MEMORANDUM

TO:COMMISSIONER SMITH

COMMISSIONER NELSON

COMMISSIONER HANSEN

DON HOWELL

FROM:LORI MANN

DATE:FEBRUARY 15, 1995

RE:DECERTIFICATION OF WATER UTILITIES

CASE NOS.  CCH-W-95-1 AND FLS-W-95-1

The Commission recently received requests from two small regulated water utilities that their Certificates of Public Convenience and Necessity be cancelled because they are now nonprofit corporations.  Both utilities have received certificates of incorporation as nonprofit corporations from the Secretary of State’s Office.  The Articles of Incorporation for the two companies state that they will not have members.  The two utilities are Country Club Hills and Falls Water, both of which are near Idaho Falls.  Several questions have come up regarding whether or not Country Club Hills and Falls Water are true nonprofit corporations no longer subject to the Commission’s regulation.

Under Idaho Code § 61-129 the term “public utility” includes every “water corporation, . . . as [that] term is defined in this chapter . . .”  Idaho Code § 61-125 defines “water corporation” as “every corporation or person . . . owning, controlling, operating or managing any water system for compensation within this state.”  In defining “corporation,” I.C. § 61-104 provides that corporation “includes a corporation, a company, an association and a joint stock association, butdoesnot include a municipal corporation, or mutual nonprofit or cooperative . . . water . . . corporation or any other public utility organizedandoperated for service at cost and not for profit. . . .”  (Emphasis added).

Traditionally, the Commission has regulated small water companies in one of two ways, either under the traditional rate of return method for those companies with sufficient assets, or under an expense recovery method for those without sufficient assets, whereby the rates are sufficient to recover costs, expenses, etc., including salaries for the company's owners (who are usually the operators/managers of the utility).  Both utilities at issue have a rate of return (i.e., profit) built into their current rates.  As nonprofit companies, one could perhaps expect their rates to decrease because a rate of return is no longer necessary.

In addition, neither corporation has members.  Jack Taylor spoke with Everett Wohlers, the staff attorney at the Secretary of State’s Office.  According to Mr. Wohlers, Idaho’s Nonprofit Corporation Act was amended last year to allow applicants for nonprofit corporate status to state that they have no members.  This change was strenuously objected to on the grounds that it would “open up pandora’s box.”  According to Mr. Wohlers, the change was made to accommodate three religious organizations.

Staff is concerned that Country Club Hills and Falls Water may be trying to avoid Commission regulation by establishing nonprofit status.  Idaho Code § 61-501 vests the Commission “with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this Act.” Furthermore, I.C. § 30-3-23 of the Nonprofit Corporation Act provides that a “corporation engaging in an activity that is subject to regulation under another statute of this State may incorporation under this act only if incorporation . . . is not prohibited by the other statute.  The corporation shall be subject to all limitations of the other statute.”  While nothing in the Public Utilities Laws specifically prohibits a utility from incorporating under the Nonprofit Corporation Act, for a utility to fall outside the Commission’s jurisdiction, it must be “organized and operated for service at cost and not for profit.”  I.C. § 61-104.  Consequently, Staff believes that these cases require further inquiry from the Commission, the Attorney General’s Office, or ultimately the courts in order to “pierce the corporate veil” and determine the true nature of these two utilities/nonprofit corporations.

Idaho Code § 67-1401(4) states that it is the duty of the Attorney General “to supervise nonprofit corporations . . . and to enforce whenever necessary any noncompliance or departure of the general purpose of such trust and, in order to accomplish such purpose, said nonprofit corporations . . . are subject at all times to examination by the attorney general, on behalf of the state, to ascertain the condition of its affairs and to what extent, if at all, said trustee or trustees may have failed to comply with trusts said trustee or trustees may have assumed or may have departed from the general purpose for which it was formed.”  Don is meeting with Jack McMahon tomorrow at the Attorney General’s Office and will discuss the situation with these two companies with him.

Lori Mann

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