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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF ISLAND PARK
WATER COMPANY'S FAILURE TO
COMPLY WITH IDAHO PUBLIC
UTILITIES COMMISSION REPORTING
AND FISCAL REQUIREMENTS,**

CASE NO. ISL-W-23-01

PETITION FOR RECONSIDERATION

The Island Park Water Company (hereinafter IPWC) hereby petitions the Idaho Public Utilities Commission (hereinafter the Commission) for a reconsideration of its Order identified as Order NO. 35817 and in particularity the ordering of penalties against the Company. The petition is based upon the following:

Bases For Reconsideration

1. Most of the difficulties experienced by IPWC are due to the reclassification of its water systems by the Idaho Department of Environmental Quality (herein after DEQ). IPWC has hired a consulting engineer and has begun discussions with the DEQ in regard to the various water systems serviced by IPWC. In general, IPWC would request that the Commission would

delay and reconsider the enforcement of its orders until the various disputations by and between the Company and DEQ are resolved, settled or litigated.

2. In particular, the Company disputes the DEQ's most recent surveys and reports of year around customers. It is understood by IPWC that in order to dispute the data and conclusions of the DEQ that an independent survey has to be conducted, all with DEQ's knowledge and approval. The Company based upon its empirical data from its customers is confident that an independent study will conclusively and in a documentary way disprove the assertions of the DEQ in regard to the number of year round customers and the classification of the various water systems being serviced by IPWC.

3. As to each system the Company would represent the following:

- a. Shotgun-South Steven's Lane. Presently this system is classified as a transient noncommunity system. It is the Company's assertion that there are no more than six (6) year-round residents. As the Commission knows, if less than 25 persons are residing in the service area six months out of the year than it should not be regulated at all.

As asserted in the Affidavits of Ms. McCarty, Roger Buchanan and in the testimony presented to the Commission the well for Shotgun-South Steven's Lane is not accessible during the winter months. There is no HOA organization who clears the roads during the winter months. The roads in this subdivision are not dedicated public roads and therefor are not subject to public maintenance. In order to provide proper operation and maintenance under the Commission's present orders the Company

would have to obtain a vehicle and a rotary snow blower in order to provide proper operation and maintenance to the Shotgun-South Steven's Lane well.

- b. Shotgun-Kickapoo. This system is presently classified as a transient noncommunity system. The Company disputes the number of year-round residents as represented by the DEQ. The well for Shot-Kickapoo is not accessible in the wintertime. There is no HOA organization that provides snow removal in the wintertime. To properly maintain and operate the well would require the purchase by the company of a vehicle and a rotary snow blower to properly maintain and operate the well.
- c. Shotgun-Cherokee. This system is presently classified as a community system. Certain private citizens "pool" their resources to clear the roads necessary to gain access to the wells. There are presently 75 connections in this system. The number of year-round residents is disputed and therefore the classification as a community system is also disputed. There is presently a new well and pump station (a design approved by the DEQ) about to go "live". The new well and pump station cannot go live due to the lack of bacteria free testing. Testing attempts are ongoing. The testing requirements would change with re-classification. Without this additional 60 GPM, the system is short of water.
- d. Shotgun-North. This system is presently classified as a community system. Some private citizens clear the roads to gain access to the wells.

The number of year-round residents is disputed and hence the community system status is also disputed by the Company. With re-classification the testing requirements would change.

It was in this distribution system a dispute arose in regard to whether there were two lots or one lot. Documentation was provided by IPWC that conclusively indicates that though taxed as a unitary entity there is in actuality two original lots-one residential, and one being used for commercial purposes. The deeds conclusively displaying this have been provided to the Commission.

- e. Aspen Ridge. This system has been classified as a community system. IPWC disputes the representation of the DEQ as to year-round residents hence the community system status is disputed by the Company. There is absolutely no access to the wells during the winter months. There are no publicly maintained roads within the subdivision and proper maintenance and operation would demand the purchase of a vehicle and a rotary snow blower in order to access the wells in the wintertime. This subdivision does have an HOA and the HOA has indicated some interest in “taking over” the wells and water distribution system for this subdivision.
- f. Goose Bay. This system is classified as a transient noncommunity system. The number of year-round residents is in dispute and the classification of the water system is in dispute. There are some private wells that are utilized throughout the subdivision. As with the other systems but to an

even greater extent there is no snow clearing to the well houses in the winter and proper operation and maintenance would require the purchase of a vehicle and a rotary snow blower to access the well houses in the wintertime.

- g. Valley View. This system was classified last year by the DEQ as a non-transient noncommunity system. This status is disputed by IPWC. The DEQ is regulating two separate systems (Valley View and Herring) as one system. As with the other systems described above there is absolutely no access to the wells in the wintertime. The wells in the subdivision as opposed to the other systems have a permit to appropriate water (not a license) with a proof date of October 1, 2025. It is the position of the IPWC that the system should be reclassified as a nonregulated system just like South Steven's Lane should be reclassified as a nonregulated system. As indicated and as proved by documentary evidence to the Commission there is a substantial legal dispute as to the ownership of the well lot for the Herring well. The various competing deeds have been provided to the Commission. The Permit to appropriate is in the name of the IPWC. As indicated, this is a permit not a water license.
- h. As stated above, many of the claimed deficiencies and defects in the maintenance and operation of these systems are due to the classification of the above water systems which classifications are going to be vigorously disputed by IPWC. The reclassification of these systems would remove

many of the “perceived” deficiencies and the increase in testing with all of the associated costs and expenses.

Physical Condition and Other Factors Regarding Dorothy McCarty

Completely absent from the Order issued by the Commission on June 14th, 2023 and identified as Order No. 35817 are the explanations given by Ms. McCarty and as proved by documentary evidence from her healthcare providers. To review:

- A. Ms. McCarty suffers from wet macular degeneration which was diagnosed in November 2022.
- B. Ms. McCarty suffered from Covid in November 2022.
- C. Ms. McCarty suffered a muscular tear on her hip and a hematoma on or about June 6th, 2022.
- D. Ms. McCarty suffered a severe sprain of her ankle on or about June 6th, 2022.
- E. Ms. McCarty acted as the healthcare giver of her sister-in-law who had several toes amputated. Ms. McCarty acted as the healthcare provider for her husband who had suffered a fall during the material time.
- F. The accountant for IPWC left service in November of 2022.
- G. Ms. McCarty explained in detail the transition of her address and limitations she has in her reading ability.
- H. Ms. McCarty addressed specifically the aging reports and the misunderstanding of both herself and her QuickBooks program in trying to interpret “aging report”. It appears that the Commission wishes to interpret later production of documents as an insidious admission of Ms. McCarty’s “sandbagging”. It is simply a 78-year-

old woman with macular degeneration attempting to interpret the wishes of the Commission and “guessing” wrong.

- I. The Commission’s Order in regard to redactions again assigns an insidious prospective whereas Ms. McCarty explained that in prior contacts and document exchanges with the Commission she was specifically cautioned about the necessity of redacting personal information for privacy reasons.
- J. The information in this section of the Petition, as it was meant at the time of the order to show cause hearing, is to reflect that none of the so-called “ghosting” or “sandbagging” acts or non-acts (as characterized by staff) were intentional; only the constraints and limitations together with personal challenges that delayed action by Ms. McCarty in attempting to respond without the assistance or continuity of longtime friends and advisors, especially in the accounting arena. In this regard, by analogy the IPWC would refer the Commission to the doctrine of impossibility or inability that is allowed to those who attempt to respond to motions for contempt. *See e.g., United States v. Rizzo* 539 F.2d 458, 465 (5th Cir 1076) The analogy is apropos in the instant situation. The Order to Show Cause in essence was to explain “why” certain audit responses by IPWC were either late or IPWC’s responses were deficient. Courts of general jurisdiction have long recognized the concept of physical and legal impossibility as a defense to contempt. *Id.* Here you have a 78-year-old woman battling mobility, ambulation and vision problems all the while trying to serve as a healthcare provider to a

sister-in-law and a husband and still trying to maintain a normal routine in business.

K. Initially, when asked for an extension of time she was advised that technically her extension period had expired. It is true that the Commission allowed Ms. McCarty and the Company continuances in an attempt to respond to the Order to Show Cause Order. Given 425 customers, ongoing repairs to the various systems, the list of questions/audit requests, the last minute (apparently preplanned) Notices of Deficiency from the DEQ and the physical and professional limitations (access to certain resources) some latitude and some recognition of the impossibility or inability doctrine should have been applied in this matter. As stated above, the most significant and substantive response to the DEQ's Notices of Deficiency would be an open attack on the classification of the systems by the DEQ. This will occur.

The Penalties Render the Company Insolvent

Idaho Code Section 55-911 defines insolvency. Under this definition and given the Commission's Order the Company, IPWC is now definitionally, practically, and operationally insolvent.

As recognized by everyone the water distribution systems are too old, too shallow and too fragile for the harsh and severe winters experienced in the Island Park area.

As indicated by testimony and by the Affidavits supplied to the Commission attempting to find resources available in the Island Park area in the wintertime to effect repairs is problematic.

The Company has retained the services of an engineer to review the water distribution system and wells of IPWC.

The engineer's conservative estimate is that a capital investiture of 5 million dollars would be necessary to bring the system to the point of being operational for the revised status and classifications urged by the DEQ. The consulting engineer also estimates that the testing now being required by the DEQ unless challenged and revised would result in testing costs of at least \$6,000 or more per well per year and this estimate does not take into account the retention of licensed water operators and of back up water operators as required by some of the classifications of some of the water systems.

Given these types of numbers the pool of companies willing to take on this responsibility are few. The resources and capitalization necessary to take over the systems given their present classification would be prohibitive for almost ever company interested in procuring water systems in eastern Idaho. The consulting engineer has estimated that a company making the capital investment that would be necessary would be asking for a tariff of \$100 to \$200 per customer per month to meet the requirements presently in place by the DEQ, by this Commission and certainly by certain future orders from the EPA.

The only valuable assets held by the IPWC at the present time are the water licenses and the water permit.

Other Factors Ignored by The Commission In The Rendering Of Its Order

In this regard the Affidavits presented by the Company and the testimony provided by the Company reflected that all of the restrictive covenants that govern the various subdivisions restrict usages in the subdivision to private residential purposes. The amended organizational

document of Island Park Water Company restricts its distribution of water for residential purposes and the water licenses, and the water permit restrict its usages to domestic usages. It would appear that though the Company has never disconnected any customer within its service area the Commission is stating that the Company, IPWC should violate the restrictive covenants of every subdivision, the organizational mandate of the Company and the definitional usages provided by Idaho statute in regard to beneficial water usages. It would also appear that the Commission condones the DEQ's combining of two water systems in laying the responsibility for the servicing of those two systems on IPWC when in order to clarify the situation the IPWC would have to maintain a quiet title action and go through certain procedures with the Idaho Department of Water Resources in regard to the Herring well. It would appear that like providing access to wells in the wintertime the Company is also supposed to shoulder the responsibilities of an adjoining and contiguous property owner who has locked the Herring well and has threatened trespass. On many different levels this appears and is unfair and inequitable.

The Company's Response to The Commission

The Company in response to the Commission's dictates has been to hire additional people to engage in the operational management of the Company and to engage a consulting engineer. As explained above, the under capitalization of the Company, the ridiculously low tariff allowed to the Company will, without some extended period of time extended to the Company to contest the DEQ's classification of the systems, and to review the testing regimes that will be required will result in the practical "taking" of the Company and its assets. The Company has engaged in some talks with some interested companies. As stated above, the process of purchase and transition is estimated to take 18 to 24 months.

It would be the request of the Company that the Company IPWC be allowed the time and ability to provide documentation to the DEQ for the reclassification of the systems as outlined above and to continue with negotiations for an orderly transition of the water systems. The time requested by IPWC would also allow time for the customers of the various systems to acclimate themselves to the inevitable tariff increases that will come as a result of the transition necessary to the systems. This transition and capitalization will be necessary even if IPWC is successful in its challenge to the DEQ in regard to the classification of the systems inasmuch as stated above it is realized and understood that the systems themselves even if changed to seasonal only systems will need to be replaced or substantially repaired.

DATED THIS 5th day of July, 2023.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Marvin M. Smith
Attorneys for Island Park Water Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of July, 2023, I caused to be served a true copy of the foregoing PETITION FOR RECONSIDERATION, by the method indicated below, and addressed to each of the following:

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