Office of the Secretary
Service Date
September 24, 2021

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF SUEZ WATER IDAHO INC.'S APPLICATION FOR AMENDMENT OF ITS CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY	))))	**CASE NO. SUZ-W-21-02** **ORDER NO. 35178**

On April 2, 2021, SUEZ Water Idaho Inc. ("Company") applied to amend its certificated service area ("CPCN" or "certificated service area") by removing an approximate 520-acre area in unincorporated Ada County.

On April 22, 2021, the Commission issued a Notice of Application and established a deadline for interested persons to intervene. Order No. 35013. No one intervened.

On June 2, 2021, the Commission issued a Notice of Modified Procedure establishing deadlines for public comment and the Company's reply. Order No. 35057. Staff filed the only comments. The Company did not reply.

On August 9, 2021, the Commission issued a final order approving the Company's Application as filed. Order No. 35130.

On August 27, 2021, Atova, Inc. ("Atova") filed a petition for reconsideration ("Petition").[1]

On September 3, 2021, the Company responded to Atova's Petition.

On September 20, 2021, Atova replied to the Company's response.

Now, having reviewed the record, the Commission denies Atova's Petition for reconsideration of Order No. 35130. We find that the submissions of Atova and the Company are sufficient to evaluate and address the concerns raised by Atova on Reconsideration.

BACKGROUND

The area the Company sought to remove from its certificated service area was approved for inclusion within its CPCN in Case No. UWI-W-06-04 by the Commission's Amended Order No. 30367 (on reconsideration). The area was approved for inclusion in the Company's CPCN expressly to allow the Company to provide service to an approximately 520-acre tract described as the "Trailhead Community."

[1] Atova's Petition was titled "Atova, Inc.'s Petition for Reconsideration and Clarification." In the body of its Petition and in its reply to SUEZ Atova referred to its request only as "reconsideration."

The City of Eagle ("City") intervened in Case No. UWI-W-06-04 arguing that it wished to provide municipal service to the Trailhead Community, that it was prepared to do so, and that it was in ongoing negotiations with the Trailhead Community's developer to provide that service.

At the conclusion of the hearing in Case No. UWI-W-06-04 the Commission concluded, among other things, that the Company was the only utility that had demonstrated a present ability to provide service to the Trailhead Community. The Commission noted that the area was both outside the City's corporate limit and area of impact boundaries.

The Trailhead Community was never developed.[2]

On November 18, 2018, the Company and Eagle Water Company ("EWC") jointly applied to the Commission requesting approval of the Company's proposed acquisition of EWC (Case Nos. SUZ-W-18-02/EAG-W-18-01).

During the proceedings in Case Nos. SUZ-W-18-02/EAG-W-18-01, the City, as an intervenor, disclosed that it had recently become aware of, and was evaluating, documents that purported to require EWC to provide the City a right of first refusal to purchase EWC's water system.

On February 26, 2019, the City commenced an action in the District Court, Fourth Judicial District, CV01-19-03534, ("District Court Case") asserting that it had a contractual, paramount right of first refusal to purchase EWC's water system.

The City, EWC, and the Company entered into a settlement and a stipulation for dismissal of the District Court Case. The Court's Order of Dismissal was filed March 8, 2021.

As part of the settlement of the District Court Case, SUEZ and the City have entered into the Water Management Agreement ("WMA"), described below.

THE APPLICATION

The Company and the City recently entered into a WMA, effective February 9, 2021. The Company agreed in the WMA to file this Application with the Commission, seeking to remove the 520-acre area from the Company's certificated service area. The City, the Company asserts, has represented that it can and will serve customers in the 520-acre area if it is removed from the Company's certificated service area. However, the City cannot serve the 520-acre area until it is

[2] The Company asserts the "entire area is undeveloped and unserved, and [the Company] has not received any formal request for extension of service from, or committed to serve, any property owner in the area." *Application* at 6. The Company also states that it is "not aware of any development applications pending before Ada County or the . . . [City] affecting this area." *Id.* at 3.

removed from the Company's certificated service area because the City agreed in a 2003 franchise agreement not to provide water service in the Company's certificated service area.

The Company states, "[r]emoval of the subject area from [the Company's] certificated service area would not necessarily preclude [the Company] from extending service there in the future if a property owner required water service and [the Company] and [the City] agreed that [the Company] was best able to serve consistent with their WMA." *Application* at 6-7. The Company asserted in its SUZ-W-21-02 Application that granting the Application would not impair the Company's ability to serve existing customers or to extend service to its remaining certificated service area. No Company investments would be stranded, and the usefulness of existing infrastructure would not be impacted.

STANDARD OF REVIEW

A person may petition the Commission to reconsider its orders. *See Idaho Code* § 61-626; Rules 331-333 (IDAPA 31.01.01.331-.333). Reconsideration allows the petitioner to bring to the Commission's attention any question previously determined and thereby affords the Commission an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979); Rule 325. The petitioner has 21 days from the date of the final order to petition for reconsideration. *Idaho Code* § 61-626(1). The petition must specify why it "contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or not in conformity with the law." Rule 331.01. Further, the petition "must state whether the petitioner . . . requests reconsideration by evidentiary hearing, written briefs, comments, or interrogatories." Rule 331.03. Any answers or cross-petitions must be filed within seven days after the petition was filed. Rule 331.02 and .05.

Once a petition is filed, the Commission must issue an order saying whether it will reconsider the parts of the order at issue and, if reconsideration is granted, how the matter will be reconsidered. *Idaho Code* § 61-626(2). If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the date for filing petitions for reconsideration. *Idaho Code* § 61-626(2). The Commission must issue its final order on reconsideration within 28 days after the matter is finally submitted for reconsideration. *Id.*

ATOVA'S PETITION

Atova is a potential developer of a 540-acre county subdivision in the area where the Commission approved the Company's Application for authority to remove the 520-acre area from

its certificated service area in Order No. 35130. Atova's Petition questioned the potential to leave future customers, possibly including Atova, with no options for service because neither the Company nor the City of Eagle ("City") would be obligated to extend service to the 520-acre area once it was removed from the Company's certificated service. Atova stated it is in the early stages of development in the area and would require water service to buildable lots, if development happens. However, without a legal obligation to serve, Atova has been advised that the Company or the City could both deny a service request and exclude the area from their expansion plans. Atova's concern was based on the premise that the Company could deny a request for service and to receive service from the City would require annexation and, without submitting to the City's requirement for annexation, future developments would be unable to receive service from the City.

Atova requested that the Commission reconsider the amendment to the Company's CPCN and obligate the Company to provide service to Atova and future developers in the area.

THE COMPANY'S RESPONSE

The Company responded to Atova's Petition and requests the Commission deny Atova's Petition. The Company argued (1) the Petition does not meet the standard established by Rule 331.01, IDAPA 31.01.01.331.01; and (2) Atova is not without options for water service.

The Company contended that Atova's Petition does not identify any aspects of the Commission's decision that are unreasonable, unlawful, erroneous, or not in conformity with the law. Instead, the Company argued the Petition only identifies the legal consequence of Order No. 35130, wherein the Company is no longer legally obligated to provide water service to the area. The Company noted the Commission acknowledged the impact Order No. 35130 would have when it mentioned that there is a mechanism in place that will allow the Company and the City to plan for future area water service investments and that the City had indicated it can and will serve the area if removed from the Company's CPCN.

Based on this argument, the Company concluded Atova's Petition did not meet the threshold requirements established by Rule 331.01, and likewise Atova did not identify any issues the Commission failed to address in Order No. 35130.

The Company also argued Atova is not in a dissimilar position from other developers in unincorporated Ada County who propose developments outside the Company's certificated service area. The Company offered that these developers can (1) request service from the Company; (2) request service from the nearest municipality; or (3) develop a water supply

independently. The Company suggested that removing the 520-acre parcel from its certificated service area puts a developer such as Atova in a better position due to competition for customers between the Company and municipalities.

The Company noted competition to serve the area removed from its CPCN by Order No. 35130 was a component in resolving the recent District Court Case between the City and the Company. The Company also noted it and the City have both declared their ability and willingness to serve the area Atova is exploring for potential development. If the situation arises where Atova or another developer requests service the WMA will govern in determining which entity is able to most efficiently serve the area. The Company expressed confidence that the area Atova is concerned with will be served when service becomes necessary.

ATOVA's REPLY

Atova replied to the Company's response stating its belief that the Commission's decision in Order No. 35130 was based on incomplete information. The additional information Atova suggested was missing from the record was the City's requirement that service will only be extended to areas that have been annexed into the City. Atova noted that the "extra burdens" placed on developers by the City could leave Atova "stranded" if the Company declines to serve the area.

COMMISSION'S DECISION AND FINDINGS

The Commission has reviewed the record in this case including the Petition, the Company's response, and Atova's reply. With this Order we deny Atova's Petition for reconsideration of Order No. 35130 and confirm the Commission's original findings and conclusions.

Idaho Code §61-626 and Rules 331 through 333, IDAPA 31.01.01.331-.333, govern petitions for reconsideration and clarification. Rule 331.01 states "[p]etitions 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*…" (emphasis added). We find Atova's Petition does not meet this standard. The Petition fails to state why Order No. 35130 was "unreasonable, unlawful, erroneous or not in conformity with the law."

We understand Atova's concern that there is no legal requirement for the Company to serve in the absence of the area remaining in the Company's certificated service area. We are not convinced service could be unavailable to Atova if the area is removed from the Company's

CPCN. The City and the Company have both sought to serve the area in recent years, including when the Trailhead Community was first added to the Company's certificated service area in Case No. UWI-W-06-04. We understand from the record in this case, past cases, and the settlement negotiated in the District Court Case that the City and the Company both have a real and significant interest in serving the area. The fact that the recently negotiated settlement in District Court specifically addressed the removal of the Trailhead Community acreage from the Company's CPCN is further evidence that the City has both a desire and the ability to serve the area Atova proposes to develop.

Moreover, the WMA provides a mechanism for the City, the Company, and developers to decide which entity will serve potential developments. A developer can work with both the City and the Company and to determine which entity is best positioned to provide service. Finally, Atova's arguments are based entirely on speculation of what *might* happen *if* a development is built. The Company held this 520-acre parcel within its service territory for years based on the possible development of the Trailhead Community. Nothing was ever developed. Our findings and decision here are based on evidence and facts in the record. This Commission was in possession of all the pertinent facts when we made our initial decision. Atova has failed to show that our decision was unreasonable, erroneous, or not in conformity with the law.

ORDER

IT IS HEREBY ORDERED that the Commission denies Atova's Petition for reconsideration of Order No. 35130 for the reasons described above.

THIS IS A FINAL ORDER DENYING RECONSIDERATION. Any party aggrieved by this Order may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. *See Idaho Code* § 61-627.

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DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 24th day of September 2021.

PAUL KJELLANDER, PRESIDENT

KRISTINE RAPER, COMMISSIONER

ERIC ANDERSON, COMMISSIONER

ATTEST:

Jan Noriyuki
Commission Secretary

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