a Motion to Strike the Notice. SPU argued that IDAPA 31.01.01 did not allow the Complainant to file a "Notice" in response to Staff's recommendations and unilaterally declare that Sorrells was in compliance with the Commission's Rules and Regulations, that no controversy remained, and that no sanction was appropriate for the years of alleged violations committed by Complainant. SPU argued that it was entitled to the full due process rights afforded under the Commission's Rules and Regulations.

On June 13, 2022, SPU sent the Commission's counsel an email with an attached copy of an Acknowledgement of Conversion Certificate that SPU received from the Secretary of State's office, confirming that Sunnyside Park Utilities, Inc. was converted into a non-profit corporation. SPU represented that it was in the process of taking the necessary steps to qualify for exemption from the Commission's regulatory authority.

#### **ORDER NO. 35513**

On August 23, 2022, the Commission issued Order No. 35513. The Commission ordered the Company to file an Application for a CPCN to become a regulated water company within 30-days of issuance of the order. The Commission suspended consideration of the remaining substantive issues until after the Company was granted or denied a CPCN.

#### **ORDER NO. 35534**

On September 7, 2022, the Company filed a motion to amend its answer, a petition to stay Order No. 35513, and a petition to review Order No. 35513. The Company represented that it had transitioned into a nonprofit corporation that was statutorily exempt from Commission regulation. The Company submitted new documentation in support of its motion, petitions, and amended answer.

On September 20, 2022, the Commission considered the Company's motion and petitions during the Commission's decision meeting and, upon motion therein, granted the Company's motion to amend its answer; granted the Company's petition to review Order No. 35513, setting an initial comment deadline of October 13, 2022, and a Company reply comment deadline of October 20, 2022; and granted the Company's petition to stay Order No. 35513 for ninety (90) days, or the Commission issues an earlier order.

#### **ADDITIONAL STAFF COMMENTS**

Staff reviewed the Company's amended answer, and all submitted documents. Based upon its review, Staff continued to recommend that the Company be regulated by the Commission. The Company represented that it changed its corporate structure to a non-profit; however, based upon the criteria Staff included in its Reply Comments filed on May 12, 2022, Staff believed the Company's amended answer did not meet three of those criteria and the Company should be regulated by the Commission.

#### **COMPANY COMMENTS**

The Company argued that it was not a Corporation under *Idaho Code* § 61-104 because it was a nonprofit entity organized and operating at cost. The Company contended that it is not a

Water Corporation under *Idaho Code* § 61-125, as interpreted by the Idaho Supreme Court, because the Company had never expressed clear, unequivocal intent to dedicate itself to public use. Further, the Company argued that all potential abuse concerns raised by Staff were mitigated by the provisions of the Idaho Nonprofit Corporation Act, which imposes specific duties on the Company's Board of Directors and were designed to protect the customers from abuse by the Directors. The Company contended that none of the issues of potential abuse raised by Staff were based upon customer complaints, and Staff had already conceded that the Company's customers have significant control over the Company's rate changes. The Company requested that the Commission determine that the Commission did not have jurisdiction over the water system operated by Sunnyside Park Utilities and dismiss Sorrells' Complaint.

### **COMMISSION FINDINGS AND DECISION**

The Commission has jurisdiction over this matter and the issues in this case under Title 61 of Idaho Code. The Commission regulates "public utilities," including "water corporations" that serve the public or some portion thereof for compensation. *Idaho Code* §§ 61-125, -129, and -501.

A "public utility" is an entity that is dedicated to serving the general public in its service area. *Idaho Code* § 61-129(1). The term "public utility" is defined to include "water corporations." *Id.* A "water corporation" is "every corporation" that owns, controls, operates or manages a water system for compensation. *Idaho Code* § 61-125. "The term 'corporation' . . . does not include . . . mutual nonprofit or cooperative . . . water . . . corporation or any other public utility organized and operated for service at cost and not for profit . . ." *Idaho Code* § 61-104.

In its petition to review Order No. 35513, the Company represents that it has transitioned into a nonprofit corporation. The Company claims that it is now statutorily exempt from Commission regulation. Specifically, the Company argues that it is not a "corporation" under *Idaho Code* § 61-104 because it is a nonprofit entity organized and operating at cost; and, that it is not a "water corporation" under *Idaho Code* § 61-125, as interpreted by the Idaho Supreme Court, because the Company has never expressed clear, unequivocal intent to dedicate itself to public use.

#### **A. Idaho Code § 61-104**

*Idaho Code* § 61-104 provides three exceptions to the Commission's regulatory authority over "corporations." The Commission does not regulate "mutual nonprofits," "cooperative corporations," nor "any other public utility organized and operated for service at cost and not for profit." *Idaho Code* § 61-104.

Here, the Company does not claim to be a mutual nonprofit, nor does the Company claim to be a cooperative corporation. Rather, the Company argues that it has established that it is organized as a nonprofit and operates at cost. Company Reply Comments at 3. The Commission disagrees.

Pursuant to *Idaho Code* § 61-104, the Company must not only show that it is “organized” for service at cost and not for profit, but also that it is “operated” for service at cost and not for profit. In these proceedings, the Company submitted some evidence that it has changed designations with the Secretary of State to register as a nonprofit. The Company has also submitted bylaws, a Third-Party Beneficiary Utility Agreement, and some other documentation to show that the Company is “organized” for service at cost and not for profit.

However, the record does not contain evidence that the Company is, or has been, “operated” for service at cost and not for profit. The Company has yet to submit any financial statements with supporting documentation, cost analysis, nor tax information for the Commission to review and consider. Based upon the lack of evidence in the record concerning the operating cost of the Company, the Commission cannot find that the Company is exempt from Commission regulation under *Idaho Code* § 61-104 as both organized, and operated, for service at cost and not for profit.

#### **B. Idaho Code § 61-125**

The Company argues that it is not a “water corporation” under *Idaho Code* § 61-125, as interpreted by the Idaho Supreme Court, because the Company has never expressed clear, unequivocal intent to dedicate itself to public use. The Company bases its claim on the Idaho Supreme Court case of *Stoehr v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921). The *Stoehr* case provides in relevant part:

Under appellant’s assignments, there is but one question for our determination, which is set forth in appellant’s brief in the following language:

“Is defendant and respondent, in so far as its natural hot water system is concerned, a public utility? If it is a public utility, the lower court erred and should be reversed, and, if it is not a public utility, the lower court should be sustained by this court.”

C. S. § 2396, provides that:

“The term ‘public utility’ when used in this chapter includes every \* \* \* water corporation \* \* \* as those terms are defined in this section. \* \* \*”

C. S. § 2392, provides that:

“The term ‘water corporation’ \* \* \* includes every corporation \* \* \* owning, controlling, operating or managing any water system for compensation within this state.”

To 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 the foregoing statutes. Such a construction may involve the question of the constitutionality of the statutes. *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249, at page 260. 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 limitations. *Salt Lake City v. Utah Light & Traction Co.*, 52 Utah, 210, 173 Pac. 556, 3 A. L. R. 715.

If the service is dedicated to the public or some portion thereof, or to persons within a given area, then any member of the public or of the given class, or any person within the given area, may demand such service without discrimination, and the public or so much of it as has occasion to be served is entitled to the service of the utility as a matter of right and not of grace. *Del Mar Water, Light & Power Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948.

A corporation becomes a public service corporation, and therefore subject to regulation as a public utility, only when and to the extent that the business of such corporation becomes devoted to a public use. *Thayer v. California Development Co.*, 164 Cal. 117, 128 Pac. 21.

*Stoehr v. Natatorium Co.*, 34 Idaho 217, 200 P. 132, 133 (1921). Specifically, the Company argues that “[a]bsent 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.” Company Reply Comments at 9. The Company’s argument is unpersuasive.

First, the Commission is not convinced that *Stoehr* remains good law. The Court in *Stoehr* reasoned 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 the foregoing statutes.” *Id.* (emphasis added). The *Stoehr* Court based its holding on the idea that unreasonable interpretations of statutes may be corrected by the judiciary. That reasoning has since been emphatically rejected by the Idaho Supreme Court. In *Verska v. Saint Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011), the Court held that:



The asserted purpose for enacting the legislation cannot modify its plain meaning. The scope of the legislation can be broader than the primary purpose for enacting it. If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial. The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature.

*Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 892-93, 265 P.3d 502, 505-06 (2011) (internal citations and quotations omitted). Based upon the holding in *Verska*, the Commission finds the Company's contention that *Idaho Code* § 61-125 requires a public utility to express an "unequivocal intent to dedicate itself to public use" unpersuasive.

Second, even if *Stoehr* remains good law, the Commission is not convinced that the Company does not provide services to the public. The *Stoehr* Court reasoned:

If the service is dedicated to the public or *some portion thereof*, or to *persons within a given area*, then any member of the public or of the given class, or *any person within the given area*, may demand such service without discrimination, and the public or so much of it as has occasion to be served is entitled to the service of the utility as a matter of right and not of grace.

*Id.* (emphasis added). The *Stoehr* Court references both a "portion" of the public and also service to "persons within a given area." The Company states that "Sunnyside Park Utilities, Inc. was formed in 2002 for the purpose of providing water and sewer service to the owners and tenants of real property located within the Sunnyside Industrial and Professional Park located in Bonneville County." Beck Declaration at 1. The Company further states that:

SPU currently provides water and sewer service to nineteen (19) commercial and industrial customers, all located in the Sunnyside Industrial and Professional Park, adjacent to Idaho Falls. There is only one vacant lot in the subdivision which could potentially connect to SPU's system in the future.

Amended Answer to Formal Complaint at 3. While the Company argues that the geographical limitation of its service excludes it from providing service to the public, the Commission would find that, even if *Stoehr* remains good law, the Company provides service to a portion of the public, designated by the given area of the Sunnyside Industrial and Professional Park.

Based upon the submitted evidence in the record and the above analysis, the Commission cannot find that the Company is a mutual nonprofit, cooperative corporation, nor a public utility

organized and operated for service at cost at this time; thus, the Commission finds that the Company is a public utility and subject to Commission regulation.<sup>2</sup>

**ORDER**

IT IS HEREBY ORDERED that the Company shall file an Application for a CPCN to become a regulated water company within 30-days of issuance of this order.

IT IS FURTHER ORDERED the Commission shall suspend consideration of the remaining substantive issues, as outlined in the Complaint and Answer, until SPU is granted or denied a CPCN.

IT IS FURTHER ORDERED that parties comply with Order No. 35375, issued April 21, 2022. Generally, all pleadings should be filed with the Commission electronically and will be deemed timely filed when received by the Commission Secretary. *See* Rule 14.02. Service between parties should continue to be accomplished electronically when possible. However, voluminous discovery-related documents may be filed and served on CD-ROM or a USB flash drive.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 27<sup>th</sup> day of December 2022.



ERIC ANDERSON, PRESIDENT

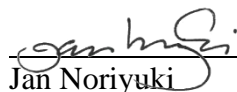


JOHN CHATBURN, COMMISSIONER



JOHN R. HAMMOND JR., COMMISSIONER

ATTEST:



Commission Secretary

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<sup>2</sup> Nothing in this Order shall prohibit any party from petitioning for review of this interlocutory order pursuant to Commission Rule of Procedure 322.