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CLAIRE SHARP, ISB #8026
Deputy Attorney General
State General Counsel & Fair Hearings Division
Public Utilities Commission
11331 W. Chinden Blvd., Building 8, Suite 201-A
Boise, ID 83714
Telephone: (208) 334-0357
E-mail: claire.sharp@puc.idaho.gov

Attorney for Commission Staff

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** **REPLY TO THE COMPANY'S REQUEST FOR RECONSIDERATION**

COMES NOW, the Idaho Public Utilities Commission Staff ("PUC Staff" or "Staff"), by and through its attorney of record, Claire Sharp, Deputy Attorney General, in response to Island Park Water Company's ("Island Park" or "Company") request for reconsideration to the Idaho Public Utilities Commission ("Commission").

The Commission's Order No. 35817 found that the Company failed to submit timely and complete responses to AR Nos. 3, 4, 7, 9 and 10, and was subject to a penalty of $2,000 for each violation, amounting to a penalty of $10,000. The Commission also found the Company: (1) improperly handled customers' complaints, amounting to a penalty of $24,000; (2) improperly billed its customers, amounting to a penalty of $144,000; (3) retaliated against customers, amounting to a penalty of $46,000; and (4) failed to provide safe and reliable service to customers for each of the seven water systems, amounting to a penalty of $210,000. The Commission also directed the Company to show proof refunds were made to certain customers who were charged in excess of the approved tariff, and the Company did so.[1]

[1] The Company's request for reconsideration suggests they might believe they were entitled to bill Ridge Cap Rentals five times the tariff amount on a theory of domestic usage or taxing district. Staff disagrees—none of these approaches are allowed under the Company's tariff.

<u>Legal Standard for Reconsideration under *Idaho Code* § 61-626(2)</u>

The Commission has the authority to grant or deny reconsideration pursuant to Idaho Code section 61-626(2). Reconsideration allows any interested person to bring to the Commission's attention any question previously determined, and it affords the Commission an opportunity to rectify any mistakes or omissions. *Washington Water Power Co., v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). Commission Rule of Procedure 331.01 provides:

> Petitions for reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is *unreasonable, unlawful, erroneous or not in conformity with the law*, and a statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted.

IDAPA 31.01.01.331.01 (emphasis added). Any person may petition the Commission to clarify an order under Rule 325, IDAPA 31.01.01.325. A petition for clarification may be combined with a petition for reconsideration. *Id.*

<u>The Company's Request for Reconsideration</u>

The Company requested the Commission "delay and reconsider the enforcement of its orders until the various disputations by and between the Company and DEQ are resolved, settled or litigated." Company Petition for Reconsideration at 2. The Company argued the Commission's Order functions as a "taking" and will render the Company insolvent. *Id.* at 9-10. The Company's request for reconsideration signaled concerns with fairness, insolvency, undercapitalization, and a heavy-handed approach from the Commission.

<u>Staff's Position on the Company's Request for Reconsideration</u>

Staff believes the Commission should reject the Company's request for reconsideration for failing to show that the Commission's Order was *unreasonable, unlawful, erroneous, or not in conformity with the law* as required by Rule of Procedure 31.01.01.331.01. Staff believes the true inequity in the matter has been to the customers who have been without safe and reliable water for months, or potentially years. These customers have not been able to rely on Ms. McCarty or her Company to maintain the water system and are now in an emergent situation where water quality is an issue.

Staff could agree with delaying enforcement of the penalties levied in Order No. 35817 for a limited time <u>if</u> the Commission establishes a path forward of requiring the Company to make good on its promise and obligation to provide safe and reliable water service to its customers on

an expedited basis or the Company agrees to the transfer operation and management responsibilities—or the actual Company—to someone, or a company, who can bring the water systems into compliance with the Commission's rules and regulations. Staff sincerely hopes that the Company makes good on its promises now. However, the Company's current behavior does not suggest to Staff that the Company is ready to make the necessary changes to do so. Staff does not condone any outcome that allows the Company to continue exposing the public to health risks of irreparable injury.

Proceedings Involving DEQ Do Not Support the PUC Granting Reconsideration

Staff notes that the Company filed its request for reconsideration on July 5, 2023, and DEQ filed a motion for preliminary injunction against the Company on July 7, 2023. DEQ's motion for preliminary injunction asks that the Company (1) address the 93 significant deficiencies identified by DEQ; (2) provide required Tier 1 and Tier 2 public notices and be prohibited from providing public notice that is inaccurate or misleading; (3) address the low pressure or lack of water at the Company's public water systems ("PWS"); (4) take and submit all required samples for its customers; (5) provide DEQ at least 48-hour notice prior to any sampling and allow DEQ staff to be present for all sampling; (6) provide plans and specification (or as-builts) for all material modifications at the public drinking water systems; (7) have a responsible charge operator for the Valley View Subdivision public drinking water system; and (8) address all health hazards at the public water systems. DEQ Memorandum in Support of Motion for preliminary Injunction at 2-3.

The Company has not articulated why this DEQ proceeding should legally affect the Commission's directives in Order No. 35817. Most importantly, the Company's proceedings with DEQ do not demonstrate that the Commission's Order was unreasonable, unlawful, erroneous or not in conformity with the law. The Company agreed that DEQ disallowed their systems from March 15, 2023, to March 29, 2023, and the Commission's Order is further supported by substantial and competent evidence, including the testimony from customers about the Company's failures to provide safe and reliable water. The hypothetical reclassification would not excuse the Company of its obligations to provide safe and reliable water as an Idaho Code Title 61 public utility with the assigned CPCN for the relevant service area(s). The proceedings with DEQ would not show that the Company failed to file timely and complete responses to AR Nos. 3, 4, 7, 9, and 10; it would not change how the Company improperly handled customers' complaints, inaccurately billed customers, failed to provide safe and reliable water, or retaliated against

customers. The authority of the Idaho DEQ and the Idaho PUC should not be confounded, nor should the regulatory requirements of either agency. It is apparent to Staff that Ms. McCarty and the Company will need to address the DEQ's allegations of chlorination, masking of test results, mispresenting testing samples and inaccurate public notifications with the district court. The complexities of managing several proceedings is not persuasive to Staff that a suspension of the Commission's Order No. 35817 is justified

Staff shares DEQ's concerns that the Company's present operation poses a danger to the public health and safety and must be immediately corrected. Staff's concerns have increased with the recent indications of *E. coli* in the Company's water systems and the Company's unrepentant approach of denying accountability and blaming others for its failures to provide safe and reliable water to the public. Staff's interest is not about "taking" the Company or its assets; Staff's interest has always been—and remains—ensuring access to safe and reliable water to the hundreds of customers IPWC serves. To that point, Staff prefers education over enforcement—however, the Company's recalcitrance to immediately addressing the various issues with the systems and the risks to public safety necessitated an escalation.

The Company's Claim of Possible Insolvency from Penalties Does Not Meet the Legal Standard for Granting Reconsideration

The Company argued that the Commission's Order No. 35817 renders the Company insolvent. *Id*. at 8. Staff agrees. The Company's insolvency would result because of the Company's numerous violations of the Idaho Public Utilities Law. Insolvency does not demonstrate that the Commission's Order was unreasonable, unlawful, erroneous or not in conformity with the law. Staff contends the Commission's penalties were appropriate under the factual circumstances and were an appropriate exercise of the Commission's statutory authority under Idaho Code Title 61.

Staff is concerned with the Company's representations of its "limited" assets, particularly the Company's statement that the "only valuable assets held by the IPWC at the present time are the water licenses and the water permit." *Id*. at 9. Staff disagrees. Public records show the Company held titles to valuable properties including 4031 Pawnee Road (Parcel No. RP00155021017A; SHOTGUN VILLAGE EST #5 LOT 17 BLK 21 SEC 12 TWP 13 RGE 42) and 4036 Pawnee Road (Parcel No. RP001550222012A; SHOTGUN VILLAGE EST #5 W 100' LOT 12 BLK 22 SEC 12 TWP 13 RGE 42). These are not lots with wells attached. The 2022 Tax Assessment values

of these properties were around $66k each, and Staff believes customers could benefit by using sale proceeds to fund necessary repairs to the system.

Staff recently learned that on or around June 28, 2023, Ms. McCarty attempted to transfer properties held by the Company to herself, personally. A fraudulent conveyance is one generally characterized by lack of fair and valuable consideration. *See Idaho Code* 55-901, *et seq*. If so, transferring the assets for the fraudulent purpose of avoiding liability and depleting Company assets for her own personal benefit is unacceptable and will void the transfer. *Id*; s*ee also Morrison v. Young*, 136 Idaho 316 (2001). The Company should commit to being fully transparent with the Commission about its financial situation and provide the Commission with an accurate accounting of its assets.

Staff believes that Ms. McCarty's liberal use of Company funds for personal or unnecessary expenditures is the primary cause of its financial difficulties the Company represents it is facing. Some of the most egregious of these may be in the recent 21 transactions totaling $2,733 to the ID Liquor Store and the three transactions totaling $850 to wineonedelivery.com in 2022. The Company, run and owned by Ms. McCarty, made payments of $36,575, combined, in 2020 and 2021 to Ms. McCarty, and payments totaling $51,630.80, during the same period, to McCarty Management services, with Ms. McCarty as the sole owner. Staff does not have a philosophical objection to management fees—however, Staff objects to apparent exorbitant management fees for such unproductive results. The Company should not be paying management fees to Ms. McCarty when her leadership has failed to hire employee(s) who can provide the relevant reports and responses to routine audit questions or run the Company when she has demonstrated an inability to do so. The Company did not even have a budget for current or expected repairs. Staff contends that Ms. McCarty has the responsibility to run her business responsibly, and raising the tariff does not address ineffective management.

Staff does not dispute that the Company's failure to request an adjustment to the tariff may have contributed to the financial difficulties but reminds the Company it is the Company's responsibility to seek such adjustment. Staff cannot begin to speculate on what the appropriate tariff amount would be if the Company were to bring a rate case. Regardless, the amount of the Company's tariff does not demonstrate that the Commission's Order was unreasonable, unlawful, erroneous or not in conformity with the law as required by the Commission's Rule of Procedure

31.01.01.331.01. If a Company believes its tariff is too low, the correct approach is to bring a rate case—not bill customers double, triple, or even five times the tariff amount. This is inappropriate.

Use of Company Funds may Support Action to Determine Personal Liability

Company tariffs are not intended to fund the personal spending of the owner, and the prolific use of Company funds for personal expenditures could reasonably support piercing the corporate veil and holding Ms. McCarty personally liable for using the Company's bank account as her personal "piggy bank." The Court's instruction has been to exercise the power of piercing the corporate veil cautiously. *Lunneborg v. My Fun Life*, 163 Idaho 856, 867, 421 P.3d 187, 198 (2018) (*citing Alpine Packing Co. v. H.H. Keim Co., Ltd.*, 121 Idaho 762, 763, 828 P.2d 325, 326 (Ct. App. 1991)). "Nevertheless, when warranted, 'courts will pierce the corporate veil and look behind the form of [an] organization to determine [its] true character ... and will disregard corporate form and consider substance rather than form.'" *Id.* (*citing O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 325, 303 P.2d 672, 678 (1956); *see also Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 917, 591 P.2d 1078, 1084 (1979) (the fact finder may disregard the corporate form, thereby making individuals liable for corporate debts or making corporate assets reachable to satisfy obligations of the individual)).

To pierce the corporate veil, "it must be demonstrated that '(1) a unity of interest and ownership to a degree that the separate personalities of the [company] and individual no longer exist and (2) if the acts are treated as acts of the [company] an inequitable result would follow.'" *Vanderford Co. v. Knudson,* 144 Idaho 547, 556–57, 165 P.3d 261, 270–71 (2007). Under the theory of piercing the corporate veil, factors to consider include the level of control that the shareholder exercises over the corporation, the lack of corporate formalities, the failure to operate corporations separately, keeping separate books, and the decision-making process of the entity. *Id.* (*citing Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc.,* 95 Idaho 599, 602, 514 P.2d 594, 597 (1973)).

Ms. McCarty is Island Park—she is the sole owner and manager. The corporate bylaws give her an absolute level of authority to make corporate decisions, completely unchecked by any corporate formalities.[2] She has not operated the Company separately, and even uses the Company's

[2] The Company's Memorandum of Director Meeting Minutes for 2020 and 2021 give Ms. McCarty "sole authority to enter into any agreement for services or contracts as it relates to Island Park Water Company now and in perpetuity. Dorothy McCarty is not restricted in any manner to convey management services with any other entity including

bank accounts for, among other things, frequent trips to the grocery store, subsidizing her family's insurance policies, and online shopping. The type and frequency of these expenditures goes beyond what Staff considers ordinary company expenses and are not what Staff would expect of a Company concerned with preserving its separateness or for funding improvements to its water system.

The Personal Circumstances of Ms. McCarty Do Not Excuse her Legal Obligations

The Company argued that the Commission unfairly attributed her delay in providing responses and failed to consider the difficulties faced by a 78-year-old woman in poor health. Company's Request for Reconsideration at 6-8. The health and personal circumstances of Ms. McCarty do not suspend the requirement to operate the water systems of IPWC in accordance with the Commission's Rules and Regulations.

For months prior to Staff's request for an order to show cause, Staff implored the Company to implement a management plan for the Company to ensure its continued, safe and reliable operation if her difficult medical and personal circumstances persisted or rendered her unable to run the Company. *See* Staff's Exhibit 7. The Company chose not to do so. The Company did not create or submit an alternative management plan to address these issues. Ms. McCarty's personal circumstances do not demonstrate that the Commission's Order No. 35817 was unreasonable, unlawful, erroneous or not in conformity with the law.

Ms. McCarty is not entitled to a favorable credibility determination, and she makes it difficult for Staff to reasonably infer that she is cooperative and forthright when significant delays in responding to audit requests occur, and the valuable lots owned by the Company as recently as June 2023 are not mentioned in the request for reconsideration which described the only value of the Company as "water licenses and water permit." *Id.* at 9. The Commission is capable of weighing evidence and deciding whether Ms. McCarty and the Company are to be believed. It is one thing if the Company wishes to concede that Ms. McCarty cannot reasonably handle the complexities of managing a water Company and complying with required rules and regulations. However, Ms. McCarty's limitations are not a legal "hall pass" to fail to properly respond to audit requests, improperly handle customer complaints, improperly bill customers, failure to provide safe and reliable water service and then retaliate against customers.

McCaryt [sic] Management Services, LLC and waives any conflict of interest in doing any business with any of the said directors of Island Park Water Company, as previously conveyed solely to Dorothy McCarty." Staff's Exhibit 11.

Staff asks the Commission to consider the enormous difficulties Island Park's customers have faced in 2022 and in prior years because they have not had consistent and reliable access to safe drinking water. Staff argues that Ms. McCarty's seemingly endless string of reasons for her poor management cannot be allowed to continue without any penalties. The litany of excuses provided are not a legal justification for reconsideration of the Commission's Order No. 35817, the Company has not demonstrated how the Order was unreasonable, unlawful, erroneous, or not in conformity with the law.

The Company insists it is taking steps by hiring employees and receiving an engineering report. These representations are not enough to resolve the matter and the engineering report has no bearing on the Commission's underlying Order No. 35817, except perhaps to substantiate the system failures that have resulted in customers losing access to safe and reliable water which are a significant reason for the penalties levied. The Company has not shown that any employees were hired and the Company no longer has a licensed operator for its water system (Roger Buchanan—the former licensed operator for the systems—has removed himself from that position and IPWC has not replaced him. The Company needs to take objectively measurable steps to improve the situation).

The Company's Water Permit, Taxing Districts, and the Herring Well Arguments Do Not Support Granting Reconsideration

The Company argues that the Commission ignored the affidavits, restrictive covenants, and water permit usages, specifically because its water permit restricts usage to domestic usage. *Id*. at 10. The Commission considered and weighed these arguments, and the Company has not demonstrated that the Commission's Order was unreasonable, unlawful, erroneous, or not in conformity with the law.

Staff reminds the Company that it never installed meters to measure actual usage and does not, therefore, have information to support its claims, and disagrees with the Company's interpretation of *Idaho Code* § 42-111 definition of what constitutes a domestic use. The Company cannot justify charging a business an amount five-times the amount of its Commission-approved tariff, by claiming that the "domestic use" definition made them do so or that the Company's interpretation of "domestic usage" means that the Company does not have to provide safe and reliable water service. There is no evidence that an actual controversy relevant to the Company's water rights exists. The Company's arguments on restrictive covenants or zoning would not allow

the Company to charge customers more than the tariff or discriminate against customers based on subjective or ambiguous "rules" or retaliate against customers in how they wish to use their property relevant to the Commission's findings on customer complaints, improper billing, failure to provide safe and reliable water service, or retaliation. The Company's tariff does not allow it to alter the billed amount based on taxing districts. Staff disagrees that "taxing districts" are synonymous with "lots" under the Company's tariff. Again, the Company might request an adjustment if it files a rate case to adjust its tariff. As for the "problematic issues" around the Herring well, the Company has not provided any evidence of a quiet title action. Staff understands the Company does not wish to be responsible, but this is not a matter that Staff must resolve in the present case.

The Path Forward for Island Park

The Commission has reduced or suspended penalties to protect the public interest, as in Atlanta Power Company, Case Nos. ATL-E-22-02 and ATL-E-22-01 ("Atlanta Power"). In Atlanta Power, the Commission outlined a path for reducing penalties if Atlanta Power complied with Commission's directives. Similarly, the Commission could tailor a path forward unique to Island Park's circumstances, and Staff recommends the Commission consider this approach as a tool for expediting safe and reliable water delivery to IPWC's customers. Staff prefers the Company's assets be put toward the repair of the system rather than paying penalties.

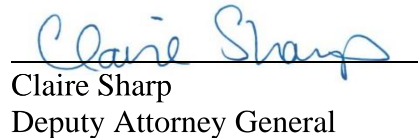
For Staff to support a proposal to reduce or hold penalties in abeyance Ms. McCarty and the Company would first have to determine whether it is realistic that the Company could even correct the problems in its public water system or if it is best to cooperate with transferring the Company to a buyer who is willing to take ownership of the situation. Based on the Company's representations, the water system needs substantial, expensive repairs. Staff would like the Company to provide proof it has a fully fleshed out plan to for the systems' repair to provide year around safe and reliable water service, can secure the financing necessary for the plan, and commit to hiring a licensed contractor to accomplish the task. Staff recommends, if the Commission would accept this path, the Company should also address how it intends to provide its customers with water during service interruptions and become compliant with safe drinking water regulations as required by other regulatory agencies. Staff contends that this all must be done on an expedited basis to comply with the timelines of *Idaho Code* § 61-626. Staff cannot justify customers remaining without safe and reliable water for longer than absolutely necessary.

The Company's customers have reached out to Staff with valid concerns about issues raised in this case, particularly about access to safe and reliable water. For the customers, Staff recommends the Commission hold a workshop to provide information and understand customers' feedback about Staff's proposed path forward. This could also provide input on how customers use their properties throughout the year—seasonally or year-round.

Staff recognizes the Company is within its rights to contest the Commission's Order No. 35817 and is not obligated to agree to any action plan Staff proposes. In that event, Staff intends to begin enforcement proceedings and will defend the Commission's Order. Staff believes the Commission's Order is supported by substantial and competent evidence and should be upheld. The Company should not be allowed to disregard the serious, widespread issues in its public water systems that endanger public health, and the Company has not shown the Commission's Order was unreasonable, unlawful, erroneous or not in conformity with the law.

Staff recommends the Commission reject the Company's petition for reconsideration because it failed to show Order No. 35817 was unreasonable, unlawful, erroneous, or not in conformity with the law. If the Commission alternatively elects to grant the Company's petition, Staff recommends the scope of such grant be confined to the Company filing a plan to provide safe and reliable water service to customers on an expedited basis as described more fully, above.

Respectfully submitted this 13th day of July, 2023.



Claire Sharp
Deputy Attorney General

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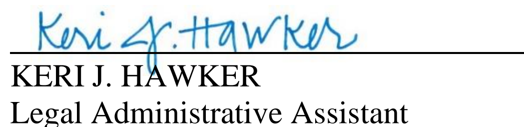
CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THIS 13th DAY OF JULY, 2023, I SERVED THE FOREGOING **STAFF'S REPLY TO THE COMPANY'S REQUEST FOR RECONSIDERATION,** IN CASE NO. ISL-W-23-01, IN THE MANNER INDICATED, TO THE FOLLOWING:

Attorneys for Island Park Water Company

Via E-Mail:

Marvin M. Smith
Hawley Troxell Ennis & Hawley LLP
2010 Jennie Lee Drive
Idaho Falls, ID 83404
mmsmith@hawleytroxell.com
CVandermeulen@hawleytroxell.com



KERI J. HAWKER
Legal Administrative Assistant