

Document 1:
Public Service Commission Ruling on
Maintaining Jurisdiction after Sandy City's
Purchase of White City Water Company

-- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH --

In the Matter of the Application)	
of WHITE CITY WATER COMPANY for)	<u>DOCKET NO. 91-018-02</u>
Commission Approval of a Contract)	
Entered into on the 8th Day of)	
October, 1991, Under Which Contract)	<u>ORDER SEVERING PROCEEDING</u>
Sandy City and the Municipal Build-)	<u>AND</u>
ing Authority of Sandy City, Utah,)	<u>REPORT AND ORDER</u>
Will Purchase All of the Out-)	
standing Stock of WHITE CITY WATER)	
COMPANY.)	

ISSUED: February 20, 1992

SYNOPSIS

Applicant, a certificated water corporation, seeks approval of the sale of all its stock to a local governmental entity and the assumption of service to its present customers by a municipal corporation. Applicant further asks the Commission to declare it has no jurisdiction over the municipality's subsequent water service operations insofar as they relate to Applicant's customers residing outside the municipal boundaries. We deem the jurisdictional question of such importance that it should be resolved before inquiring whether the transfer is in the public interest. Accordingly, we sever the prayer for declaratory relief from the balance of the proceeding and declare the Commission has jurisdiction over a municipality to the extent it provides retail water service outside its boundaries as a general business.

Appearances:

Calvin L. Rampton James Burch	For	White City Water Company, Applicant
Val R. Antczak, Lee Kaposloski and T. Patrick Casey	"	Sandy City Corporation, Intervenor
Jeffrey W. Appel Michele Mattsson	"	White City Water Users, et al, Intervenor
Gerald E. Nielson, Deputy County Attorney, Salt Lake	"	Salt Lake County, Intervenor
Michael Ginsberg Laurie Noda Assistant Attorneys General	"	Division of Public Util- ities, Utah Department of Commerce, Intervenor

By the Commission:

PROCEDURAL HISTORY

The application in this matter was filed November 4, 1991. The Commission conducted a prehearing conference December 9, 1991, and asked the parties to brief the issues of the Commission's jurisdiction to approve the contract which is the subject of these proceedings and, should the contract be approved, the Commission's jurisdiction over Sandy City in connection with water customers residing outside the city. Oral arguments were heard by the Commission on February 18, 1992. Having been fully advised in the premises, the Commission enters the following Report and Order.

FINDINGS OF FACT

1. Applicant is a water corporation certificated by this Commission. In its Application, Applicant seeks approval of a transfer of all its outstanding stock to an instrumentality of Sandy City Corporation, (hereafter "Sandy") a Utah municipal corporation. Applicant further seeks declaratory relief in the form of a Commission declaration that "the integrated system constitutes a municipal water system under the laws of the State of Utah."
2. Under the proposed contract terms, the stock would be transferred to the Municipal Building Authority of Sandy City (hereafter "the Authority"). Applicant would retain its corporate existence for the lifetime of the bonds issued by the Authority to finance the purchase.
3. Applicant would cease operating the system and, for a nominal rental, would lease the system to the Authority, which in turn

would sublease to Sandy. Sandy would actually operate the system and, to the extent feasible, would integrate Applicant's present system with Sandy's municipal system. Payment to the bondholders would be made by the Authority out of rentals realized from the sublease to Sandy, which in turn proposes to pay the rental fees out of water charges to customers.

4. In its brief, Sandy states explicitly that customers residing outside the city limits will be charged more than those residing within. The stated rationale is that the customers outside the city limits should bear a greater proportion of the costs of the acquisition.
5. In the contract, the stock transfer is specifically conditioned upon this Commission's final Order declaring that the Commission does not have and will not assert any jurisdiction over Sandy, whether in regard to customers residing inside or outside the city limits.

CONCLUSIONS OF LAW

As we view it, Applicant seeks two separate and distinct forms of relief--approval, per se, of the contract, and declaratory relief in regard to the Commission's jurisdiction. We deem the declaratory branch of the proceeding so important that it should be severed from the approval branch.

The subject transaction differs from other transfers hitherto considered by the Commission in that the transfer is to an entity arguably outside Commission jurisdiction. It would leave a number of customers, who have had recourse to the Commission for grievances, effectively without recourse to any entity, public or private. Given

that stark fact, we refuse to take the "all or nothing" choice presented by Applicant. Instead, we propose to resolve the jurisdictional issue in this proceeding, with the docket number in the caption above, as a matter separate from the contract approval. In light of our action in this proceeding, Applicant may choose to proceed or not in the approval action.

We turn now to the merits of the jurisdictional issue.

We concede at the outset that we have no authority to regulate a municipality within its boundaries. However, we conclude that case law, statutory law, and public policy support our authority to regulate Sandy's water service outside its boundaries. In reaching this conclusion, we believe the salient considerations include disenfranchisement of the extra-territorial customers, Sandy's limited statutory powers, the structure of the transaction, our doubts that service outside the city boundaries would constitute exercise of a municipal function, and our skepticism that Sandy would indeed be selling surplus water as contemplated by the Utah statutes.

Disenfranchisement of the Customers

At present, all of Applicant's customers, inside and outside the city limits, have recourse to the Commission to ensure just and reasonable rates. Absent our involvement in Sandy's ratemaking outside its boundaries, the customers would have no means to prevent Sandy from charging excessive rates. In its initial brief, Sandy states that the customers are not "entirely" disenfranchised, since they can attend Sandy City public meetings. (Sandy, Initial Brief, at 9).

We deem the assertion less than ingenuous. One cannot be partially disenfranchised; either one can vote or not. Clearly the customers located outside Sandy's boundaries do not have a right to vote in Sandy City. The opportunity to attend meetings is a poor substitute for the right to reward or punish via the ballot.

The fact that Sandy proposes to charge a differential rate immediately upon approval of the transaction is a strong indication of how the "outside" customers would fare under the proposal. Indeed, we can predict with considerable confidence, that in case of conflict between the interests of franchised and disenfranchised customers, the interests of the former will receive priority--no matter how vociferous the protests raised in meetings.

Limitation of Sandy's Statutory Powers

Unquestionably, as Sandy asserts, the Commission is a creature of statute with all the limitations on power and jurisdiction that implies. However, Sandy itself stands in much the same position; its powers are circumscribed also. See State v. Hutchinson, 624 P.2d 1116, 1121 (Utah 1980).¹

We proceed first on the premise that if Sandy takes over the utility service of White City Water Company, the city must also take on the utility's obligations. According to our Supreme Court in North Salt Lake v. St. Joseph Water & Irrigation Co, 223 P.2d 577

¹The Hutchinson Court actually broadened a municipality's authority by holding that the powers delegated by the Legislature should be liberally construed. The Court's rationale was that local democratic institutions should be strengthened, thus empowering citizens in regard to the local affairs most immediately affecting them. Were we to adopt the Applicant's position, we would, of course, actually disempower the extra-territorial customers, running counter to the Hutchinson rationale.

(Utah 1950), when North Salt Lake condemned a water company, it took upon itself the obligations imposed upon the water company, including the effect of an Order issued by this Commission before the condemnation.²

Other jurisdictions have extended the principle explicitly to include rate regulation. For example, in City of Orangeburg v. Moss, 204 S.E.2d 377 (S.C. 1974), the court held that the South Carolina PSC had jurisdiction to regulate a municipality operating electrical facilities outside its boundaries. The court held that the constitutional grant of Power to municipalities by the State to operate electrical facilities was not a limitation on the power of the State to regulate those activities through the PSC or otherwise.

It is the position of the plaintiff in the current action that this constitutional grant of power to the municipalities of the State to operate electrical facilities is a limitation on the power of the State of South Carolina to regulate those activities through the Public Service Commission or otherwise. The writer does not agree. He feels that the section in question was no more than a constitutional provision to permit certain municipal activities previously held ultra vires and that

²At the time of that hearing the water company was a utility subject to the rules and regulations of the Public Service Commission and its findings and orders were binding on the company, its successors, those claiming through or under it, and those later dealing with it.

* * *

If limitations were imposed on the water company in the hearing before the Public Service Commission, then condemnation of the property by the town would not unblock the controls. The . . . town takes the franchise and property subject to all burdens of furnishing water that were imposed at the time of transfer.

Id. at 223 P.2d 577. If a previous Commission Order is binding on a town clearly exercising a municipal function, a fortiori the town is subject to Commission regulation when exercising a non-municipal function.

it is not to be construed as limiting the powers of the State to regulate such activities. (emphasis added.)

Id. at 378. It is true that South Carolina had in place legislation specifically empowering their PSC to regulate extra-territorial service. The issue, nevertheless, was the constitutionality of that legislation, and we believe there is scant difference in principle between that case and this.

It is not unreasonable to suppose that one of the obligations Sandy may be required to assume is that of state regulation of rates charged to customers residing outside the city limits.

As derogating from the foregoing analysis, we have been cited Article XI, Section 5, of the Utah Constitution which provides a municipality the authority to furnish public utility services "local in extent and use"; Utah Code Ann. § 17A-3-914(3); the Municipal Building Authority Act; the 1988 amended definition of "person" under Utah Code Ann. § 4-2-2; and Utah Code Ann. § 10-7-4 which gives a municipality authority to condemn a water system. We do not perceive any of these provisions as denying us authority to regulate rates charged by Sandy for water service outside its boundaries.

Article XI, Section 5, gives Sandy the power to furnish public utility services, but not necessarily the power to set extra-territorial rates, particularly in light of the "local in extent and use" provision, which has no obvious meaning other than as a reference to the City's boundaries.

Any prohibition by the Municipal Building Authority Act is irrelevant in this proceeding. As noted in the Findings of Fact above, the sole role of the Authority is to be a conduit. Obviously, Sandy could issue and service its own bonds. We strongly

suspect the Authority is involved in the transaction only in a "belt and suspenders" attempt to insulate the real principals, Applicant and Sandy, from our jurisdiction. We believe we are entitled to assess the substance, not the mere form, of the transaction. So assessing the transaction, it is obvious the Authority has no real role or participation in the arrangement, and its presence should be disregarded.

It is true that in 1988 the Legislature deleted "governmental entity" from the definition of "person." Utah Code Ann. § 54-2-2 (1988). Our perusal of the Legislative history of this change, however, does not indicate that the Legislature intended to foreclose our regulation of a city's extra-territorial retail water customers. (See transcript of the Legislative history on this amendment, Exhibit "A" to Reply Brief, White City Water Users).

Finally, Utah Code Ann. § 10-7-4 does give a municipality power to condemn a water system, but it does not necessarily give a municipality power to set utility rates for extra-territorial retail customers. In a condemnation proceeding, a city is limited by strict laws to protect the new owners of those systems and the citizens served thereby. Indeed, as noted earlier, the St. Joseph Water case, supra, suggests that water systems acquired by condemnation carry with them all their regulatory baggage.

Sandy does not have specific delegated authority to serve water outside its boundaries without state regulation. Where there are gaps in the coverage of applicable statutes, as in the instant case, we believe that legislative intent should be interpreted so as to

protect constitutional rights of citizens, which in this case are the extra-territorial retail customers.

The Nature of the Arrangement

As noted above, Sandy has made great efforts to avoid our jurisdiction in the way it has set up the proposed transfer. The elaborate nature of the arrangement between White City, the Authority, and Sandy, renders the arrangement suspect.

Sandy's initial brief claims that neither White City, the Authority, nor Sandy are subject to our regulation. (Sandy, Initial Brief, at 6-14). As noted above, the role of the Authority is explicable only as an attempt to avoid our jurisdiction. Given the expressed intent to charge extra-territorial customers differential rates, Sandy's good faith, in structuring the transaction as it has, must be questioned.

Sandy is Not Performing a Municipal Function

Should Sandy provide water service to White City's extra-territorial customers, it would, to that extent, not be exercising a municipal function. Sandy would be acting as a traditional utility (exercising a business function) and therefore would be subject to regulation.

Sandy claims that Utah Constitution Art. VI, Section 28, prohibits us from interfering with Sandy's municipal functions. (Sandy, Initial Brief, at 7). Obviously, we agree that we cannot interfere with Sandy's municipal functions, but we maintain that Sandy's proposed service to the extra-territorial customers is not a municipal function.

Recent Utah cases support our position. In Utah Associated Municipal Power Systems v. Public Service Commission, 789 P.2d 298 (Utah 1990), in which Art. VI, Section 28, was at issue, the Court discussed the alleged "municipal function" performed by Utah Associated Municipal Power Systems ("UAMPS") in attempting to construct a utility line and to provide utility service. UAMPS resisted the jurisdiction of the Commission on constitutional grounds, arguing that they were political subdivisions exercising municipal functions, even though part of their service area was located outside, or would have a substantial impact outside, the boundaries of the political subdivisions.

The UAMPS Court applied a balancing test first enunciated in City of West Jordan v. Utah State Retirement Board, 767 P.2d, 530 (Utah 1988). Under that test, no particular activity conducted by a municipality is ipso facto a municipal function for purposes of Art. VI, Section 28. Instead, a functional analysis is to be conducted, considering such factors as

the relative abilities of the state and municipal governments to perform the function, the degree to which the performance of the function affects the interests of those beyond the boundaries of the municipality, and the extent to which the legislation under attack will intrude upon the ability of the people within the municipality to control through their elected officials the substantive policies that affect them uniquely.³

³Id. at 534. The Court went on to say the balancing test would best serve the Constitutional purpose without "erecting mechanical conceptual categories that, without serving any substantial interest, may hobble the effective government which the state constitution as a whole was designed to permit." Ibid. In the instant case, of course, the only "substantial interest" our assuming jurisdiction would affect would be that of Sandy in "milking" the extra-territorial customers to the maximum extent possible.

Applying that test, the UAMPS Court had little difficulty in finding that the construction of the utility transmission line for the purpose of generating, buying and selling electricity across the state was outside the ambit of Art. VI, Section 28. Utah Associated Municipal Power Systems v. Public Service Commission, supra, 789 P. 2d at 302.

The present proposal is closely analogous to the UAMPS case. In particular, those residing outside Sandy stand to be severely impacted, while our assuming jurisdiction in regard to them would have minimal impact on Sandy's legitimate interests. By purposefully acquiring an existing public utility, and thereby taking over the obligation to serve 58% of the customers of an existing certificated public utility, Sandy is stepping outside the exercise of its municipal function and subjecting itself to state regulation of rates for those extra-territorial customers surplus.

Sandy attempts to bolster its position by referring to Utah Code Ann. § 10-8-14(1) concerning sale of surplus water by a municipality. A careful reading of this statute, however, weighs against Sandy's proposal and in favor of the extra-territorial customers.

According to the statute, a city "may sell and deliver the surplus product or service capacity of any such works, not required by the city or its inhabitants, to others beyond the limits of the city. . . ." In attempting to show that it would be serving "surplus" water in accordance with this statute, Sandy states that it "has more than ample capacity to serve the non-Sandy White City customers and will therefore in fact be selling 'surplus' water to

them upon acquisition of the White City system." (Sandy, Initial Brief, at 8). This interpretation is contrary to Utah case law on the subject and contrary to a common sense definition of "surplus."

In support of Sandy's interpretation of surplus, it cites County Water System v. Salt Lake City, 278 P 2d 285 (Utah 1954) and Salt Lake County v. Salt Lake City, 570 P 2d 119 (Utah 1977)

In County Water System, supra, the Utah Supreme Court stated that the authority of municipalities to sell utility services beyond its corporate boundaries was limited to the disposal of surplus water. Id. at 289.

In fact, after first delineating a municipality's powers of surplus water disposal in sweeping terms, Justice Crockett, writing for the Court, appears to have had immediate second thoughts. In his next paragraph, he hedged the municipality's authority:

But such permissive sale of surplus water . . . is clearly not calculated to permit the city to purchase water solely for resale, nor to construct, own or manage facilities and equipment for the distribution of water outside of its city limits as a general business.

Id. at 290.

The Court also made clear its concept of surplus water--a temporary glut occasioned by provision for prudent future expansion. This would, according to the court, foreclose a municipality's commitment to purchasers of surplus water for any long-term supply. Ibid. Under this concept, if Sandy is indeed to sell surplus water, the extra-territorial customers stand to be left literally high and dry in the near to medium term.

In this case, however, Sandy will not be disposing of surplus water it now possesses--it will be surplus only by virtue of Sandy's

calculated acquisition of a class of captive, disenfranchised customers--precisely the situation Justice Crockett inveighed against.

Sandy cites Salt Lake County, supra, for the proposition that "[A municipality's] business in furnishing water to its residents and activities reasonably incidental thereto is not subject to regulation by the Public Service Commission." Id. at 570 P.2d 121-122. Sandy, however, fails to quote the complete paragraph. The next, and more relevant sentence is: "But just however great an extent a city may engage in rendering a utility service outside its city limits without being subject to some public regulation is not so clearly determined." (emphasis added.) The second sentence is not mere dictum. The case involved the propriety of a summary judgment rendered by the district court, and the Supreme Court remanded for determination of precisely the issue of a municipality's amenability to regulation of extra-territorial service. We do not know the subsequent course of the litigation.

The Salt Lake County case evidences to us the Court's concern with precisely the potential for abuse presented by the instant proposal. We think it would be difficult to find a clearer instance of a city's stepping over the boundary of legitimate surplus water sales under the statute.

Our conclusion is strengthened by C.P. National Corporation v. Public Service Commission, 638 P.2d 519 (Utah 1981), According to the Court,

" . . . We believe that [Utah Code Ann. § 10-8-14] imposes a limitation on a city operating outside its borders. It negates the proposition that a city could purposely engage in the distribution of power to localities or persons

outside its limits except to dispose of surplus." [Citing County Water System, supra]. In the instant case, the municipalities intend to continue to serve a large area outside any of their limits. . . .

Section 10-8-14 does not contemplate nor authorize a city to so operate its electric light and power works. There is good justification for this limitation since municipally owned utilities are not subject to the jurisdiction and supervision of the Public Service Commission but are controlled solely by the administration of the city or town wherein they are located . . . customers who are non-residents of the municipalities would be left at the mercy of officials over whom they have no control at the ballot box and they could not turn to the Public Service Commission for relief. (emphasis added.) (citations omitted.)

Id. at 524.

We can only add that the situation is not one whit different when a municipality purposefully acquires an existing, regulated water system. While there may be no explicit statutory authority for us to assume jurisdiction, the obvious remedy for the abuse of extra-territorial customers is for us to continue to regulate their rates; otherwise, to meet the Court's concern, the instant proposal would have to be found ultra vires.⁴

If there is a common thread running through the history of economic regulation in the United States, it is the abhorrence of unchecked monopoly. We see no reason to suppose that a monopoly held by a municipality over powerless extra-territorial utility customers would be any more benevolent than a monopoly held privately. Sandy's expressed intent to impose higher rates immediately upon the extra-

⁴That is the course the Court took in the CP National case. The main issue was the constitutionality of the municipalities' acquiring an existing electrical utility by condemnation. The Court assumed without discussion that we would have no jurisdiction over rates charged the extra-territorial customers. One wonders if the same result would have been reached had the Court considered the jurisdictional issue and applied the City of West Jordan test.

territorial customers is ample demonstration of the reason we are unwilling to cede jurisdiction in these circumstances.

We conclude that in the event the proposal presented by Applicant were to be approved by the Commission, the Commission would retain jurisdiction to regulate rates charged the extra-territorial retail customers, at least to the extent of nullifying invidious discrimination. Accordingly, Applicant's prayer for a declaratory judgment to the contrary should be denied.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

- >> On the Commission's own motion, the prayer of WHITE CITY WATER COMPANY, for a declaration that, should the Commission approve a transfer of the stock of said company to the Sandy City Building Board, pursuant to the contract delineated in said Company's application, the Commission would have no jurisdiction thereafter to set rates for customers residing outside the boundaries of Sandy City, be, and the same hereby is, severed from the balance of the proceeding and given the Docket Number 91-018-02;
- >> Said prayer is denied;
- >> Any party aggrieved by this Order may, within 30 days of the issuance hereof, petition for review; failure so to do will forfeit the right to such review, as well as the right to appeal to the Utah Supreme Court.

DATED at Salt Lake City, Utah, this 20th day of February,
1992.

/s/ Brian T. Stewart, Chairman

(SEAL)

/s/ James M. Byrne, Commissioner

/s/ Stephen C. Hewlett, Commissioner
Pro Tempore

ATTEST:

/s/ Julie Orchard
Commission Secretary

Document 2:

Utah State Division of Public Utilities Report
on Purchase of White City Water Stock by
Michael L. Ginsberg and Laurie L. Noda
Assistant Attorneys General of Division of
Public Utilities.



State of Utah

DEPARTMENT OF COMMERCE
DIVISION OF PUBLIC UTILITIES

Michael O. Leavitt
Governor

Constance B. White
Executive Director

Frank Johnson
Division Director

Heber M. Wells Building
160 East 300 South/P.O. Box 45807
Salt Lake City, Utah 84145-0807
Phone: (801) 530-6651

April 16, 1993

TO THE PUBLIC SERVICE COMMISSION OF UTAH
ATTENTION: JULIE ORCHARD, SECRETARY

RE: DOCKET NO. 91-018-01

IN THE MATTER OF THE APPLICATION OF WHITE CITY WATER COMPANY FOR COMMISSION APPROVAL OF A CONTRACT ENTERED INTO ON THE 8TH DAY OF OCTOBER, 1991, UNDER WHICH CONTRACT SANDY CITY AND THE MUNICIPAL BUILDING AUTHORITY OF SANDY CITY, UTAH, WILL PURCHASE ALL OF THE OUTSTANDING STOCK OF WHITE CITY WATER COMPANY

The Division of Public Utilities hereby files its report on the sale of the stock of White City Water Company to Sandy City. This report is being presented in anticipation of the April 30, 1993 meeting between all the parties. We have available at any party's request the cost of service studies on diskette. We will also be available to meet with any of the parties to explain our analysis prior to the April 30, 1993 meeting.

Respectfully,

Laurie Noda

Michael L. Ginsberg

Michael L. Ginsberg

Laurie L. Noda

Assistant Attorneys General

Attorneys for the

Division of Public Utilities



CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 1993, a true and correct copy of the DIVISION OF PUBLIC UTILITIES' REPORT ON THE SALE OF WHITE CITY WATER COMPANY TO SANDY CITY, in Docket No. 91-018-01, was mailed, postage prepaid, to the following:

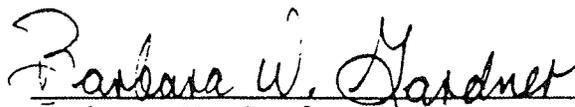
JEFFREY W. APPEL, ESQ.
MICHELE MATSSON, ESQ.
APPEL & MATSSON
ATTORNEYS FOR WHITE CITY WATER USERS ET AL.
175 SOUTH MAIN STREET
SUITE 1110
SALT LAKE CITY, UT 84111

VAL ANTCZAK, ESQ.
PARSONS, BEHLE & LATIMER
ATTORNEYS FOR SANDY CITY
ONE UTAH CENTER
201 SOUTH MAIN STREET, SUITE 1800
SALT LAKE CITY, UT 84147-0898

CRAIG ANDERSON, ESQ.
DEPUTY COUNTY ATTORNEY
CIVIL DIVISION
2001 SOUTH STATE STREET, #S-3600
SALT LAKE CITY, UT 84190-1200

CALVIN L. RAMPTON, ESQ.
JAMES W. BURCH, ESQ.
JONES, WALDO, HOLBROOK & MCDONOUGH
ATTORNEYS FOR WHITE CITY WATER COMPANY
170 SOUTH MAIN STREET, SUITE 1500
SALT LAKE CITY, UT 84101

MICHAEL L. GINSBERG, ESQ.
LAURIE L. NODA, ESQ.
ASSISTANT ATTORNEYS GENERAL
ATTORNEYS FOR THE DIVISION OF PUBLIC UTILITIES
1100 BENEFICIAL LIFE TOWER
36 SOUTH STATE STREET
SALT LAKE CITY, UT 84111
(Hand delivered)


Barbara W. Gardner

DIVISION OF PUBLIC UTILITIES

**REPORT ON THE SALE OF
WHITE CITY WATER COMPANY
TO SANDY CITY**

**PUBLIC SERVICE COMMISSION OF UTAH
DOCKET NO. 91-018-01
APRIL 16, 1993**



DIVISION OF PUBLIC UTILITIES

REPORT ON THE SALE OF WHITE CITY WATER COMPANY TO SANDY CITY

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DIVISION OF PUBLIC UTILITIES

REPORT ON THE SALE OF WHITE CITY WATER COMPANY TO SANDY CITY

INTRODUCTION

The Division of Public Utilities (Division) was asked to examine the various issues which were raised by the proposed sale of stock of the White City Water Company (White City or Company) to the Municipal Building Authority of Sandy City (Sandy). The Division has gathered and analyzed information from White City and Sandy and has prepared the following report. The Division staff members with primary responsibility for preparing this report are Ralph Creer, Manager Compliance and Water Section, Lowell Alt, Chief Engineer, Dal Hawks, Senior Engineer, Judith Johnson, Financial Analyst, and Carl Mower, Chief Auditor.

White City Water Company is an investor owned water utility operating in Salt Lake County under the jurisdiction of the Public Service Commission of Utah (Commission). Part of the certificated service area of White City is inside the boundaries of Sandy City and part of the service area is in unincorporated Salt Lake County. Sandy has proposed acquiring the stock of White City and assuming the service obligations of the Company.

Both White City and Sandy have indicated that the existing White City water system has numerous deficiencies in the physical plant which should be addressed and considered in conjunction with

the sale of the White City stock. White City and Sandy witnesses have argued that higher rates to non-Sandy residents will be justified because of the improvements to the water system which must be made in the near future. If Sandy purchases the Company under its current proposal, the current White City customers will be split into two groups. The group of customers who are within the Sandy City limits would pay the same water rates as other Sandy residents, while the group of customers residing outside city limits would pay the county or non-resident rates which are considerably higher than the resident rates.

CONCLUSIONS

The Division has reached the following conclusions:

Accounting and Financial Issues

- There is some question as to whether White City Water Company could borrow the money necessary to finance the improvements needed to its water system.
- White City Water Company changed its accounting for contributions in aid of construction without coming before the Commission for a corresponding rate decrease.
- White City Water Company paid \$51,000 in dividends to stockholders each year from 1986 to 1992 and has increased the amount to \$100,000 for 1993 in spite of its claim that immediate improvements to the system are necessary.

Service Responsibilities

- Sandy City has agreed to assume the service responsibilities of White City Water Company and to treat all customers equally as to the providing of water service.
- Sandy City has agreed to provide the facilities necessary to improve the fire protection capability of the White City system.

Engineering Analysis

- A combined Sandy City/White City water system would require fewer capital improvements and would be more efficient to operate than if the systems remain

independent.

- Based on the layout of the physical water plant in the area, Sandy City is in a better position than White City to make needed fire protection improvements to the White City Water Company system.

Cost-of-Service Analysis

- Because of needed capital improvements, White City Water Company rates could increase as much as 54 percent over the next five years, if the Company remains independent.
- Based on the Division's cost-of-service model, Sandy City could acquire White City, and the cost to serve the merged system in 1997 would be slightly less than the 1992 Sandy City cost-of-service and only 23 percent higher than current White City rates.
- A price differential between resident and non-resident rates is not supported by the Division's cost-of-service studies for Sandy City.

ACCOUNTING AND FINANCIAL ISSUES

The National Association of Regulatory Utility Commissioners (NARUC) revised the uniform system of accounts (USOA) for water utilities in 1984. The Commission adopted the NARUC USOA and classifications for Class A, B, and C water utilities operating in the state of Utah. Commission rule R746-330-4 requires water utilities to keep their accounts in accordance with the USOA appropriate to their respective classification. The classification of water utilities is based on annual operating revenues. Class A utilities are those having annual water operating revenues of \$750,000 or more. White City Water Company meets the classification of a Class A water utility.

The Division used the information contained in the White City annual reports for the past several years. The Company provided preliminary financial statements for 1992 to the Division in advance of filing its annual report. The 1992 report constitutes the basis of most of the financial and cost of service analysis performed by the Division. The Division asked certain clarifying questions about the information contained in the report, but it did not perform an audit of the information.

The capital structure of White City would change significantly if it borrowed most of the money needed for the capital improvements proposed either by its engineer or Sandy City's engineer. The result would probably be a lower overall cost of capital since the debt would cost less than the current allowed 15 percent return on equity. This means that the allowed rate of

return on rate base would be lower than the current allowed 13.22 percent. A lower rate of return on rate base would result in a lower average cost-of-service in the Division's 1997 forecast cost study for White City.

To include the entire capital improvements program needed by White City in one year as proposed by Ronnie Smith is unrealistic since it would make borrowing the money much more difficult from a cash flow and needed rate increase perspective. There is some question as to whether the Company would be able to borrow some \$3 million without the personal guarantee of the major stockholders, which they are reluctant to provide. The Company's total assets at the end of 1992 were \$1.976 million. Financing would be easier to obtain in smaller amounts to pay for the improvements if they are spread out over a number of years. Rate increases will most likely be needed as the improvements are made but also can be spread out if the improvements are spread out over a number of years.

Contributions in Aid of Construction

One of the concerns that will need to be considered in the next rate case of the Company is the issue of contributions in aid of construction. The USOA contains two accounts dealing with contributions in aid of construction. The first account is Account 271 - Contributions in Aid of Construction and the second account is Account 272 - Accumulated Amortization of Contributions in Aid of Construction. The accounting definitions for these two accounts are included as Attachment 1 to this report.

Account 271 requires that all contributions to the utility of money, property, or plant be recorded in this account. These contributions would include all plant that a developer installs and contributes to the utility as well as all connection fees required of customers before they can receive service from the utility. If plant or property is contributed to the utility it is to be included in the plant accounts of the utility. The plant is then depreciated over the appropriate service life of the plant.

Before a utility can use Account 272 it must have specific approval of the Commission. If this account is used by a utility the contributions recorded in Account 271 can be amortized over the estimated service life of the related asset. The concurrent credit for the amortization is made to depreciation expense. The reason for using this account is to allow in rates only the depreciation expense of non-contributed assets and to prevent the utility from developing a negative rate base caused by reducing gross plant by the amount of the contribution and the accumulated depreciation on the gross plant.

White City Water Company has been using Account 272 since 1986. The Division can find no evidence that the Commission ever approved the Company using this account. The Company's rates were based on not using Account 272. The effect of the Company's using this account is that the depreciation expense included in rates is too high. The Company started using Account 272 but did not come before the Commission for a rate decrease to take into consideration the lower depreciation expense it was recording on

its books. Therefore, the excess depreciation taken since 1986 has been increasing the net income of the Company.

Attachment 2 page 1 shows the amount of revenues, net income, contributions in aid of construction, amortization of contributions in aid of construction, dividends paid, and dividend payout ratio for each year from 1986 to 1992. The board of directors of White City Water Company has authorized the Company to increase the dividends to \$100,000 in 1993. These dividends are being paid to stockholders despite the fact that the Company has major plant replacements to be constructed in the immediate future and there is some question about the ability of the Company to arrange adequate financing at reasonable costs.

Attachment 2 page 2 shows the amount of contributions in aid of construction by the year in which they were received, the estimated service life in years, and the amount of amortization of the contributions in aid of construction for 1992. The connection fees are being amortized over a service life of 8 to 15 years which is probably much shorter than the actual life of the plant. Prior to 1986 the Company was not capitalizing connection fees into Account 271. The Company was showing them as "other income" on the income statement. The Commission apparently treated connection fees as revenue in calculating the rates of the Company in the last general rate case in 1983. The order uses the figure of \$19,000 as the estimated revenue to be received from connection fees. The actual amount of connection fees received in 1983 was \$87,489.

To treat connection fees as revenue means that any difference

between what is included in rates and what actually occurs will directly affect the net income of the Company. Connections, and thus connection fees, have had a wide variance over the years of White City Water Company's existence. The present rates are based on connection fees being treated as revenue while the Company has changed its accounting for them to one of capitalizing them in Account 271. The difference has flowed to the bottom line.

SERVICE RESPONSIBILITIES

Surplus Water

Sandy City presently serves water to customers outside of its city limits under the theory that it is serving surplus water to them. The term surplus water has the connotation that at some point in time the city will need the water for its city customers and thus the water will no longer be available to serve customers outside the city boundaries. If the sale of White City Water Company to Sandy City is consummated, the water provided to the Sandy City residents now served by White City Water Company would not be served under the surplus water theory. However, the water provided to the county residents of White City Water Company would still be served under the surplus water theory. Sandy City has agreed that it will treat county residents the same as city residents as far as providing water to them. This means that Sandy City will acquire sufficient water sources to guarantee continued supply of water to all customers it will serve.

Sandy has provided the following responses to Division information requests.

. . . No explicit curtailment policy exists at present. The only difference in the manner in which Sandy treats its current customers located outside the city compared to customers within the city is that customers located outside of city limits are charged a higher rate for the reasons explained in the previously filed testimony of Darrel Scow previously filed in this matter. (Response to February 23, 1993 information request no. 2.)

Sandy does not anticipate a need to distinguish between customers for purposes of future curtailments. In the history of water delivery in the valley, no retail

customer has been denied water delivery regardless of classification by a municipal water purveyor. However, it must be noted that constitutional issues may compel a municipality to prioritize delivery to it's citizens in extreme circumstances. (Response to February 23, 1993 information request no. 3.)

Fire Protection

White City Water Company presently has the responsibility to provide water to fight any fires that start in its service territory. The service territory of White City Water Company includes area both within the city boundaries of Sandy City and outside Sandy City in the county area. Sandy City provides the fire trucks and manpower to fight fires inside the city limits. Salt Lake County provides the fire trucks and manpower to fight fires in the county area. There is some evidence that White City Water Company would have some difficulty providing fire protection to certain areas within its service territory.

If Sandy City purchases White City Water Company as proposed, it should then be required to provide water at sufficient pressure and volume to fight fires within the entire present service territory of White City Water Company, not only within city boundaries but also outside the city boundaries. The evidence suggests that Sandy City could provide water at sufficient pressure to provide adequate fire protection with very little additional investment in plant facilities.

Sandy has provided the following responses to Division information requests.

Sandy has no statutory nor common law responsibility

or liability to provide water pressure or water for fire protection for areas served by Sandy outside of city limits. Sandy operates its system in a way, however, that is meant to provide adequate water pressure and water for fire protection purposes. With respect to the White City Water Company system, Sandy has no statutory nor common law liability or responsibility for fire protection. Again, however, Sandy plans on making the improvements outlined in the testimony and report of Mr. Steven McFarland of Eckhoff, Watson & Preator in order to assure that adequate pressure and water are available for fire protection for the entire system and all customers of the system. (Response to February 23, 1993 information request no. 8.)

. . . If Sandy City acquires the White City Water Company, as stated above, it would endeavor to install and maintain fire hydrants necessary to provide adequate fire protection. . . . (Response to February 23, 1993 information request no. 9.)

ENGINEERING ANALYSIS

The White City engineering consultant (Lawrence Alsup), and Sandy City's consultant (Eckhoff, Watson and Preator Engineering), have performed extensive engineering analysis work in studying the White City system. The Division has examined their work and accepts the engineering judgement behind their recommendations with a few reservations. The Division has approached the engineering issues with the goal in mind of understanding and interpreting them. We have identified and asked additional clarifying questions in order to determine how a combined Sandy/White City water system would or would not benefit ratepayers.

The testimony and reports of Sandy and White City witnesses discuss plant deficiencies in three major areas: water storage, fire protection and general system improvement, and system rehabilitation (replacement of aging pipes). The following sections summarize the Division's engineering analysis for each of these three areas. The cost estimates which seem to be the most reasonable are identified, along with a basic time period over which the costs would most likely be spread. The magnitude and timing of the costs for capital improvements are incorporated in the cost of service studies included in this report.

Water Storage

It appears that the issue of water storage has been one of the driving forces behind the proposed sale of the White City system.

In June of 1990, White City filed an application with the Commission seeking permission to build an above ground storage tank for the upper pressure zone on the site of the existing tank on 9800 South (PSC Docket No. 90-018-01). White City came to the Commission seeking relief from Sandy City zoning requirements which it deemed to be too restrictive. The Commission told White City, in essence, to go back and attempt to meet the Sandy City requirements for building a tank within their city limits.

At that time, the water storage needs of White City were analyzed by the Division, and we agreed with Mr. Alsup's conclusion that more storage capacity was needed for the upper pressure zone. Separate analysis by the consulting firm of Eckhoff, Watson, and Preator Engineering, Inc. (EWP) has also verified the need for additional storage capacity. EWP has been hired as consultants to Sandy to analyze the engineering aspects of the proposed sale.

Summary of Mr. Alsup's Findings

On page 4 of Mr. Alsup's testimony, he states that, "the system needs 1.5 million gallons additional storage now to meet State Health requirements." On the next page he states,

The State Department of Health has a rule of thumb of 200 gallons of storage required per capita which is a reasonable figure and based on this and the storage which is now available in the system 1.5 million gallons of storage is needed. A high degree of fire protection is required in some commercial areas which requires additional storage.

Exhibit 1 presents the costs that Mr. Alsup identified for the additional water storage:

B. New Additions

6. Acquire land for new reservoir	\$100,000
7. Construct 1.5 million gallon reservoir	900,000
8. Install 24" pipe from present upper tank to new reservoir	<u>61,200</u>
SUBTOTAL	\$1,061,200

Mr. Alsup explains on page 5 of his testimony that White City has entered into an agreement with the Salt Lake County Water Conservancy District (SLCWCD) to provide storage capacity until additional storage can be constructed. He also states that the agreement is not a suitable long-term solution to the storage issue because of the high cost and uncertain reliability of the arrangement.

Mr. Alsup made one statement on pages 5 and 6 of his testimony which addressed how he thought the storage could be handled if the White City system was integrated into the Sandy City System. He states,

Sandy has considerable storage above the White city system. I am not familiar with the names of their storage, but they have a 5 million gallon storage above where we want to build our reservoir. . . . White City Water system through its use of control valves could easily be integrated into Sandy's system and relieve the dependency on the Conservancy District.

Summary of Mr. McFarland's Findings

Mr. McFarland, an engineer with EWP, analyzed the White City Water Company system using Cybernet, a computer modeling program designed to simulate large water networks. EWP mapped the system and then determined the deficiencies based on the results of the various computer runs. Based on his computer modeling work, Mr.

McFarland made the following statement:

In several major fire scenarios, significant safety concerns were identified by the computer modeling. Specifically, the current system, with its limited storage capacity and line size deficiencies, would not meet the fire safety standards established by Sandy City fire department for a number of specific potential fire scenarios within the White City Water Company service territory. (See pages 4 and 5 of prefiled testimony.)

His findings led him to a recommendation to include an additional 1.5 million gallons of storage capacity (over and above Mr. Alsup's estimates) in his capital improvement budget. (See page 6 of testimony and table 3 of exhibit 2.)

Table 4 of Mr. McFarland's Exhibit 2 shows that the storage requirements could be reduced by one million gallons if Sandy purchases the White City system. This reduction is made possible because White City would have access to existing Sandy City reserves for fire protection.

After reading Mr. McFarland's recommendations, the Division was initially under the impression that Sandy City would construct a two million gallon stand alone storage tank, much as White City will have to do if the system is not sold. However, after reviewing Sandy City's master plan for water system capital improvements, it became apparent that Sandy City would incorporate the needs for additional White City storage in with the needs for the Sandy system. On page 23 of the Master Plan, it shows that two million gallons of capacity are reserved for White City needs in a proposed tank to be built near the Little Cottonwood Water Treatment Plant. (See Attachment 3 to this report). Page 31 of the Master Plan shows that the storage project was assigned a

number one priority and that the estimated cost of the eight million gallon tank was approximately three million dollars. (See Attachment 4 to this report.) The cost studies sponsored in testimony by Darrel Scow include budget plans for capital improvements over several years. The additional storage is budgeted for fiscal years 1994 and 1995. (See Attachment 5 to this report).

The Division believes that the timing of the capital improvements which will be made to the White City system is a very important issue because of the relationship between plant improvements and rates. Typical regulatory treatment allows a utility to apply for adjustments to rates after improvements to the system have been made.

If the two systems are merged, the Division's understanding of the Sandy City master plan is that a separate water storage facility would not be built for the White City customers. Long term storage needs for White City would be addressed when Sandy builds the new eight million gallon tank.

The Division then questioned Mr. McFarland as to how the storage shortfall would be addressed during the time period between the purchase of the system and the time the additional storage would be built. Through a telephone conversation with Mr. McFarland, and a subsequent meeting in his office, we were assured that Sandy could provide adequate initial storage reserves for White City by connecting White City onto the existing Sandy City network. For example, if a large fire did occur in the White

City area, water could be diverted from one of several Sandy storage tanks which are located above the White City system. Sandy is also interconnected with the SLCWCD and may be able to utilize some of the conservancy district's water in an emergency. This is made possible under the terms of an interlocal agreement of which Sandy and the SLCWCD are parties. On page 31 of his Exhibit 2, Mr. McFarland makes a statement which alludes to Sandy's ability to provide storage in the short term. He states,

Water storage agreements with the Salt Lake Water Conservancy District should be obtained immediately to guarantee fire flow protection, or else water supply connections from Sandy City to White City Water Company storage reservoirs must be made immediately.

It is worthwhile to note that even if Sandy still relied on the Conservancy District to provide water storage for the White City system, Sandy has a fixed price agreement with the Conservancy District for the purchase of water which is more favorable than White City's current agreement.

In summary, if the sale is finalized Sandy would not have to actually build additional storage capacity in the short term, and future White City storage needs would be addressed through the master plan of Sandy. Because of this finding, the Division has modeled the cost of service for a merged Sandy/White City system using the assumption that no additional capital costs be assigned for water storage. The cost of future White City storage has been included in the Sandy City master plan, and assigning additional costs would be double counting. Attachment 6 to this report summarizes the plant additions which would be required for a merged

system. Page 2 of the Attachment 6 shows the assigned plant categories for the improvements and projects a 5 year time table over which the project costs have been spread. This information has been incorporated into the Division's cost of service model for a merged system.

Fire Protection And General System Improvement

Through computer modeling of the White City water system, Mr. McFarland identified several areas which have inadequate fire protection. In general, he pointed out the need for additional large diameter trunk lines, primarily in the lower pressure zone. If White City were to remain a separate water company, he estimated that the cost of system upgrades would be \$730,237 (see table 2 of McFarland's Exhibit 2). By interconnecting with the Sandy system, he estimated that the costs could be reduced to \$512,303 (see table 4 of McFarland's Exhibit 2). Because these improvements are safety related, the Division agrees with Mr. McFarland that they should be addressed immediately. For the purposes of the cost of service study, The Division has used Mr. McFarland's cost estimates. We have also assumed that the projects would be completed within the first two years after the Sandy and White City systems are merged. If the systems are not merged, the higher cost estimates for the stand alone system should be used.

System Rehabilitation (replacement of aging pipes)

In Exhibit 1 of his testimony, Mr. Alsup identifies approximately 2.3 million dollars of replacement work which needs to be done for the White City system. On page 2 of his testimony he explains the need for the work as follows:

The 6-inch steel pipe currently in the ground was installed prior to 1955. The pipe is a steel pipe with a coal tar wrap and is possibly the poorest type of water pipe for this service. The same applies to the 10-inch and the 12-inch pipe and it is our opinion that all of this pipe will have to be replaced with ductile iron pipe within a very short time.

He goes on to explain what he means by a very short time on the next page of his testimony. He states, "Certainly within ten years and preferably within five."

Mr. McFarland appears to agree generally with Mr. Alsup's recommendations, but estimated that the cost of the improvements would be higher. He categorizes the pipe replacement as a short-term need and states that, "Short term improvements would typically occur in the two to five year period." (see page 33 of Exhibit 2)

Because this is a large expense of \$2.5 million or more, the timing of the improvements is critical. Mr. Alsup and Mr. McFarland agree that the pipes should be replaced, but there is little evidence pointing to the immediate need for the project. In the last few years, White City has not spent more than \$31,000 annually on maintenance of transmission and distribution lines (see annual reports, operation and maintenance expense account number 622).

The Division has no reason to disagree with the need for the

pipe replacement projects, our only questions relate to when either White City or Sandy would actually initiate and complete the projects. We recognize that the steel pipe has a limited service life and that certain White City system pipes are approaching the end of their useful life.

For purposes of modelling the costs, we have used Mr. McFarland's cost estimates and made the conservative assumption that the work would be completed over a five year period. As was noted earlier, Mr. Alsup's testimony suggested that the costs could be spread over a period as long as ten years. Attachment 7 summarizes the plant additions which would be required for an independent White City system. Page 2 of Attachment 7 shows the assigned plant categories for the improvements and projects a 5 year time table over which the project costs have been spread. This information has been incorporated into the Division's cost of service model for an independent White City system.

Conclusions

From an engineering viewpoint, the proposed sale is clearly beneficial for the following reasons:

1. A merged system is more efficient in terms of the physical plant required to serve the customers. Specifically, Sandy can handle the water storage needs of White City without having to immediately build a storage tank. When new storage is needed, a tank which serves the needs of the integrated system can be designed. A merged system would also decrease

the incidents of duplicated services. Sandy currently has main lines running through the White City territory which could be utilized to improve the service to White City customers. If White City remains independent, they will have to build new service mains in areas where the Sandy mains already exist.

2. Sandy City is in a better position to upgrade the fire protection needs of the White City system. If the systems are merged, Sandy can address specific water pressure and volume needs quickly by linking certain portions of the two systems. These improvements can be made at a lower cost as a merged system compared to White City as an independent system.

3. A system which combines the water resources of Sandy City and the White City Water Company would have access to a more diversified and reliable water source than if the systems remain separate. White City's water rights are limited to underground wells. Sandy has access to wells and several surface water sources. It may be possible to lower the cost of water through a resource planning process. For example, the best use for the White City wells may be as peaking sources in the summer, rather than paying the pumping costs throughout the entire year. This type of planning may result in lower costs to all customers.

While the Division believes that the technical benefits of the

sale have been clearly demonstrated by Mr. McFarland and the other experts, we also believe that an otherwise attractive proposal can be made undesirable if the resulting charges to ratepayers are unreasonable. The recommendations of the White City witnesses, particularly Ronnie Smith, give the impression that all of the engineering improvements must be made overnight. His approach leads to the conclusion that the ratepayers should accept Sandy City's county rate as a better alternative than paying much higher rates to White City after the system improvements have been made. However, a closer review of the engineering reports shows that most of the costs of the system improvements will be spread over several years. The following cost of service studies will demonstrate that spreading the improvement costs over several years greatly reduces the rate impact to customers.

COST OF SERVICE STUDIES

The Division of Public Utilities analyzed the cost studies filed by Ronnie Smith for White City Water Company and by Dr. Robert Siegel for Sandy City. Both studies were based on 1991 actual data from which either forecasts or adjustments were made. Since 1992 actual data was available, the Division decided to do cost studies based on the more recent data. Five different cost-of-service studies were completed:

1. White City Water Company -- 1992 Actual.
2. White City Water Company -- 1997 Forecast.
3. Sandy City Water Fund -- 1992 Actual.
4. Sandy City Water Fund -- 1997 Forecast.
5. Merged White City Water Company and Sandy City -- 1997 Forecast.

This report will discuss the Division's five cost studies as well as our analysis of Mr. Smith's and Dr. Siegel's cost studies.

Description of Division's Cost Study Methodology and Terms

The Division's cost studies presented in this report are fully distributed embedded (or forecasted embedded) cost-of-service studies. An **embedded cost study** assigns or allocates the booked or historical costs of a firm to the various customer classes it serves. Our forecasted studies are based on forecasts of booked costs. A **fully distributed cost study** assigns or allocates all of the revenue requirement costs of the firm to the various customer

classes it serves.

Our studies use cost causation as the guiding principle in the assignment and allocation of costs to customer classes. **Cost causation** is the principle that costs should be borne by those who cause them to be incurred. This is done not just because it is perceived as fair, but to help send a correct price signal to the consumer.

The purpose of a cost-of-service study is first to determine the cost of serving a customer class and second to determine the relative relationship of revenue to cost among the various customer classes. In determining the cost of serving a customer class the first step is to **direct assign** to a class any costs that clearly are caused (incurred by or for) only that class. The next step is to allocate any cost jointly caused by two or more classes. **Allocation** is the apportionment of costs among two or more classes in accordance with each class's relative share of a measurable cost-defining service characteristic such as number of accounts or gallons of water used.

Three basic categories of costs in a cost study are direct, joint and common. **Direct costs** are costs clearly caused by (incurred by or for) only a single customer class. **Joint costs** are those clearly caused by two or more classes. Joint costs result when two or more classes use (share) the same facilities, labor or materials. **Common costs** are those that are common to all classes yet not directly caused by any single class. Common costs are associated with and indirectly caused by all classes.

Since most of the costs of a utility are joint costs, the allocation step is very important. To make the allocation step easier two other preliminary steps are done. The first step is **functionalization**. This is the arrangement of costs according to major functions and begins with a System of Accounts. Many utilities maintain subaccounts to achieve greater precision. Examples of major water plant categories are: wells, pumps, tanks, meters and mains.

The next step is **classification**. This is the further division of costs into categories bearing a relationship to a measurable cost-defining service characteristic. For a water utility, demand, commodity and customer are typical classification categories. Here demand costs are related to peak water use, commodity costs are related to total water consumption and customer costs are related to the number of accounts and the number and size of meters. Fire protection is often used as a classification category. Once the appropriate measurable cost-defining service characteristic is determined then it can be used to allocate joint costs among classes.

The Division's approach to determining the appropriate measurable cost-defining service characteristic to use in the allocation of joint plant costs is to first talk to the engineers responsible for plant changes. Since the size and timing of installation of water plant is primarily determined by engineers, we ask them about the data used in their decision making process. The next step is to determine if this data is available by customer

class. We often find that the raw data used by engineers is not broken out by class because it is not required for them. It then is necessary to find available data that is as close in kind to the ideal data as possible to use as a surrogate. It is the use in cost allocations of data similar to that used in making engineering decisions that establishes a cost causal link between the joint plant costs and the allocation to customer classes.

The rate of return analysis is done by calculating the earned rate of return on rate base for each class so that it may be compared with the system rate of return (the average rate of return for all classes and services). A class that has an earned rate of return on rate base of less than the system average is not covering its costs.

The American Water Works Association (AWWA) Manuals on "Water Rates" and "Revenue Requirements" and the National Regulatory Research Institute (NRRI) publication, "Cost Allocation and Rate Design For Water Utilities" were used to help in the determination of revenue requirement and the classification and allocation of costs.

Mr. Smith's Cost Study for White City Water Company

In the course of reviewing the White City Water Company information, we met with: several White City representatives on February 19, 1993, LaDell Harston on February 26, 1993 and March 9, 1993, and Ronnie Smith on March 10, 1993.

Mr. Smith used 1991 data since that was the latest available.

He also calculated the effect of implementing all of their proposed capital improvements in one year. Since 1992 data was now available the Division decided to do a cost study using 1992 data. Some adjustments were made to Mr. Smith's assumptions regarding the effect of the capital improvements. One adjustment was in the estimated power costs for water production because his estimate seemed too high. Our estimated power costs were based on average costs for a few White City wells. It was also felt that it would be more appropriate to show the effects of implementing the capital improvement program over at least the five years recommended by Steven McFarland of Eckhoff, Watson & Preator. The main problems with Mr. Smith's study were the use of old 1991 data, the implication that all improvements would be made in one year and no accounting for customer and total usage growth over the time period that the improvements would be installed. The main effect of the increase in customers and usage over time would be the spreading of the fixed costs of the improvements over more billing units which would lower the necessary rate. Another effect would be the extra connection fees that could help pay for the plant additions.

Division's 1992 Actual Cost Study for White City Water Company

We received a preliminary 1992 financial statement from White City the last week of February 1993. This preliminary 1992 actual data was used for our initial 1992 cost study. We received White City's final 1992 Annual Report on March 31, 1993 and used it to update our study.

The White City accounting system together with the Commission's required annual report format does a good job of functionalizing costs. Costs were then classified as demand, commodity or customer related. The customer classification was split into customer plant related and customer services related. For this study, classification categories of hydrants and customer deposits were also used. Customer services means customer costs that are non-plant related such as meter reading, billing and collection. The main identifiable customer plant costs were meter related costs. The next step was the allocation of the classified costs to the customer classes of residential, commercial and schools. Peak usage was used to allocate demand related costs. Total usage was used to allocate commodity related costs. The number of meters was used to allocate customer services related costs. Equivalent meters was used to allocate customer plant related costs. Equivalent meters is equal to the number of meters of each size weighted by the cost of each size meter. Hydrants were allocated on the average number of customers. Customer deposits were direct assigned to the residential class. This resulted in a total cost-of-service by customer class. Total annual billing units were used to calculate average unit costs by customer class for different usage levels. The complete cost study printout including the resulting average costs is shown in Attachment 8.

Division's 1997 Forecast Cost Study for White City Water Company

All plant costs, expenses and customer data were forecast for the years 1993 through 1997. The plant costs were based on Steven McFarland's five year capital improvements plan for White City Water Company which totaled about \$4.7 million. Although his plan cost more and was over a shorter period of time than White City's own engineering estimate which totaled about \$3.7 million, it was used as a worse case scenario. We felt that our 1997 cost study would show the most that White City's rates would have to go up. White City's engineer, Lawrence Alsup indicated that the cost of the improvements would be about \$1,000,000 less and that pipe replacement (half of the cost) could be spread over ten years instead of five. Attachment 9 shows the year by year development of the 1993-1997 plant forecast. Our forecast of expenses generally was based on an escalation rate equal to the average percent increase of each account over the last four years. Depreciation expense and accumulated depreciation were calculated based on the assumed plant additions discussed above together with typical plant lives. Forecasts of contributions were based on customer growth times current connection fees. White City's estimates of customer growth of ninety four customers per year was used which was based on the average annual growth over the last thirty years. Usage data was forecasted based on average usage per customer by class. The complete cost study printout including the resulting average costs is shown in Attachment 9.

Dr. Siegel's Cost Study for Sandy City Water Fund

In the course of reviewing the Sandy City information, meetings were held with: Dr. Robert Siegel and Steven McFarland of Eckhoff, Watson & Preator on February 11, 1993 and March 11, 1993, Art Hunter and Rick Smith of Sandy City on March 29, 1993, and Larry Ipson and Ray Jewkes of Sandy City on April 2, 1993.

Dr. Siegel's cost study used historical usage, customer data and operating expenses over the past few years to project the same data from 1992 through 1997. The last year of actual data he used was 1991. Sandy City does not keep historical data in the format needed to do cost-of-service studies. Therefore a lot of preliminary work had to be done before Dr. Siegel could progress with his cost study. Even still, some data was not available such as the number of meters by size by customer class. Sandy City's accounting system for the water fund does not have the same level of functionalization as that used by White City. The cost of meter plant is buried in the account for mains making an accurate allocation of an important customer cost almost impossible. Since all billing and collection costs are handled on a centralized basis by Sandy City, the cost of billing and collection for the water fund has to be estimated. We discovered that even by April 2, 1993 Sandy City had no data on the actual total gallons of water used by each customer class for the fiscal year ending June 30, 1992. This lack of important data means that a cost-of-service study must use more than the usual number of assumptions.

Dr. Siegel's cost study is based on several assumptions that

we disagree with. He allocated the total Sandy City Water Fund revenue requirement between inside the city and outside the city (county) solely based on the total gallons of water used by each customer class. This assumption ignores the cost causing service characteristics of customer accounts, peak usage and equivalent meters.

Dr. Siegel assigned over \$20 million of plant to the county customers related to the annexation of Sandy City into the Metropolitan Water District of Salt Lake City (MWDSLCC) even though this cost is not a booked cost for Sandy City. It appears to us that this cost was assigned to the county customers because city customers pay property taxes to MWDSLCC while county customers do not. Our inquiries at the Salt Lake County Property Tax Office revealed that county customers pay property taxes to the Salt Lake County Water Conservancy District (SLCWCD) but not to MWDSLCC and that city (Sandy City) customers pay property taxes to MWDSLCC but not to SLCWCD. Dr. Siegel's study indicates that over half of Sandy City's cost of purchased water comes from SLCWCD with the rest from MWDSLCC. The relative property tax rates show the county customers pay more. We believe that the net effect of this property tax issue is a wash (i.e., one tax cancels the other). Sandy City's annual report indicates that the intent of the water enterprise fund is recover the costs of providing goods or services to the general public through user charges. Based on this we believe that the cost-of-service study for the water fund should include only booked accounting costs.

Dr. Siegel's study deducted from rate base the capital contributed by developers through the end of fiscal year 1992. He did not deduct from rate base the contributed capital from connection fees which amounts to about \$18 million gross and \$13 million net of accumulated depreciation. For his five year rate base projections, he did not deduct any projected capital contributions. The American Water Works Association Manual on "Revenue Requirements" indicates all contributions should be deducted from rate base. The combination of the added MWDSLIC rate base adjustment and the nondeduction of contributed capital result in his rate base and therefore his calculated water rates being overstated.

He also did not include revenue credits as an offset to the calculated revenue requirement. Revenue credits are revenues other than water revenues from tariffed rates. The cost of providing the services behind these revenues have been allocated to all customer classes and therefore these customers should get credit for the revenues to offset their allocated costs. Actual revenue credits for fiscal year 1992 were \$257,303.

Another area of difference was the classification of costs. Dr. Siegel classified all operating expenses except water purchases and utilities as 100% customer related. At the very least this approach ignores any operation and maintenance labor and material costs associated with wells, pumps, mains and tanks that are not customer costs. The effect of these classification differences results in his monthly minimum cost for 6000 gallons being more

than twice our calculated cost. It also appears that Dr. Siegel classified all plant as commodity related and ignored the effect of different peak demands of the customer classes.

Dr. Siegel made an adjustment for fire protection by reducing the county revenue requirement based on the understanding that Sandy City does not bear the responsibility for fire protection outside the city. We understand in reality, Sandy City does provide water pressure and water for fire protection to all of its customers and intends to in the future and therefore we believe that the county customers should pay an equitable share of the costs.

Several of the differences between Dr. Siegel's study and ours resulted in increases in rates. However, the net of all differences was a dramatic decrease in rates from the levels calculated by Dr. Siegel.

Division's 1992 Actual Cost Study for Sandy City Water Fund

Our 1992 cost study was based on actual data for the 1992 fiscal year ending June 30, 1992. Data was obtained from the Sandy City fiscal year 1992 annual report and from meetings with Art Hunter, Rick Smith, Larry Ipson and Ray Jewkes of Sandy City. It was disappointing to learn that a lot of important data was not available because of the Sandy water fund accounting system and their customer data base. No actual total usage data by customer class for fiscal year 1992 was available. This had to be estimated by multiplying the average usage per account calculated by Dr.

Siegel for 1989-1991 times the actual number of accounts for 1992. No information was readily available on the number and size of meters by customer class. No information was available on customer billing, collection and accounting costs. We estimated this by using average cost per customer for White City Water Company. Sandy City's accounting system does not functionalize personnel costs or administrative costs which together account for 25% of the total operating expenses of the water fund. The effect of this lack of good cost and customer data is to compromise the accuracy of any cost allocations between customer classes. However, the average cost results for all customers is reasonable since only the determination of the total water fund revenue requirement was required and was done before any allocations between classes.

Our cost study included materials & supplies, prepayments and construction work in progress in the determination of rate base while Dr. Siegel's study did not. The major differences in the determination of rate base was our exclusion of the MWDSLDC-related rate base and the deduction from rate base of all connection fee capital contributions.

After our functionalization adjustments, costs were classified as demand, commodity or customer related. The customer classification was split into customer plant related and customer services related. The next step was the allocation of the classified costs to the customer classes of city, Union Jordan, County and schools. This resulted in a total cost-of-service by customer class. Total annual billing units were used to calculate

average unit costs by customer class for different usage levels.

The Sandy City water fund has over \$7 million in cash which we assume is the source of almost \$700,000 in interest earned in fiscal year 1992. We did not include this interest income in calculating the revenue requirement since these funds may be earmarked for capital projects in the near future. This interest income has offset a large part of interest expense (almost \$1 million) allowing lower rates to be charged than otherwise possible. This helps explain why our calculated average cost of 20,000 gallons per customer per month of \$19.90 is higher than the current rate charged city customers of \$16.96. The rest of the difference is explained by the higher rates charged Union Jordan and county customers. The complete cost study printout including the resulting average costs is shown in Attachment 10.

Division's 1997 Forecast Cost Study for Sandy City Water Fund

All plant costs, expenses and customer data were forecast for the years 1993 through 1997. The plant costs were based on Steven McFarland's five year capital improvements plan for Sandy City Water. Attachment 11 shows the year by year development of the 1993-1997 plant forecast. The forecast of expenses was based on actual fiscal year 1992 values escalated at rates equal to those used by Dr. Siegel. Depreciation expense and accumulated depreciation were calculated based on the assumed plant additions discussed above together with the plant lives used by Dr. Siegel. Forecasts of developer and connection fee contributions were based

on 1992 actual values escalated at the estimated average customer growth rate. Customer growth rates were estimated using the average annual percent change over the six year period from 1985 to 1991 using Dr. Siegel's customer data. Usage data was forecast based on average usage per customer by class for 1989-1991.

Our determination of depreciation expense resulted in higher values than those used by Dr. Siegel. The full amount of the depreciation expense was used with no reduction for depreciation on contributed plant. This treatment is consistent with the AWWA Manuals on "Water Rates" and "Revenue Requirements". Normal regulatory treatment would have allowed only the depreciation expense on noncontributed plant. However, since the AWWA manuals did not recognize this treatment and because we desired consistency for studies done for both White City and Sandy City, unadjusted depreciation expense was used for all Division cost studies. This treatment results in slightly higher rates. The estimated cost of purchased water was greatly increased because Dr. Siegel's 1993 estimate was only about half of the 1992 actual cost of water purchases. Use of Dr. Siegel's values for depreciation expense and water purchases would have resulted in much lower average unit costs. The complete cost study printout including the resulting average costs is shown in Attachment 11.

Division's 1997 Forecast Cost Study for

Merged White City Water Company and Sandy City

The 1997 forecast of the merged Sandy City and White City water systems used the data from our separate 1997 forecasts for Sandy City and White City. The 1992 actual plant balances for Sandy City and White City were summed and the additions for the years 1993 through 1997 were forecast. The forecasted plant additions were the sum of Steven McFarland's five year plan for Sandy City alone plus the White City improvements needed based on McFarland's estimates for White City if the two systems were merged. This is actually less than the improvements needed for the two systems if no merger takes place. Attachment 12 shows the year by year development of the 1993-1997 plant forecast. The depreciation expense and accumulated depreciation were calculated based on the plant forecast. The other rate base items for the two systems for 1992 were added together and projected for 1993-1997 using the same method as for Sandy City alone. The forecasted customers and usage were added together for the two systems for 1997. The forecasted operating expenses for the two systems were added together even though some operating efficiencies could be assumed. The complete cost study printout including the resulting average costs is shown in Attachment 12.

Results and Conclusions

Attachment 13 is a summary of the average water rates

calculated for each of the Division's cost-of-service studies together with the rates determined by the cost studies done by White City and Sandy City. Also shown are the current White City and Sandy City water rates.

The summary rate comparison shows that the Division's calculated 1992 average cost to serve the typical White City customer using 20,000 gallons per month is \$15.53. This is very close to the current rate of \$15.31. Our calculated 1992 average cost to serve the 20,000 gallon per month customer of Sandy City is \$19.90 which compares to the current city residential rate of \$16.96. This rate is possible because of extra interest income not included in the cost study and higher rates charged some customers.

The Division's 1997 forecast cost study for White City shows the average cost for 20,000 gallons per month is \$23.59 which is a 54% increase over the current rate yet considerably lower than the \$28.25 calculated by White City. We considered this cost study a worst case scenario with actual average costs being somewhat lower depending on the cost and timing of capital improvements.

The Division's 1997 forecast cost study for Sandy City shows the average cost for 20,000 gallons per month is \$19.79 which is slightly less than the actual 1992 average cost. The Division's calculated average cost for county customers was \$19.52 which was close to but lower than all other customer classes. The Division's county cost was considerably lower than the county cost calculated by Dr. Siegel of \$30.93. For all practical purposes the cost to serve city and county customers is the same.

The Division's 1997 forecast cost study for the merged White City and Sandy City water systems shows the average cost for 20,000 gallons per month is \$18.85 which is 23% higher than the current White City rate of \$15.31. Neither Sandy City nor White City completed a merged cost-of-service study. This merged average cost of \$18.85 is lower than either our White City stand-alone 1997 forecast of \$23.59 or our Sandy City stand-alone 1997 forecast of \$19.79. This is explained because the merged system has lower capital improvements, lower taxes, lower required rate of return, and higher connection fees. Our merged system cost study did not assume any operating expense savings from the merger but we feel that it would be reasonable to expect some which would further lower the combined costs.

UNIFORM SYSTEM OF ACCOUNTS FOR CLASS A WATER UTILITIES

271 Contributions in Aid of Construction

A. This account shall include:

1. Any amount or item of money, services or property received by a utility, from any person or governmental agency, any portion of which is provided at no cost to the utility, which represents an addition or transfer to the capital of the utility, and which is utilized to offset the acquisition, improvement or construction costs of the utility's property, facilities, or equipment used to provide utility services to the public.

2. Amounts transferred from account 252 - Advances for Construction, representing unrefunded balances of expired contracts or discounts resulting from termination of contracts in accordance with the Commission's rules and regulations.

3. Compensation received from governmental agencies and others for relocation of water mains or other plants.

B. The credits to this account shall not be transferred to any other account without the approval of the Commission.

C. The records supporting the entries to this account shall be so kept that the utility can furnish information as to the purpose of each donation, the conditions, if any, upon which it was made, the amount of donations from (a) states, (b) municipalities, (c) customers, and (d) others, and the amount applicable to each utility department.

Note:--There shall not be included in this account advances for construction which are ultimately to be repaid wholly or in part (See account 252 - Advances for Construction).

UNIFORM SYSTEM OF ACCOUNTS FOR CLASS A WATER UTILITIES

272 Accumulated Amortization of Contributions in Aid of Construction

A. This account shall reflect the amortization accumulated on account 271 - Contributions in Aid of Construction, if recognized by the Commission.

B. Specifically, balances in account 271 which represent contributions of depreciable plant shall be amortized by charges to this account over a period equal to the estimated service life of the related contributed asset. A group or overall composite rate may be used for contributed balances that cannot be directly related to a plant asset.

C. The concurrent credit for the amortization recorded in this account shall be made to account 403 - Depreciation Expense.

Document 3:

September 19, 1991 Salt Lake County Public
Work's Fire Chief Larry Hinman letter to
District Attorney David Yocum on Fire
Marshall's concerns.



SALT LAKE COUNTY PUBLIC WORKS DEPARTMENT
DIVISIONS OF
FIRE - PARAMEDIC - EMERGENCY SERVICES

RANDY HORIUCHI
Salt Lake County Commissioner

LONNIE L. JOHNSON
Director

LARRY C. HINMAN
Fire Chief

19 September 1991

Mr. David Yocum, Esq.
Salt Lake County Attorney
2001 S State St #S3500
Salt Lake City, UT 84190

Dear Dave:

SUBJECT: Opinion on Liability of Fire Chief in Providing Fire Hydrants With
Less Than Adequate Fire Flow.

As Fire Chief, I am required by County Ordinance, to enforce the Uniform Fire Code. Division III, Appendix III-A, of the Code, describes fire flow requirements (from fire hydrants), for buildings based upon square footage, and type of construction. The Code specifically states that required fire flow for one and two family dwellings which do not exceed 3600 square feet, is to be 1000 gallons per minute for a sustained duration of two hours.

For many years, County Fire has had to deal with less than adequate water supplies for fire fighting, particularly in the Millcreek, Olympus Cove, and Canyon Rim areas. The poor water supply in these areas came about as development occurred many years ago. As subdivisions were constructed, private water companies were formed to provide culinary water. Little attention was paid to adequate fire flows. These private companies have now contracted with Salt Lake City Water for culinary water supply, and the fire flow situation remains inadequate.

The Uniform Fire Code essentially requires installation of fire hydrants for all new construction. In the areas of the unincorporated County, cited above, most development is one, or two lot subdivisions. When we approve plans for construction on these lots, we invariably require placement of a fire hydrant, as is most cases, there are few, if any in the area. We know, that do to the condition of the water supply infrastructure, that the fire hydrant will not provide the 1000 gpm per minute as required by the Fire Code. In many cases, flow is between 300 and 500 gallons per minute, which is inadequate in fighting a fire in an involved one or two family dwelling.

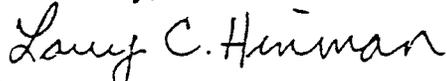
As you can see, legal questions arise with regard to the liability of the County, and the Fire Chief. The questions upon which I am requesting an opinion, are as follows.

1. What is the liability to the Fire Chief, and the County, when I am requiring placement of fire hydrants in new construction, knowing full well, that the hydrant will not provide adequate fire flow as required in the Uniform Fire Code, which I enforce?
3. What is our liability if I stop requiring fire hydrant placement, due to inadequate flow, as a result of an inadequate water supply infrastructure?
4. Do I as Fire Chief, have the authority to place construction moratoriums in areas where adequate fire flows cannot be provided by the water system?

I would appreciate a timely opinion in this matter, as Public Works has formed a taskforce to address these water supply problems.

Please feel free to contact me with any questions you may have in this matter.

Yours truly,



Larry C. Hinman, Chief
Fire, Paramedic/Emergency Services

cc. Lonnie Johnson
Fire Marshall Berry
Chief Berry

Document 4:

Memorandum September 19, 1991 to Salt Lake
County District Attorney Civil Division Chief
Bill Hyde by Jerry Nielson Attorney in DA's
Office

M E M O R A N D U M

JEM
TO: Bill Hyde
FROM: Jerry Nielson
DATE: September 30, 1991
RE: Salt Lake City Sales of Water in Salt Lake County;
Sufficiency for Fire Fighting

I've been asked by the fire chief to assist with a contract regarding fire hydrant repairs and compensation for water used through fire hydrants. The sticking point in that is the city's insistence that we indemnify them--which makes no sense to me. On further inquiry it turns out that the city has extensively acquired water companies in the county; or worse, has entered into contracts to supply water to them and bills their customers, whereupon the water company essentially disappears. The problem is:

A. The systems frequently do not have sufficient flow or pressure to fight fires.

B. The city takes no responsibility--they're just selling surplus water.

C. The county residents served by those systems are served by a city that regards them as merely purchasers of "surplus" water who would be cut off if the city needed the water for its residents.

D. The county residents may be providing an unreasonable profit or subsidy to city residents in the water rate structure which is in the unregulated discretion of the city.

The city's unreasonableness derives in part from the case of County Water System v. Salt Lake City, a highlighted copy of which is enclosed.

I intend to meet with a committee per a notice enclosed on October 9 at 8:30 a.m. to consider the problem generally and from the perspective of the fire chief. The chief has asked Paul Maughan to advise him as to his liability and his options. One option presumably is halting development until the water supply is sufficient to fight fires. I've been asked to advise about the possibility of obtaining the assistance of

the Public Service Commission to require the city to be more responsible. I also told the group I'd try to get Marty Verhoef or someone in our office to advise about the possibility of solving the problem by creating special improvement districts. I think Paul is also considering that issue.

I've talked to Dave Stott, Public Service Commission counsel, who expresses an interest in obtaining a reconsideration of the problem of County Water System v. Salt Lake City. He believes the action could be initiated in court or by a petition to the Public Service Commission.

I'm writing this memo because I think the problem is very serious to county residents and presents many difficult political problems to our office and the county generally. I would like your assistance to get this committee advised as special service district alternative--if it is an alternative.

Acknowledging my lack of expertise, let me make some rambling observations about the problem:

1. Our residents' fire insurance rates may go up. (I don't think the insurance companies are aware of the extent of the problem as yet.)
2. Stopping development would be a serious blow to developers and owners of property being held for development.
3. The proposition that our residents' use of their water is subject to being cut off to assure flows to the city is horrendous.
4. I don't know if our residents are being abused in the rate structures, but there appears to be opportunity for abuse. I note that Salt Lake mayoral candidates are crying double taxation--an issue that I consider hackneyed. I think there is now some reverse double taxation and this is an instance.
5. If special service districts are a possible solution, which I doubt, we'll be in the unhappy position of taxing to improve the city's water system.
6. Getting the court to reverse the County Water System case or, more realistically, to get them to say that the

city has now gone beyond the incidental sale of surplus water and is in fact in the proprietary water business and should be supervised by the Public Service Commission, will be a major legal and political struggle. Timing is important. In that connection Paulina Flint says the White City people are mounting a campaign to keep Sandy City from acquiring the White City Water Company. They have hired Jeff Appel.

Jeff says that, rather than simply frustrate the sale, he wants to take the position that the Public Service Commission should regulate Sandy City's operation of the water company--our problem exactly. I understand Sandy says if they are required to be supervised, they don't want to acquire the water company.

I will be out of town for two out of the next two and a half weeks.

My recommendation is tentative, but I'd say re-visit the County Water System case, probably at the Public Service Commission rather than in court. If Appel raises the question in the Sandy City matter, maybe we could join him. The principal advantage would be to avoid the Salt Lake City-Salt Lake County confrontation so difficult for our elected

Memorandum
September 30, 1991
Page 6

officials. At the same time, I'd want the Public Service Commission to squarely consider the Salt Lake City problem in the context of the extent of their water sales to county residents. To do that we'd be better off taking the city on directly.

My apologies for the disorganization of this memo. I wanted something on your desk while I was gone.

Encl.
R1311

Document 4:

October 6, 1992 Letter by Deputy County Attorney
Civil Division Gerald E Nielson to Senator Fred
Finlinson asking for Public Service Commission
Jurisdiction



THE OFFICE OF
SALT LAKE COUNTY ATTORNEY

DAVID E. YOCOM
COUNTY ATTORNEY



WALTER R. ELLETT, CHIEF DEPUTY
JUSTICE DIVISION

WILLIAM R. HYDE, CHIEF DEPUTY
CIVIL DIVISION

DONALD SAWAYA, CHIEF DEPUTY
GOVERNMENTAL SERVICES DIVISION

October 6, 1992

Senator Fred Finlinson
CALLISTER, DUNCAN & NEBEKER
10 East South Temple, #800
Salt Lake City, Utah 84133

Dear Senator:

I have attended the legislative water committee meetings which you chair in an effort to input the county's concerns. I was pleased at your consideration and understanding of the county's concerns; that the "surplus water" issue was real became clear by Salt Lake City's comments about their deliberations about cutting off county residents to prefer city residents even though they concluded that they would not do that. I was elated when you grasped the water company "service" issue that was highlighted when the city urged that because firefighting in the unincorporated county was a county responsibility, it was the county's responsibility to upgrade the city's water distribution system. Because it seems obvious to me that the water distribution system should be paid for by water service fees, I thought that exposition of the problem would serve best to illustrate the need for a constructive or creative solution.

The problems we are trying to address are admittedly complex. For argument's sake I want to attempt to simplify them by categorizing them in four ways, not necessarily in order of priority.

1. The "surplus water" problem. Most people don't understand it and they would be alarmed if they understood that the water they receive in their homes could be regarded as "surplus" and taken from them in order to prefer city residents.
2. The "disenfranchisement" problem. The unincorporated residents have no voice in the distribution of the water which is essential to their lives and to the continuing value of their properties.
3. The "rate discrimination" problem between city residents and unincorporated users.

4. The "inadequate service" problem that might also be a "discriminatory service" problem is best illustrated by the supply of water in insufficient quantities or in insufficient force to fight fires that we know are going to happen.

When we began, I understood it was proposed to legislate that the Public Service Commission (PSC) have jurisdiction over the delivery of water service by cities outside of their corporate limits, a suggestion that I believe is within the legislature's power.

It is now proposed that we solve these problems as follows:

A. The "inadequate service" problem is addressed by a provision that requires the county to spend a specified proportion of its district levy to maintain and improve the water systems. If that means the fire hydrants, it's at least an appropriate county expense, but I doubt the county wants or needs the legislature's assistance to allocate its fire district tax levy dollars. If it anticipates that the county will levy taxes to upgrade the city's water distribution system, it is objectionable on several levels. First, it is unpalatable for the county to be required to levy taxes to repair a city system. Second, it is the city's system--the county would need the city's permission to modify its property. Because the city's objectives regarding the upgrading of its facilities would be different than the county's, disputes could be expected. Third, the county would be taxing county residents in areas where water distribution systems are adequate to upgrade the systems of other citizens. The county would be tempted to seek alternative and possibly less satisfactory financing for fire protection that was not encumbered by these problems.

On the other hand, if the legislature clarified the PSC's jurisdiction in unincorporated areas, the PSC could require the upgrading in a measured way as part of its traditional role. To the extent it was practicable, the users of the water system requiring the upgrading would be required to pay for it as part of their water bill, which makes sense.

It is also proposed that if the costs are recovered through water service charges, there should be a tax avoidance. That's wonderful, but the "if" becomes large. The people won't insist on it because no one plans for fires and the politicians won't provide for it because it is not comfortable to raise taxes.

The solution--put the PSC in charge; setting rates and setting service standards is what they do. When the cities have to increase their water bills, they will have an unassailable explanation (the PSC made me do it). The judicious nature of the PSC's processes will increase the comfort level of the citizens and

the politicians alike. In the end, a difficult thing can be accomplished with a minimum of pain.

B. It is proposed to solve the "rate discrimination" problem by giving the PSC jurisdiction if the proposed unincorporated rate is more than 175 per cent of the city rate. The question is, why is 175 per cent presumed fair? The PSC's principal function is to determine and set rates that are exactly fair. The practical effect of this proposal would be to set all unincorporated rates at exactly 175 per cent, thereby guaranteeing "rate discrimination" in all cases when 175 per cent doesn't happen to be exactly fair. Clarifying the PSC's jurisdiction is the obvious solution to the rate discrimination problem.

C. The "disenfranchisement" problem is proposed to be solved by water advisory councils. The city's enthusiasm for this solution is the clue to its weakness. The councils would have no power but the power of persuasion. For the politicians, advisory councils make convenient scapegoats, without surrendering any actual power. The impartiality of the PSC and, of course, the fact that it has real power, make clarifying its jurisdiction the clear choice of alternatives here.

D. The "surplus water" problem is harder to solve in part because it arises because of a constitutional provision prohibiting cities from alienating interests in water. This writer assumes without knowing that the agreements of the cities with the water companies provides some protection to the previous subscribers of the water companies. That would be especially true if they had been approved by the PSC as they should have been since the PSC presumably had jurisdiction over the prior water company. The level of protection of actual subscribers is more likely than the protection of landowners or "prospective subscribers" whose land was in the service area of the prior water company but who were not actual subscribers when the transfer to the city was made. The Utah Supreme Court in North Salt Lake v. St. Joseph Water & Irr. Co., 223 P.2d 577, declared that prior users of water connections have a right to be protected where a city condemned an entire water system. That court also found that findings of the PSC were determinative as to the extent of such rights.

What has been proposed is that the issue of the city's obligations to the acquired water company's prior customers should be determined by the state engineer. How the state engineer would enforce its orders is not clear. Presumably, he could determine that a portion of the water right belonged to the former customer, but he wouldn't have power to require the city to serve that customer. Again, it is respectfully urged that the PSC, because of their recognized expertise and wider scope of their enforcement alternatives, can protect the former customer rights more

efficiently. The former customers can, of course, resort to the court, but that is impractical, and if it was practical, the court would not have the expertise the PSC has.

In sum, it appears that the proposal we began with--clarifying that the PSC has jurisdiction over water sales in the unincorporated county--is a significantly more effective way to deal with the problems than the solutions proposed. It further seems clear that the proposed solutions were reached in an effort to find alternatives that would not infringe on the city's unbridled discretion. The proposal of a powerless water advisory council and the involvement of the PSC after an arbitrary 175 per cent discriminatory rate can only be explained on that basis. The worst failing is simply that the proposals do not seriously address the public safety issue. Unless an institution with the ability to consider the issues and the authority to enforce its mandates is involved, the reluctance of the city officials to increase water service fees to upgrade the water service system and the reluctance of the users to require improved service until the fire has occurred will frustrate a meaningful solution. It is further respectfully urged that upgrading water service systems should be paid for by water service fees because that is a convenient way to do it and because they are so naturally related that the public can be expected to understand and accept that form of taxation more easily than any other.

If the legislature's concern is about interference with a municipal function which is forbade by the constitution rather than a deference to the city's wishes, it is respectfully urged that defining activities of the cities outside their boundaries as not municipal is not itself interference with a municipal function.

The stumbling block here is County Water System v. Salt Lake City, 278 P.2d 285, 3 U.2d 46, wherein the court held that a city's sale of surplus water outside its boundaries was a municipal function. Note the court also declared in that case that cities have no authority to sell surplus water outside their limits except as expressly permitted by statute. The county urges that is a finding that the function is not inherently municipal but is dependent on the determination of the legislature that it was municipal. It follows that the legislature that determined that it was a municipal function can now determine that sales outside city boundaries are not a municipal function. That is especially true where, as here, they are not municipal because of their inherent nature but because of legislative fiat. The court in City of West Jordan v. Retirement Bd., 767 P.2d 530 (Ut. 1988), grappled with the issue of what is a municipal function and concluded it should be determined by a balancing approach that depends on the relative abilities of the state as opposed to the city to perform the function. The county urges that by that analysis, the problems

Senator Fred Finlinson
October 6, 1992
Page 5

posed by the city's unbridled discretion as opposed to the efficiency of the proposed state agency (PSC) intervention mandate a conclusion that the proposed involvement by the PSC is not a municipal function and, accordingly, it is not an interference with a municipal function.

I am enclosing for your consideration a copy of a Pennsylvania case upholding a legislative determination that sales of water by cities outside their corporate limits are subject to regulation by the PSC, together with a copy of the Pennsylvania statute and a copy of the statute giving their cities "Home Rule." The purpose of the Home Rule statute in Pennsylvania is roughly the same as the purpose of the "Ripper Clause" in Utah (Art. VI, sec. 28, Utah Const. provides that the legislature shall not delegate to any special commission any power to interfere in any municipal function) -- to give the cities autonomy. That Pennsylvania supports PSC regulation outside the cities' corporate limits in spite of Home Rule is some indication Utah could do the same in spite of the Ripper Clause.

Your committee has said that it does not want to enter into the annexation issue. But by deciding that the committee has effectively decided that cities will be free to coerce annexations to obtain water. As you can see, the residents of White City and other unincorporated areas feel very strongly about remaining in unincorporated Salt Lake County. The county urges that strongly felt desire is entitled to governmental protection. By providing that the PSC can protect them at least from unfair coercion, the legislature would provide that protection.

Very respectfully,



GERALD E. NIELSON
Deputy County Attorney
Civil Division
Telephone: (801) 468-2655

ARTICLE IX

LOCAL GOVERNMENT

Sec.

1. Local government.
 2. Home rule.
 3. Optional plans.
 4. County government.
 5. Intergovernmental cooperation.
 6. Area government.
 7. Area-wide powers.
 8. Consolidation, merger or boundary change.
 9. Appropriation for public purposes.
 10. Local government debt.
 11. Local reapportionment.
 12. Philadelphia debt.
 13. Abolition of county offices in Philadelphia.
 14. Definitions.
- Schedule.

Extensive amendments of the Pennsylvania Constitution adopted in 1966, 1967, and 1968 modified and renumbered many sections and repealed others.

A Table is provided in the front of this volume listing the article and section numbers of the Pennsylvania Constitution as it read on January 1, 1966 and showing how they were affected by the 1966, 1967, and 1968 amendments.

The original text of the Constitution of 1874 with the complete text of all amendments to January 1, 1966 is included in this edition beginning on page 93 of the preceding volume, for convenient reference.

Article 9 was added April 23, 1968. See Schedule at end of the Article for effective dates.

See, also, italicized note and table at the head of Article 8.

§ 1. Local government

The General Assembly shall provide by general law for local government within the Commonwealth. Such general law shall be uniform to all classes of local government regarding procedural matters.

For effective date, see Schedule following section 14 of this Article.

Historical Note

Repeals:

Proposal No. 6, adopted by the Constitutional Convention, and approved by the electorate on April 22, 1963, provided in section 2, in part, as follows: " . . . section one of article thirteen: sections one, two, three, four, five, six, seven and eight of article fourteen and sections one, two, three, four and five of article fifteen are repealed."

1874 Section

As originally adopted, Article XV, § 1, read: "Cities may be chartered whenever a majority of the electors of any town or borough having a population of at least ten thousand shall vote at any general election in favor of the same."

1922 Amendment—adopted Nov. 7

Added two sentences to Article XV, § 1, reading:

"Cities, or cities of any particular class, may be given the right and power to frame and adopt their own charters and to exercise the powers and authority of local self-government, subject, however, to such restrictions, limitations, and regulations, as may be imposed by the Legislature. Laws also may be enacted affecting the organization and government of cities and boroughs, which shall become effective in any city or borough only when submitted to the electors thereof, and approved by a majority of those voting thereon."

1963 Amendment—adopted April 23

Added present Article IX, § 1.

Repealed Article XV, § 1.

Amended and renumbered former Article IX, § 1, as Article VIII, §§ 1, 2.

Library References

Statutes \Leftarrow 66 et seq.

C.J.S. Statutes § 152.

Notes of Decisions

1. In general

The Constitution gave the Legislature the power to impose, even on local self-government of city, any restrictions and limitations the Legislature desired. *Call v. City of Philadelphia*, 177 A.2d 324, 406 Pa. 290, 1962.

The Constitution granted and reserved to the Legislature, and the Legislature in turn, in granting home rule to Philadelphia, i. e., the right to frame and adopt a charter, clearly and specifically reserved to itself the power to impose restrictions, limitations and regulations on any Philadelphia Home Rule Charter. *Id.*

As to raising of revenue by taxation, as in other phases of exercise of local self-government, cities have only such powers and authority as have been delegated to them by legislature, within restrictions, limitations, and regulations imposed. *H. J. Heinz Co. v. City of Pittsburgh*, 37 A.2d 96, 170 Pa. Super. 435, 1952.

The Legislature may delegate to a city council the authority by ordinance to levy, assess, and collect taxes for general revenue purposes. *Blauner's v. City of Philadelphia*, 193 A. 889, 330 Pa. 312, 1923.

§ 2. Home rule

Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum. The General Assembly shall provide the procedure by which a home rule charter may be framed and its adoption, amendment or repeal presented to the electors. If the General Assembly does not so provide, a home rule charter or a procedure for framing and presenting a home rule charter may be presented to the electors by initiative or by the governing body of the municipality. A

Historical Note

Repeals:

Proposal No. 6, adopted by the Constitutional Convention, and approved by the electorate on April 23, 1963, provided in section 2, in part, as follows: ". . . section one of article thirteen: sections one, two, three, four, five, six, seven and eight of article fourteen and sections one, two, three, four and five of article fifteen are repealed."

1874 Section

As originally adopted, Article XV, § 1, read: "Cities may be chartered whenever a majority of the electors of any town or borough having a population of at least ten thousand shall vote at any general election in favor of the same."

1922 Amendment—adopted Nov. 7

Added two sentences to Article XV, § 1, reading:

"Cities, or cities of any particular class, may be given the right and power to frame and adopt their own charters and to exercise the powers and authority of local self-government, subject, however, to such restrictions, limitations, and regulations, as may be imposed by the Legislature. Laws also may be enacted affecting the organization and government of cities and boroughs, which shall become effective in any city or borough only when submitted to the electors thereof, and approved by a majority of those voting thereon."

1968 Amendment—adopted April 23

Added present Article IX, § 1.

Repealed Article XV, § 1.

Amended and renumbered former Article IX, § 1, as Article VIII, §§ 1, 2.

Library References

Statutes § 66 et seq.

C.J.S. Statutes § 152.

Notes of Decisions

1. In general

The Constitution gave the Legislature the power to impose, even on local self-government of city, any restrictions and limitations the Legislature desired. *Call v. City of Philadelphia*, 177 A.2d 324, 406 Pa. 290, 1962.

The Constitution granted and reserved to the Legislature, and the Legislature in turn, in granting home rule to Philadelphia, i. e., the right to frame and adopt a charter, clearly and specifically reserved to itself the power to impose restrictions, limitations and regulations on any Philadelphia Home Rule Charter. *Id.*

As to raising of revenue by taxation, as in other phases of exercise of local self-government, cities have only such powers and authority as have been delegated to them by legislature, within restrictions, limitations, and regulations imposed. *H. J. Heinz Co. v. City of Pittsburgh*, 37 A.2d 96, 170 Pa. Super. 455, 1952.

The Legislature may delegate to a city council the authority by ordinance to levy, assess, and collect taxes for general revenue purposes. *Blauner's v. City of Philadelphia*, 193 A. 339, 320 Pa. 342, 1929.

§ 2. Home rule

Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum. The General Assembly shall provide the procedure by which a home rule charter may be framed and its adoption, amendment or repeal presented to the electors. If the General Assembly does not so provide, a home rule charter or a procedure for framing and presenting a home rule charter may be presented to the electors by initiative or by the governing body of the municipality. A

municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.

For effective date, see Schedule following section 14 of this Article.

Historical Note

1874 Section

See Historical Note under section 1 of this Article.

1968 Amendment—adopted April 22

Added present Article IX, § 2.

Renumbered former Article IX, § 2, as Article VIII, § 5.

Library References

Municipal Corporations 4S(1), 64 et seq.

C.J.S. Municipal Corporations §§ 35 et seq., 153 et seq.

Notes of Decisions

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ough into a city pursuant to a "special election." therefore was held violative of this provision. *Id.*

It was argued that if the Constitution be construed to require the vote to be taken at a general election, it would mean that a vote upon the question of becoming incorporated as a city of the third class could only be taken once in two years, because general elections for State offices under the existing system are only held in even-numbered years—a delay which should be avoided if possible. But the court said this result did not necessarily follow, and that in the light of the constitutional amendments adopted for the purpose of providing for the holding of municipal elections throughout the Commonwealth in November in odd-numbered years, there was no reason why municipal elections thus held should not be deemed general elections within the spirit and purpose of the Constitution as amended and the statutory provisions relating thereto, and this view was afterwards embodied in the constitution by expressly permitting the vote on incorporation to be taken at municipal elections. *Id.*

1. In general

Under art. 15, § 1 (repealed), legislature could delegate to cities the authority to levy, assess and collect taxes for general revenue purposes, subject to such restrictions, limitations and regulations as might be imposed. *Rutherford v. City of Lancaster*, 19 D. & C.2d 59, 36 *Lanc.Rev.* 292, 1960.

2. Incorporation

Where electors of a borough, pursuant to right reserved under art. 15, § 1 (repealed) voted to change form of government to that of city of the third class, such action was final, and could not be attacked by quo warranto or any other form of proceeding: the question no longer being judicial one after such change. *Com. v. City of Washington*, 121 A. 144, 234 Pa. 245, 1925.

The provision of art. 15, § 1 (repealed) as it was before the amendment of 1922, that "cities may be chartered, whenever a majority of the electors . . . shall vote, at any general election, in favor of the same" was held to require the vote of the electors on the question of incorporation to be taken at a general election. *Com. v. City of South Bethlehem*, 74 A. 244, 248 Pa. 581, 1915.

Act 1913, July 7, P.L. 694 (repealed), authorizing the incorporation of a bor-

3. Annexation of territory

Act 1937, May 24, P.L. 204 (repealed), therefore, which provided for the annexation of territory to a city upon the petition of at least three-fifths of the taxable inhabitants, did not offend against art. 15, § 1 (repealed). *Carbondale Township's Appeal*, 5 C.C. 309, 5 *Lanc.* 205, 1938; but it was held unconstitutional as special legislation, in *Ayars' Appeal*, 16 A. 256, 122 Pa. 266, 2 L.R.A. 377, 1939.

CHAPTER 15

SERVICE AND FACILITIES

Chapter

General Provisions

Discontinuance of service to leased premises

SUBCHAPTER A

GENERAL PROVISIONS

- 1501. Character of service and facilities.
- 1502. Discrimination in service.
- 1503. Discontinuance of service.
- 1504. Standards of service and facilities.
- 1505. Proper service and facilities established on complaint.
- 1506. Copies of service contracts, etc., to be filed with commission.
- 1507. Testing of appliances for measurement of service.
- 1508. Reports of accidents.
- 1509. Billing procedures.

Cross References

Bureau of consumer services, see § 308 of this title.

Effect of commission action, see § 316 of this title.

Enforcement proceedings,

Attorney general, see § 503 of this title.

Commission, see § 502 of this title.

Investigation of interstate service and facilities, see § 314 of this title.

Prior rights preserved, see § 103 of this title.

Public letting of contracts, see § 513 of this title.

Reciprocity, see § 313 of this title.

Rural and intercity common carrier surface transportation assistance, see 66 P.S. § 2051 et seq.

Library References

Public Service Commissions § 6.7.

C.J.S. Public Utilities § 44.

§ 1501. Character of service and facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

§ 1501 PUBLIC UTILITIES REGULATION 66 Pa.C.S.A.

Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. The commission shall have sole and exclusive jurisdiction to promulgate rules and regulations for the allocation of natural or artificial gas supply by a public utility.

1978, July 1, P.L. 598, No. 116, § 1, effective in 60 days.

Historical Note

Prior Laws:

1976, Oct. 6, P.L. 1057, No. 215, § 3. 1913, July 26, P.L. 1374, No. 354, art. II, § 1, art. III, § 1, art. V, §§ 1, 2
1937, May 28, P.L. 1053, art. IV, § 401 (66 P.S. § 1171).

Cross References

Burden of proof, adequacy of services and facilities, see § 315 of this title
Common carriers,
 Connections with other lines, see § 2303 of this title.
 Full crews, see § 2305 of this title.
 Operation and distribution of facilities, see § 2301 of this title.
Facilities defined, see § 102 of this title.
Private wire for gambling information prohibited, see § 2902 of this title
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electors" as that term is defined by the Code⁵ and may not be denied the important right of participating in the election process. We note that the Code itself provides in Section 1852, 25 P.S. § 3552, that upon conviction of a willful violation of the Code, a person must be disfranchised for four years. Absent such a conviction we conclude that an otherwise qualified elector is entitled to participate in the nomination process. Since no other challenge has been made to the four signatures at issue, we must hold that the signatures were improperly stricken from the nomination papers.

Having established the validity of four additional signatures, the total number of valid signatures is increased to 136, or two in excess of the number needed for nomination. We, accordingly, need not rule on the validity of the two other categories of signatures described above.⁶



Condemnation of Water Distribution Mains and Appurtenances Owned by Berkmont Industries, Inc., etc.

Petition of BOROUGH OF BOYERTOWN.

Commonwealth Court of Pennsylvania.

Argued June 11, 1982.

Decided Oct. 4, 1983.

On petition for appointment of a board of viewers, the Court of Common Pleas,

Section 102(t) of the Code, 25 P.S. § 2602(t) defines a "qualified elector" as:

[A]ny person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.

Berks County, entered an order from which the defendant borough appealed. The Commonwealth Court, No. 26 Misc. Docket No. 3, Williams, J., held that: (1) where borough's water main extension was not of itself physically attached to any main of private developer but was, rather, addition to main that borough had constructed, and where there was no competent evidence to show that capacity of developer's mains to provide adequate supply of water had been or would be diminished because of installation and use of borough's 1976 extension, there was no de facto taking, in view also of borough's duties under water-supply contracts between the parties and its duties as public utility to provide adequate and reasonable service, but (2) although borough's water main extension which was not physically attached to any main of private developers did not amount to de facto taking, there was actual taking where, because of agreement between borough and developers, borough's water system would gain contractually contemplated group of new, rate-paying patrons, while developers bore cost of installing initial water mains, and borough's appropriation of use of developer's mains impressed them with new servitude.

Affirmed.

1. Eminent Domain ⇐ 2(1)

Neither physical appropriation nor formal divestiture of an owner's title are required to create right to eminent domain damages, and when entity clothed with power of eminent domain has, by even non-appropriative act or activity, substantially deprived owner of beneficial use and enjoy-

6. Appellee argues that the trial court erred in failing to invalidate several other signatures on the nomination papers. Appellee has failed, however, to file a cross appeal from the trial court's order and his arguments, therefore, need not be addressed.

ment of his property, taking will be deemed to have occurred. 26 P.S. § 1-502(e).

2. Property ⇐ 1

In its precise legal sense, word "property" denotes aggregate of rights or legal relations that owner has in or with respect to physical object. 26 P.S. § 1-502(e).

See publication Words and Phrases for other judicial constructions and definitions.

3. Property ⇐ 7

According to common-law concepts, "property" includes right to possess, use, enjoy and dispose of a thing, but also included in bundle of rights constituting "property" is right to exclude other persons from using the thing in question. 26 P.S. § 1-502(e).

4. Eminent Domain ⇐ 2(1)

When entity having power of eminent domain deprives person of any legal rights or interests he has with respect to tangible or definite thing, there is, to such extent, a taking of his property, and one such deprivation results from direct appropriation of possession or use, taking is termed "actual taking," but when person is substantially deprived of rights of beneficial use and enjoyment, not by direct appropriation but as consequence of nonappropriative act by entity with power of eminent domain, result is called a "de facto taking." 26 P.S. § 1-502(e).

See publication Words and Phrases for other judicial constructions and definitions.

5. Waters and Water Courses ⇐ 183(1)

Where borough furnished public water service beyond its municipal boundaries, borough was to that extent subject to jurisdiction of state Public Utility Commission and was in many respects to be treated same as ordinary public utility. 66 Pa.C.S.A. §§ 102, 1501; 66 P.S. § 1 et seq. (Repealed).

6. Waters and Water Courses ⇐ 194

Where borough was furnishing public water service beyond its municipal boundaries, mains installed by developers outside

the borough became and were facilities the borough's water-distribution system by each main continued to be private property of its respective installer, and then of the installer's successors in interest, except for such rights as were granted to others by contract. 66 Pa.C.S.A. §§ 102, 1501; 66 P.S. § 1 et seq. (Repealed).

7. Eminent Domain ⇐ 2(10)

Where borough's water main extension was not of itself physically attached to any main of private developer but was, rather, in addition to main that borough had constructed, and where there was no competent evidence to show that capacity of developer's mains to provide adequate supply of water had been or would be diminished because of installation and use of borough's 1976 extension, there was no de facto taking, in view also of borough's duties under water-supply contracts between the party and its duties as public utility to provide adequate and reasonable service. 26 P.S. § 1-502(e); 66 Pa.C.S.A. §§ 102, 1501; 66 P.S. § 1 et seq. (Repealed).

8. Eminent Domain ⇐ 2(10)

Although borough's water main extension which was not physically attached to any main of private developers did not amount to de facto taking, there was actual taking where, because of agreement between borough and developers, borough's water system would gain contractually contemplated group of new, rate-paying patrons, while developers bore cost of installing initial water mains, and borough's appropriation of use of developer's mains impressed them with new servitude. 26 P.S. § 1-502(e); 66 Pa.C.S.A. §§ 102, 1501; 66 P.S. § 1 et seq. (Repealed).

9. Eminent Domain ⇐ 293(1)

Although plaintiff stated that its claim was one for de facto taking, use of land was not fatal to plaintiff's case, and, also, allegation that borough's use of water main extension had subjected plaintiff's mains to additional servitude was an assertion of actual taking. 26 P.S. § 1-502(e).

10. Eminent Domain ⇐ 315

Although plaintiff had right to just compensation with respect to each water main for which it initially claimed, and not just those as to which trial court found taking, trial court's decision was to be affirmed as it stood, plaintiff having not filed a cross appeal.

Robert I. Cottom, Matten, & Cottom, Reading, for petitioner.

Cari F. Mogel, Raymond C. Schlegel, Balmer, Mogel, Speidel & Roland, Reading, J. Gregg Miller, Barbara H. Sagar, Pepper, Hamilton & Scheetz, Philadelphia, Karen Lee Turner, Mogel, Speidel & Roland, Reading, for Berkmont Industries, Inc.

Before BLATT, WILLIAMS and DOYLE, JJ.

WILLIAMS, Judge.

The Borough of Boyertown (Borough) has appealed from an order of the Court of Common Pleas of Berks County dismissing the Borough's preliminary objections to a petition under Section 502(e) of the Eminent Domain Code¹ for the appointment of a board of viewers. The petition had been filed by Berkmont Industries, Incorporated (Berkmont), and asserted that the Borough had committed a *de facto* taking as to certain property allegedly belonging to the petitioner.

The facts of this case are highly complex, and span a period of more than fifty years. Unlike the usual eminent domain matter, the instant case does not involve a taking or injury of a person's interest in land, as such, or a building. The *res* of this litigation is a system of water-distribution mains, which have been installed in the ground under public streets. Berkmont, claiming ownership of the distribution mains, asserted that the Borough committed a *de facto* taking by making an unauthorized connection to the mains, and by using that connection to

supply water to certain additional customers of the Borough's water system.

BACKGROUND

In 1927, one J. Clifford Levengood owned a tract of land located partly in the Borough of Boyertown, Berks County, and partly in Douglas Township, Montgomery County. The Levengood tract is divided by Route 73, which is also known as East Philadelphia Avenue. Thus, part of the tract is also north of East Philadelphia Avenue, and part is to the south of it. Desiring to develop his property as building lots, Levengood entered into two agreements with the Borough to supply the tract with water from the Borough's water system.

The first agreement, dated 1927, included the following provisions:

1. The Borough permitted Levengood to connect a water main with the Borough main.

2. The Borough agreed to supply water for houses erected, or to be erected, on Levengood's property.

3. Levengood agreed to lay the main in a specified manner subject to the Borough's supervision and instruction.

4. The Borough was to receive the water rents from the customers.

5. Levengood could permit other property owners whose land abutted a street in which Levengood had laid a main to connect to such main if: (a) Levengood obtained the written consent of the Borough; and (b) the consumer agreed to pay the Borough for the water service.

The agreement also provided that:

6. Levengood could charge such other property owners the *pro rata* share of his expenses incurred in the construction of the main, based upon the per front [footage] of property abutting the main.

7. If any of Levengood's property in Douglass Township should be annexed into the Borough, the main in the annexed area would become the sole property of the Borough.

1. Act of June 22, 1964, Special Sess., P.L. 84, as

amended, 26 P.S. § 1-502(e).

8. The Borough agreed to maintain and repair the main after installation. Pursuant to that agreement, the first Levensgood main was installed, running eastward along East Philadelphia Avenue into Douglass Township, from the terminus of the Borough's main in East Philadelphia Avenue. That terminus was at the boundary line separating the Borough, which is in Berks County, from Douglass Township, which is in Montgomery County.

In 1928, based on an essentially identical agreement with the Borough, Levensgood installed a second main. This one extended from his first main, and ran northward in the bed of a street called Montgomery Avenue. Both the first Levensgood main and the second were entirely within Douglass Township.

By 1946, Levensgood had sold portions of his tract, presumably as building lots. In January 1946, Levensgood and his wife sold the remainder of the tract, together with such interest as they had in the two water mains, to Boyertown Realty Corporation (BRC).

Between 1947 and 1956, BRC laid several new water mains to serve its tract. Those new mains were installed in the beds of Rhoads Avenue, Highland Avenue, and Douglass Street, all of which, like East Philadelphia Avenue, are public streets running through the BRC tract. BRC also extended the main that Levensgood had installed in East Philadelphia Avenue. The mains installed by BRC may be summarized as follows:

1. A main installed in 1947 in a section of Highland Avenue that is within Borough limits.
2. A main installed in 1947 in a section of Rhoads Avenue that is within Borough limits.
3. A main installed in 1948 in a section of Rhoads Avenue that is within Douglass Township.
4. The mains installed by BRC in 1947, in Highland Avenue and Rhoads Avenue, were exten-

4. An extension main added in 1951 to the main in the Douglass Township section of Rhoads Avenue. This extension is entirely within Douglass Township.

5. Mains installed or added in 1953 in Douglass Street, Rhoads Avenue and Highland Avenue. All of these mains are entirely within Douglass Township.

6. An extension main added in 1953 to the original Levensgood main in East Philadelphia Avenue. This extension is entirely within Douglass Township.

7. An extension main added in 1954 to the main in the Borough section of Highland Avenue. This extension is entirely within Borough limits.

8. A main installed in 1956 in Douglass Street, which is entirely within Douglass Township.

BRC's installation of the foregoing water mains was done pursuant to the consent and supervision of the Borough in each instance.² Yet, BRC and the Borough entered into only one formal written agreement. That agreement was dated February 6, 1950, and related back to the main installed in Rhoads Avenue in 1948. The agreement of February 6, 1950, was, for the most part, essentially identical to the Levensgood agreements of 1927 and 1928. There was, however, one variation: as to persons who owned property abutting the main, and who wished to connect to the main, the 1950 agreement did not purport to restrict BRC to the right of recouping a *pro rata* share of installation costs, as did the Levensgood agreements. Indeed, the 1950 agreement was entirely silent on the point.

The water mains installed by Levensgood and by BRC formed two separate divisions: one division was in and north of East Philadelphia Avenue; the other division was south of that street. The two divisions had not been connected; hence, water could not have flowed from one to the other. To improve circulation in those mains, the Bor-

sions from Borough mains.

ough, at some time in the early 1960's, installed a "looping" main that connected the two divisions. The "looping" main was run from the northeasterly end of the BRC-installed main in Douglass Street, and made to connect with the terminus of BRC's addition to the main in East Philadelphia Avenue. The "looping" main, like the two points it connected, was entirely in Douglass Township.

In 1964, the Commonwealth of Pennsylvania relocated Route 100 to a point just east of the terminus of the main in East Philadelphia Avenue. For the purpose of making public water available to areas east of the new Route 100, the Borough, at its own expense, extended the East Philadelphia Avenue main from its then existing terminus to a point across the new Route 100. That extension was entirely in Douglass Township. Prior to making the 1964 extension, the Borough advised BRC that the extension was being made *without prejudice to any agreements between them*. The Borough also stated that the extension would entail no charge to BRC and was to be installed *strictly as a public accommodation*.

In 1966, BRC was merged into the Union Manufacturing Company, which, in 1967, was merged into Fashion Hosiery Mills. In connection with the latter merger, Fashion Hosiery Mills changed its name to Berkmont Industries, Incorporated, the appellee herein.

We turn now to the facts that triggered the instant case. About November 1976, the Borough made another extension to the water main in East Philadelphia Avenue. This addition *connected to the Borough's 1964 extension across Route 100*, and ran eastward in East Philadelphia Avenue to the Gilbertsville Shopping Center in Douglass Township. The 1976 extension, though installed by the Borough, was paid for by the private developer of the shopping center. In 1978, the Borough made yet another eastward extension of the same main, this time to Zern's Market, which paid for the installation.

On March 22, 1977, Berkmont filed, in the Court of Common Pleas of Berks County, a petition under Section 502(e) of the Eminent Domain Code (Code) for the appointment of a board of viewers. The petition averred that, as of November 11, 1976, Berkmont was the owner of the water mains that had been installed by Levengood and by BRC in East Philadelphia Avenue, Montgomery Avenue, Rhoads Avenue, Highland Avenue, and Douglass Street. The petition also averred that the Borough, on or about November 11, 1976, had extended Berkmont's mains to serve other Borough customers in Douglass Township, and that the extension was made without the consent of Berkmont. The petition further averred that the Borough, by making the November 1976 extension, deprived Berkmont of the incidents of its ownership of the mains that had been installed by Levengood and BRC. Based on the foregoing averments, and the further averment that the Borough had not filed a declaration of taking, the petition went on to assert that the Borough's extension constituted a *de facto* taking of Berkmont's mains.

The Borough filed preliminary objections which (1) raised the defense of a statute of limitations, and (2) asserted that Berkmont's petition did not state a cause of action. The trial court ruled that the preliminary objections could not be used to raise the statute of limitations. However, the court did agree that the petition for viewers did not set forth a cause of action. Upon sustaining that element of the Borough's demurrer, the court gave Berkmont leave to file an amended petition.

On February 23, 1978, Berkmont filed an amended petition, which repeated the averments made in the original petition, and added the following new averments:

(1) That the Borough, in making the November 1976 extension, and allowing other customers to connect thereto, did so without paying Berkmont the connection fees to which it was entitled under existing agreements.

(2) That the Borough's use of the November 1976 extension interferes with Berkmont's use and enjoyment of its mains, and subjects Berkmont's mains to an additional servitude for which Berkmont has not been paid the connection fees to which it is entitled.

(3) That the Borough's use of the November 1976 extension depreciates the value of Berkmont's mains by increasing the wear and tear on them.

(4) That the Borough's use of the November 1976 extension restricts Berkmont's right and ability to use its mains.

(5) That the Borough's use of the November 1976 extension will require Berkmont to replace its mains sooner than usual, because of the increased use of them.

The amended petition renewed Berkmont's assertion that the installation and use of the November 1976 extension constituted a *de facto* taking of Berkmont's mains.

The Borough filed preliminary objections to the amended petition, and again made a general assertion that Berkmont had failed to state a cause of action for a *de facto* taking. More specifically, the preliminary objections also asserted that, given the Borough's agreements with Levensgood and BRC, the extension in issue did not constitute a *de facto* taking.

After hearing argument, the trial court, in an order dated July 6, 1978, determined that the averments of Berkmont's petition were sufficient to state a cause of action for a *de facto* taking. That same order directed the parties to present evidence by deposition and stipulation, to be filed of record within three months. On November 28, 1980, after they had filed depositions and exhibits, the parties entered into a written stipulation, which provided, in essence, as follows:

(1) That there was no record evidence to show that additional use of Berkmont's mains has created any additional wear

and tear on those mains; and no inference was to be drawn in favor of or against either party because of the lack of such evidence.

(2) That the trial court discussed with both parties the contents of its opinion; and, after being given the opportunity to present further evidence, both parties advised the court that they did not desire to do so.

The trial court approved the stipulation and ordered it to be filed.

On March 3, 1981, the trial court entered an order dismissing the Borough's preliminary objections to the amended petition, having concluded that Berkmont had proved a right to eminent domain damages. In so deciding, the trial court determined that Berkmont had suffered an *actual* taking, rather than a *de facto* taking as the petitioner had alleged. However, the court concluded that a taking had occurred only as to some of the mains that Berkmont claimed, not all. As to the following mains, the court concluded that there was *no taking of any type*: the mains installed by Levensgood and BRC in East Philadelphia Avenue; the main installed by Levensgood in Montgomery Avenue; and the mains installed by BRC in 1947 in Highland Avenue and Rhoads Avenue.

From the trial court's order of March 3, 1981, the Borough filed the instant appeal.

DISCUSSION

The water mains which the trial court held to have been taken were: the mains that BRC installed in Rhoads Avenue in 1948, 1951 and 1953; in Douglass Street in 1953 and 1956; and in Highland Avenue in 1953 and 1954. The trial court began its reasoning by concluding that, of the foregoing mains, all of the ones installed by BRC since 1948 were but extensions of the main installed in Rhoads Avenue in 1948, and thus were governed by the 1950 agreement between the Borough and BRC.³ The court

point has not been contested by the appellant.

3. The process by which the trial court arrived at this conclusion is not clear; however, the

next determined that the 1950 agreement, unlike the 1927 and 1928 agreements, did not restrict BRC to recouping a *pro rata* share of its construction costs when an abutting landowner sought to connect to one of the mains governed by the 1950 agreement. In other words, the court construed the 1950 agreement to mean that BRC was free to set any charge it desired for a connection to the mains governed by that agreement.

Based on the above premises, the trial court concluded that BRC, and thus its successor, Berkmont, had a legally-protected veto power over the use of the capacity of the water mains governed by the 1950 agreement. The court further opined that the Borough, by installing and using its November 1976 extension, had appropriated the "excess capacity" of the mains governed by the 1950 agreement, in that the Borough was using the capacity of those mains to pump water to new customers of the Borough's water system. In the court's view, the Borough's action constituted an actual taking of property, for which Berkmont was entitled to just compensation.

The Borough, as the appellant herein, raises two arguments: (1) that no taking of any type has been shown by Berkmont; and (2) that Berkmont's allegation of a *de facto* taking made it improper for the trial court to base its order on a finding of actual taking.

[1] With respect to what constitutes a "taking" of property, the law of eminent domain has undergone great change in recent years. There has been an expansion of the number of routes for reaching a conclusion that property has been "taken." Certainly, a taking occurs when an entity having the power of eminent domain physically appropriates the possession or use of private property. This is what our jurisprudence has traditionally meant by the term "actual taking." See *Rosenblatt v. Pennsylvania Turnpike Commission*, 398 Pa. 111, 157 A.2d 182 (1959); *Lakewood Memo-*

rial Gardens, Inc. Appeal, 381 Pa. 46, 112 A.2d 135 (1955). Yet, neither physical appropriation nor a formal divestiture of an owner's title are required to create a right to eminent domain damages. *Miller v. Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951). It is now well settled that when an entity clothed with the power of eminent domain has, by even a non-appropriative act or activity, substantially deprived an owner of the beneficial use and enjoyment of his property, a taking will be deemed to have occurred. *Conroy-Prugh Glass Co. v. Commonwealth*, 456 Pa. 384, 321 A.2d 598 (1974); *Griggs v. Allegheny County*, 402 Pa. 411, 168 A.2d 123 (1961), *rev'd on other grounds*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962); see *Miller*. Such compensable circumstances have been given, rather unfortunately, the label "*de facto* taking."

[2] Although the Eminent Domain Code provides procedures for determining just compensation when property has been taken, the Code itself does not define the term "property." Therefore, the meaning of the word "property" must be drawn from other sources of law. Frequently, the word "property" is used to describe the physical object that is the subject of ownership. However, in its precise legal sense, the word "property" denotes the aggregate of rights or legal relations that an owner has in or with respect to the physical object. *Redevelopment Authority of the City of Philadelphia v. Lieberman*, 461 Pa. 208, 336 A.2d 249 (1975).

[3] According to common-law concepts, "property" includes the right to possess, use, enjoy and dispose of a thing. *DiGirolamo v. Apanavage*, 454 Pa. 557, 312 A.2d 382 (1973); *Willcox v. Penn Mutual Life Insurance Co.*, 357 Pa. 581, 55 A.2d 521 (1947). Also included in the bundle of rights constituting "property" is the right to exclude other persons from using the thing in question. *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982);⁴ *Kaiser Aetna v.*

4. — U.S. —, 102 S.Ct. 3164, 73 L.Ed.2d 868.

United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). Indeed, the Supreme Court of the United States has indicated that, for eminent domain purposes, the term "property" includes "every sort of interest" an individual may possess. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78, 65 S.Ct. 357, 359-60, 89 L.Ed. 311 (1945).

[4] Thus, when an entity having the power of eminent domain deprives a person of any of the legal rights or interests he has with respect to a tangible or definite thing, there is, to that extent, a taking of his property. See *Lieberman; Miller*. It is when such a deprivation results from a direct appropriation of possession or use that the taking is termed "actual." When, however, a person is substantially deprived of the rights of beneficial use and enjoyment, not by direct appropriation, but as a consequence of a non-appropriative act by an entity with the power of eminent domain, the result is called a "de facto taking." See, e.g., *Lando v. Urban Redevelopment Authority of Pittsburgh*, 49 Pa. Commonwealth Ct. 566, 411 A.2d 1274 (1980). Therefore, to resolve the case at bar, we must first determine what legal rights or interests Berkmont had relative to the water mains here involved. Following that, we must determine whether Berkmont has been deprived of any such right or interest by the complained-of actions of the Borough.

Of significance to the instant case is the decision of the Pennsylvania Superior Court in *Overlook Development Co. v. Public Service Commission*, 101 Pa. Superior Ct. 217 (1931); *aff'd per curiam*, 306 Pa. 43, 158 A. 869 (1932). *Overlook* addressed the issue of what rights a land developer retained relative to a water main which the developer,

at his own expense, installed in a public highway and connected to the main of a public-service water company to obtain a supply of water to the developer's land.⁵ The case was an appeal by the developer's successor in interest, from a decision by the state Public Service Commission allowing a neighboring landowner to connect a water pipe to the privately installed main, and to do so without paying any compensation to the appellant. The appellant, in *Overlook*, argued that the Commission's order was confiscatory.

In the *Overlook* case, the Court began its analysis by deciding that the developer-installed main, because it had been connected with the water company's main for the service of patrons, had become a "facility" of the water company. That conclusion was based on the statutory definition of the term "facilities" in the Public Service Company Law of 1913.⁶ However, the Court proceeded to advance the following principle: the mere fact that the developer-installed main became a facility of the water company "did not destroy the private character of the main, nor render it subject to use by the [w]ater [c]ompany in supplying water to the public generally, or to any portion of the public as such." 101 Pa. Superior Ct. at 224. The Court then held that the main "continued to be appellant's private property, subject only to the rights therein which it granted to others by contract, and did not become devoted to a public use." *Id.* at 225 (Emphasis added). Based on the foregoing rationale, the Court further held that the Commission's order was unlawful because it resulted in the appropriation of the use of the developer-installed main without the payment or securing of just compensation to the appellant.

5. In the *Overlook* case, the main in question had actually been jointly paid for by two people. However, for the sake of convenience, we will use the unitary term "developer" in describing the facts of that case.

6. Act of July 26, 1913, P.L. 1374, as amended, formerly 66 P.S. § 1 et seq. Section 1 of this

Act, 66 P.S. § 1, defined the facilities of a public service company as including: "all tangible real and personal property, . . . and any and all . . . means and instrumentalities in any manner owned, operated . . . used . . . in connection with, the business of any public service company." (Emphasis added.)

We must note that in *Overlook* the agreement between the developer and the water company expressly declared that the developer-installed main should remain the property of the developer and the developer's heirs and assigns. The agreement also contained specific provisions about extensions of and connections to the main. In that regard, the agreement provided that any extension of the main required the consent of both the developer and the water company; and further provided that the developer could recover a *pro-rata* share of the original construction costs from any person desiring to extend the main. The agreement additionally provided that the developer had the exclusive permission to sell the right to connect with the main, subject, however, to the rules and regulations of the water company. *Overlook*, 101 Pa. Superior Ct. at 221.

Although the *Overlook* opinion included a holding that the developer's successor had the right to enforce the terms of the contract, that conclusion did not negate or detract from the broader, central proposition of the case: that, absent a dedication to public use, the developer's successor retained all proprietary rights in the main except for those that had been granted away by contract. Merely because the developer's written agreement with the water company specifically addressed the developer's power to exclude others from making extensions or connections, did not mean that such a right would not have existed otherwise; nor could it mean that all other rights of ownership ceased to exist because the agreement was silent as to them.

Unlike the agreement in the *Overlook* case, the agreements that Levengood and BRC entered into with the Borough did not expressly declare that either of those developers would remain the owners of the mains they respectively installed. We conclude, however, that no contractual provision was necessary to clothe Levengood and

BRC with the general ownership of those mains. In the absence of some contractual or other legal provision to the contrary, Levengood and BRC became the owners of those mains by paying for the materials from which the mains were constructed, and bearing the total cost of their installation. With respect to the Levengood-BRC mains installed in Douglass Township, the express terms of the written agreements themselves fortify the conclusion that those mains remained the property of their installers. Each of the agreements involved in this case provided that if the Levengood land in Douglass Township should be annexed into the Borough, "the main in the annexed area would become the sole property of the Borough." This clause indicates a recognition that, in the absence of such annexation, the mains that Levengood and BRC installed in Douglass Township would remain *their* property.

[5, 6] Section 1501 of the present Public Utility Code, 66 Pa.C.S. § 1501, provides in pertinent part that: "Any public utility service being furnished or rendered by a municipal corporation *beyond its corporate limits* shall be subject to regulation and control . . . as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility." (Emphasis added.) Thus, because the Borough in the instant case furnishes public water service beyond its municipal boundaries, the Borough is, to that extent, subject to the jurisdiction of the state Public Utility Commission; and is, in many respects, to be treated the same as an ordinary public utility. *E.g., White Oak Borough Authority v. Pennsylvania Public Utility Commission*, 175 Pa. Superior Ct. 114, 103 A.2d 502 (1954). Section 102 of the Public Utility Code, 66 Pa.C.S. § 102, defines the "facilities" of a public utility in essentially the same terms that were used in the former Public Service Company Law.⁷ Consequently, by force of

7. 66 Pa.C.S. § 102 defines the "facilities" of a public utility as including: "all tangible and intangible real and personal property . . . and any and all means and instrumentalities in any

manner owned, operated . . . used . . . in connection with, the business of any public utility." (Emphasis added.) This definitional element was also set forth in Section 2(10) of the

the *Overlook* decision, the mains installed by Levensgood and by BRC in Douglass Township became, and are, facilities of the Borough's water-distribution system. That fact, however, did not negate the private character of those developer-installed mains. *Overlook*. There has been no showing that any of the Levensgood-BRC mains were ever dedicated to public use. Accordingly, each of those mains continued to be the private property of its respective installer, and then of the installer's successors in interest, except for such rights that had been granted to others by contract.

[7] It is undisputed that Berkmont is the successor to whatever property rights Levensgood and BRC had retained as to the water mains they installed. As noted, Berkmont's petition for viewers alleged a *de facto* taking of those mains; and, in so alleging, focused on the extension the Borough made in November 1976 from the then existing terminus of the main in East Philadelphia Avenue. The first element of Berkmont's claim was that the Borough's 1976 extension constituted an unauthorized extension of Berkmont's mains, and that such deprived Berkmont of connection fees to which it was entitled. That contention, however, was not sustainable; because, the Borough's 1976 extension was not, of itself, physically attached to any main of Berkmont's. The 1976 extension was an addition to the main that the Borough had constructed in 1964, at its own expense, to bring its water system across the new Route 100. There is no basis for concluding that Berkmont had any property rights in the Borough's 1964 installation. In short, the Borough's 1976 extension was not one that would have given Berkmont a right to connection fees.

In the proceedings before the trial court, there was no competent evidence to show that the capacity of Berkmont's mains, to provide an adequate supply of water, had been or would be diminished because of the installation and use of the Borough's 1976 extension. Hence, there was no showing

that Berkmont had been deprived of the beneficial use and enjoyment of its mains as to constitute a *de facto* taking. A claim of *de facto* taking cannot be successfully based on consequences that are merely conjectural or presupposed. *Filbert Limited Partnership Appeal*, 64 Pa. Commonwealth Ct. 605, 441 A.2d 1345 (1982). As an additional matter, should the Berkmont mains suffer in their capacity to provide adequate and reasonable water service to patrons permitted to use them, the Borough would be faced not only with its duties under the water-supply contracts in this case, but also with its duties as a public utility to provide adequate and reasonable service. See 66 Pa. C.S. § 1501.

[8] Although we conclude that there has been no showing of a *de facto* taking in this case, we agree with the trial court's determination that Berkmont has suffered an *actual* taking. Pursuant to the agreement that the Borough entered into with Levensgood and BRC, the Borough's water system would gain a contractually-contemplated group of new, rate-paying patrons, while the developers bore the cost of installing the initial water mains. The first segment of this group of patrons consisted of persons who had erected or would erect houses on the Levensgood tract. The second segment of the patron group consisted of the owners of land that abutted one of the privately installed mains but was not part of the Levensgood tract. However, this second type of patron could not connect to any of the mains unless both the installer and the Borough consented, and unless a connection fee was paid to the installer. Except for these two contractually-contemplated groups of users, neither Levensgood nor BRC relinquished the proprietary right of excluding others from using the mains they installed. That right of exclusion is now vested in Berkmont.

The Borough does not challenge the trial court's finding that the mains installed by Levensgood and BRC are being used by the

Borough to pump water to the customers who have connected with the Borough's 1976 extension in Douglass Township. We must conclude, therefore, that the Borough has appropriated the use of Berkmont's mains, and has impressed them with a new servitude. Such action constituted an actual taking of property. The Borough, by applying Berkmont's mains to public use, has diminished the owner's right of exclusion. As the Supreme Court of the United States observed in the *Kaiser Aetna* case; the right to exclude others is one of the most essential "sticks" in the bundle of rights characterized as "property." 444 U.S. at 176, 100 S.Ct. at 391. We do not suggest that the Borough, in its capacity as a public utility, may not extend its "facilities" to accommodate the public. Indeed, the Borough could be compelled to do so under certain circumstances. Our decision, like that in *Overlook*, is simply that not even a public utility may appropriate private property, without paying or securing just compensation, to serve the public or any portion thereof.

[9] Although Berkmont stated that its claim was one for a *de facto* taking, the use of that label was not fatal to the appellee's case. Moreover, one of Berkmont's allegations was that the Borough's use of the 1976 extension had subjected Berkmont's mains to an *additional servitude*. That allegation was an assertion of an actual taking.

[10] In our view, Berkmont has a right to just compensation with respect to each for the mains for which it initially claimed, and not just those as to which the trial court found a taking. However, since Berkmont has not filed a cross-appeal, we must affirm the trial court's decision as it stands.

ORDER

AND NOW, the 4th day of October, 1983, the order of the Court of Common Pleas of Berks County, entered March 3, 1981, dismissing the preliminary objections of the Borough of Boyertown, is hereby affirmed.

CAPITOL AREA TRANSIT, Petitioner.

v.

WORKMEN'S COMPENSATION
APPEAL BOARD (DUNCAN),

Respondents.

Commonwealth Court of Pennsylvania.

Submitted on Briefs May 12, 1983.

Decided Oct. 11, 1983.

Employer appealed from award of workers' compensation benefits. The Commonwealth Court, No. 1620 C.D. 1982, Barbieri, J., held that evidence sustained finding of cause or relationship between bus driver's occupation and his anal problems.

Affirmed.

Workers' Compensation ⇌ 1502

Evidence sustained finding of cause or relationship between bus driver's job and his rectal and anal problems, which included hemorrhoids and anterior perianal abscess with anal fistula.

Frederick W. Andrews, Graf, Knupp & Andrews, P.C., Harrisburg, Pa., for petitioner.

R. Elliot Katherman, York, for respondents.

Before BLATT, MacPHAIL and BARBIERI, JJ.

BARBIERI, Judge.

Capitol Area Transit appeals to this Court from the action of the Workmen's Compensation Appeal Board in affirming an award against it in favor of its employee, Chaucer A. Duncan. We will affirm.

Chaucer A. Duncan, while a bus driver for the defendant over a period of some

Document 5:

February 10, 1992 Letter to Representative Kurt
E. Oscarson in Support of Public Service
Commission Legislation by Ted Stewart
Commission Chairman



State of Utah
PUBLIC SERVICE COMMISSION OF UTAH

Norman H. Bangerter
Governor

Hedder M. Weiss Building
160 East 300 South, 4th Floor
P.O. Box 45555
Salt Lake City, Utah 84145
(801) 530-6716

February 10, 1992

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Legal Counsel
Julie Orchard
Commission Secretary

The Honorable Kurt E. Oscarson
Utah State Representative
Utah State House of Representatives
State Capitol
Salt Lake City, UT 84114

RE: HB 323 Retail Utility Service
by Municipalities Outside Boundaries

Dear Representative Oscarson:

In response to your inquiry about the position of the Public Service Commission on SB 158, which would provide state regulatory oversight of municipal utility retail sales to non-residents, please be advised as follows.

The Commission is convinced that some state oversight of a municipal utility operating outside its boundaries is proper and necessary. As you know, a municipality has only the constitutional authority to offer utility services which are local in extent and use (Article XI, 5 b). However, pursuant to 10-8-14 the Legislature authorized cities to sell surplus utility product or service beyond city boundaries. Consequently, many cities are selling utility services to non-residents and, by reason of court decisions relating to 10-8-14, have avoided regulation.

It is clear that those receiving service outside city boundaries do not have the same protections against rate and service abuses that city residents enjoy. The temptation for city officials to overcharge and underserve non-resident, non-voting customers to hold down rates for city residents is considerable. The Commission has received numerous complaints from non-resident customers which suggest that abuses are occurring.

The Commission, therefore, supports the concept embodied in HB 323.

Sincerely,

B. Ted Stewart
Commission Chairman



5 (WATER SERVICE CHARGES)

6 1992

7 GENERAL SESSION

8 SUBSTITUTE (BUFF)

9 H. B. No. 323

By Kurt E. Oscarson

10 David S. Ostler

11 AN ACT RELATING TO CITIES AND TOWNS; PROVIDING THAT CHARGES FOR RETAIL
12 WATER SERVICE PROVIDED BY CITIES AND TOWNS TO CUSTOMERS LOCATED
13 OUTSIDE THEIR BOUNDARIES MAY NOT EXCEED THE COST OF THE SERVICE.

14 THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

15 AMENDS:

16 10-8-14, AS LAST AMENDED BY CHAPTER 60, LAWS OF UTAH 1983

17 Be it enacted by the Legislature of the state of Utah:

18 Section 1. Section 10-8-14, Utah Code Annotated 1953, as last
19 amended by Chapter 60, Laws of Utah 1983, is amended to read:

20 10-8-14. Water, sewer, gas, electricity, telephone, and public
21 transportation -- Service beyond city limits -- Retainage escrow.

22 (1) [They] A municipal legislative body may:

23 (a) construct, maintain, and operate:

24 (i) waterworks[];

25 (ii) sewer collection[-sewer] or treatment systems[];

26 (iii) gas works[];

27 (iv) electric light works[];

28 (v) telephone lines; or

29 (vi) public transportation systems[-or];

1 (b) authorize the construction, maintenance, and operation of the
2 [same] facilities listed in Subsection (a) by others~~[,]~~; or

3 (c) purchase or lease ~~[such-works-or-systems]~~ the facilities listed
4 in Subsection (a) from any person or corporation~~[,--and-they]~~.

5 (2) (a) A municipal legislative body may sell and deliver the
6 surplus product or service capacity of any ~~[such-works]~~ facility listed
7 in Subsection (a), not required by the city or town or its inhabitants,
8 to others beyond the limits of the city or town.

9 (b) (i) If a city or town provides retail water service to customers
10 located outside the city's or town's boundaries, charges for that service
11 may not exceed the cost of providing the service.

12 (ii) Costs which may be recovered by the water service charges
13 include costs of:

14 (A) acquiring water or water rights;

15 (B) development;

16 (C) transmission and distribution;

17 (D) operation and maintenance; and

18 (E) repair and replacement.

19 ~~[(2)]~~ (3) (a) If any payment on a contract with a private person,
20 firm, or corporation to construct ~~[water-works,--sewer--collection,--sewer~~
21 ~~treatment--systems,--gas-works,--electric-light-works,--telephone-lines,--or~~
22 ~~public-transportation-systems]~~ any facility listed in Subsection (1)(a)
23 is retained or withheld, it shall be placed in an interest bearing
24 account ~~[and-the]~~.

HOUSE FLOOR AMENDMENT

February 18, 1992

Representative _____ proposes the following amendment to
SUBSTITUTE H. B. 323, WATER SERVICE CHARGES:

1. Page 2, Line 11:

After "service" insert ", as determined in accordance with this subsection"

and after line 11 insert:

"(ii) The cost of providing water service shall be the average cost of providing water service to:

(A) all customers served by the city or town; or

(B) all customers served by the city or town within a certain class of service, such as residential or industrial."

Re-number accordingly

1 (b) The interest shall accrue for the benefit of the contractor and
2 subcontractors to be paid after the project is completed and accepted by
3 the [~~board-of-commissioners-or-city-council~~] legislative body of the city
4 or town. [~~It-is-the-responsibility-of-the~~]

5 (c) The contractor [~~to~~] shall ensure that any interest accrued on
6 the retainage is distributed by the contractor to subcontractors on a pro
7 rata basis.

Document 6:

February 24, 1993 Letter of Support by Salt Lake
County Commissioner Randy Horiuchi to
Representative Kurt Oscarson.



RANDY HORIUCHI
Salt Lake County Commissioner

BLAZE WHARTON
Administrative Assistant

February 24, 1993

Representative Kurt Oscarson
State House of Representatives
Salt Lake City, Utah 84114

Dear Rep. Oscarson,

A majority of the Salt Lake County Commission supports the concept of a bill that you are carrying regarding public service commission authority over municipal and independent water companies.

Representing the largest number of individual water users in the state, the Salt Lake County Commission is concerned that there is no recourse for our residents regarding water rates and service.

For example, a resident of the unincorporated county that lives in Holladay is a customer of Salt Lake City water, which has a monopoly on water service in the area. There is no way in which that Holladay resident can make their voice heard because they cannot vote for Salt Lake City council people, mayor or trustees of the system. The only recourse the water customer would have is to go to court, hardly a satisfactory conclusion.

Some 280,000 unincorporated resident have no recourse of impacting their water source. This bill would give these customers an unbiased regulatory body to grieve on rates and service. Your bill provides representation and fairness to users that are otherwise, unrepresented.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy Horiuchi", is written over the typed name.

Randy Horiuchi

Document 7:

Letter of support of PSC Jurisdiction from United
Association of Community Councils Presently
know as Association of Community Councils
Together(ACCT).



United Association of Community Councils

2100 SO. STATE STREET • SUITE N-4002 • SALT LAKE CITY, UTAH 84190-5100 • (801) 468-3636

MEMO TO: LEGISLATORS AND SENATORS

FROM: UNITED ASSOCIATION OF COMMUNITY COUNCILS OF SALT LAKE COUNTY [UACC]

SUBJECT: H B 201 [JURISDICTION OF PUBLIC SERVICE COMMISSION]

POSITION: SUPPORT

DATE: FEBRUARY 2, 1993

Since the 1992 legislative session we have been studying the various concerns relating to the unincorporated water users, in a committee chaired by Senator Fred Finlinson.

Since that time the issue has been narrowed down to dealing with water concerns in Class One Counties only. There will be no provision linking the smaller communities with limitations, reductions, or sales to non resident consumers.

The legislation will allow the unincorporated consumers, in Salt Lake County, to secure a forum for redress. The legislation would provide an opportunity for 190,000 currently disenfranchised residents to address their grievances to the Public Service Commission. The following concerns exist in Salt Lake County:

- * Charges are arbitrary and not based on fact.
- * No secure water supply exists.
- * No redress available without onerous cost.
- * Governmental Planning does not take into consideration surplus supply and demands.
- * Clarification of infrastructure services and charges are not available.
- * Fire protection limited due to inconsistent fire flows and dry fire hydrants.
- * Planning and development influenced and leveraged unnecessarily.
- * Lack of accountability for water quality.
- * Water suppliers acting as " Defacto Utilities".

House Bill 201 allows for reactive consideration, by the Public Service Commission, of the unincorporated Class One County residents interests. WE ASK THAT YOU SUPPORT H B 201. THANK YOU

Document 8:

Compilation of 1992 and 1993 Letters and
Legislation for PSC Jurisdiction.



United Association of Community Councils

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State of Utah
PUBLIC SERVICE COMMISSION OF UTAH

Norman H. Bangert
Governor

Hedder M. Wells Building
160 East 300 South, 4th Floor
P.O. Box 45535
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February 10, 1992

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Commission Chairman





RANDY HORIUCHI
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BLAZE WHARTON
Administrative Assistant

February 24, 1993

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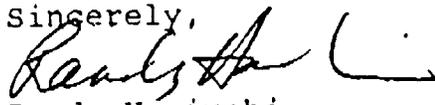
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Sincerely,


Randy Horiuchi



5 (WATER SERVICE CHARGES)

6 1992

7 GENERAL SESSION

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9 H. B. No. 323

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22 (1) [~~They~~] A municipal legislative body may:

23 (a) construct, maintain, and operate:

24 (i) waterworks[~~;~~];

25 (ii) sewer collection[~~;~~-sewer] or treatment systems[~~;~~];

26 (iii) gas works[~~;~~];

27 (iv) electric light works[~~;~~];

28 (v) telephone lines; or

29 (vi) public transportation systems[~~;~~-or];

1 (b) authorize the construction, maintenance, and operation of the
2 [same] facilities listed in Subsection (a) by others~~[,]~~; or

3 (c) purchase or lease ~~[such-works-or-systems]~~ the facilities listed
4 in Subsection (a) from any person or corporation~~[,--and-they]~~.

5 (2) (a) A municipal legislative body may sell and deliver the
6 surplus product or service capacity of any ~~[such-works]~~ facility listed
7 in Subsection (a), not required by the city or town or its inhabitants,
8 to others beyond the limits of the city or town.

9 (b) (i) If a city or town provides retail water service to customers
10 located outside the city's or town's boundaries, charges for that service
11 may not exceed the cost of providing the service.

12 (ii) Costs which may be recovered by the water service charges
13 include costs of:

14 (A) acquiring water or water rights;

15 (B) development;

16 (C) transmission and distribution;

17 (D) operation and maintenance; and

18 (E) repair and replacement.

19 [~~2~~] (3) (a) If any payment on a contract with a private person,
20 firm, or corporation to construct ~~[water-works;--sewer--collection;--sewer~~
21 ~~treatment--systems;--gas-works;--electric-light-works;--telephone-lines;--or~~
22 ~~public-transportation-systems]~~ any facility listed in Subsection (1)(a)
23 is retained or withheld, it shall be placed in an interest bearing
24 account ~~[and-the]~~.

1 (b) The interest shall accrue for the benefit of the contractor and
2 subcontractors to be paid after the project is completed and accepted by
3 the [~~board-of-commissioners-or-city-council~~] legislative body of the city
4 or town. [~~it-is-the-responsibility-of-the~~]

5 (c) The contractor [~~to~~] shall ensure that any interest accrued on
6 the retainage is distributed by the contractor to subcontractors on a pro
7 rata basis.

HOUSE FLOOR AMENDMENT

February 18, 1992

Representative _____ proposes the following amendment to
SUBSTITUTE H. B. 323, WATER SERVICE CHARGES:

1. Page 2, Line 11: After "service" insert ", as determined in accordance with this subsection"

and after line 11 insert:

"(ii) The cost of providing water service shall be the average cost of providing water service to:

(A) all customers served by the city or town; or

(B) all customers served by the city or town within a certain class of service, such as residential or industrial."

Re-number accordingly

(PUBLIC UTILITIES REVIEW OF WATER RATES)

1993

GENERAL SESSION

S. B. No. 69

By Scott N. Howell

AN ACT RELATING TO PUBLIC UTILITIES; EXTENDING THE PUBLIC SERVICE COMMISSION'S JURISDICTION TO PUBLIC ENTITIES THAT PROVIDE RETAIL WATER SERVICE TO CUSTOMERS OUTSIDE THEIR BOUNDARIES; AND REQUIRING COMMISSION APPROVAL FOR CERTAIN MERGERS AND ACQUISITIONS.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

- 10-8-14, AS LAST AMENDED BY CHAPTER 60, LAWS OF UTAH 1983
- 17A-3-914, AS LAST AMENDED BY CHAPTER 5, LAWS OF UTAH 1991
- 54-2-1, AS LAST AMENDED BY CHAPTER 227, LAWS OF UTAH 1992
- 54-4-28, UTAH CODE ANNOTATED 1953
- 54-4-30, UTAH CODE ANNOTATED 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 10-8-14, Utah Code Annotated 1953, as last amended by Chapter 60, Laws of Utah 1983, is amended to read:

10-8-14. Water, sewer, gas, electricity, telephone, and public transportation -- Service beyond city limits. -- Retainage escrow.

(1) [They] A municipal legislative body may:

(a) construct, maintain, and operate:

(i) waterworks[?];



1 is retained or withheld, it shall be placed in an interest-bearing
 2 account ~~[and-the]~~.

3 (b) The interest shall accrue for the benefit of the contractor and
 4 subcontractors to be paid after the project is completed and accepted by
 5 the ~~[board-of-commissioners-or-city-council]~~ legislative body of the city
 6 or town. ~~[It-is-the-responsibility-of-the]~~

7 (c) The contractor ~~[to]~~ shall ensure that any interest accrued on
 8 the retainage is distributed by the contractor to subcontractors on a pro
 9 rata basis.

10 Section 2. Section 17A-3-914, Utah Code Annotated 1953, as last
 11 amended by Chapter 5, Laws of Utah 1991, is amended to read:

12 17A-3-914. Supplemental to other laws -- Nonapplicability of other
 13 laws -- Validation of existing building authorities.

14 (1) This part is supplemental to ~~[all-existing-laws]~~ any law
 15 relating to the acquisition, use, maintenance, management, or operation
 16 of projects by public bodies.

17 (2) ~~[It-shall-not-be-necessary-for-a]~~ A public body or ~~[a]~~ building
 18 authority ~~[to-comply-with-the-provisions-of-other-laws]~~ is exempt from
 19 any law concerning the acquisition, construction, use, and maintenance of
 20 projects, including ~~[, -but-not-limited-to,]~~ public bidding laws and the
 21 Utah Procurement Code, ~~[where]~~ if the projects are acquired, expanded, or
 22 improved under this part.

23 (3) (a) ~~[No]~~ Except as provided in Subsection (b), no board,
 24 commission, or agency of the state, including the ~~[Utah]~~ Public Service

- 1 (ii) sewer collection~~[; sewer]~~ or treatment systems~~[;]~~;
- 2 (iii) gas works~~[;]~~;
- 3 (iv) electric light works~~[;]~~;
- 4 (v) telephone lines; or
- 5 (vi) public transportation systems~~[; or]~~;

6 (b) authorize the construction, maintenance, and operation of the
 7 ~~[same]~~ facilities listed in Subsection (a) by others~~[;]~~;

8 (c) purchase or lease ~~[such-works-or-systems]~~ the facilities listed
 9 in Subsection (a) from any person or corporation~~[; and they]~~.

10 (2) (a) A municipal legislative body may sell and deliver the
 11 surplus product or service capacity of any ~~[such-works]~~ facility listed
 12 in Subsection (a), not required by the ~~[city]~~ municipality or its
 13 inhabitants, to others beyond the corporate limits of the ~~[city]~~
 14 municipality.

15 (b) (i) If a municipality referred to in Subsection (2)(b)(ii)
 16 provides retail water service to customers outside its corporate limits,
 17 the municipality shall be considered a public utility and shall be
 18 subject to the jurisdiction of the Public Service Commission to the
 19 extent of that service.

20 (ii) Subsection (2)(b)(i) applies only to municipalities that are
 21 within counties of the first or second class.

22 ~~[2]~~ (3) (a) If any payment on a contract with a private person,
 23 firm, or corporation to construct ~~[water-works; sewer-collection; sewer~~
 24 ~~treatment-systems; gas-works; electric-light-works; telephone--lines; or~~
 25 ~~public--transportation--systems]~~ any facility listed in Subsection (1)(a)

1 Commission, shall have any jurisdiction over building authorities or
2 projects.

3 (b) (i) Any building authority referred to in Subsection (3)(b)(ii)
4 owning, controlling, or leasing any water system for public service
5 within this state is a public utility and is subject to the jurisdiction
6 of the Public Service Commission to the extent the water system owned,
7 controlled, or leased by the building authority is used to provide retail
8 water service to customers located outside the boundaries of the public
9 body that organized the building authority.

10 (ii) Subsection (3)(b)(i) applies only to building authorities that
11 are organized by a municipality within a county of the first or second
12 class.

13 (4) (a) No ordinance, resolution, or proceeding in respect to any
14 transaction authorized by this part, shall be necessary except as
15 specifically required in this part nor shall the publication of any
16 resolution, proceeding, or notice relating to any transaction authorized
17 by this part be necessary, except as required by this part.

18 (b) Any publication made under this part may be made in any
19 newspaper conforming to the terms of this part and in which legal notices
20 may be published under the laws of Utah, without regard to the
21 designation of it as the official journal or newspaper of the public
22 body.

23 (c) No resolution adopted or proceeding taken under this part shall
24 be subject to referendum petition or to an election other than as
25 permitted in this part.

1 (d) All proceedings adopted under this part may be adopted on a
 2 single reading at any legally convened meeting of the governing body or
 3 the board of trustees of the authority as appropriate.

4 (5) Any formal action or proceeding taken by the governing body of a
 5 public body or the board of trustees of an authority under the authority
 6 of this part may be taken by resolution of the governing body or the
 7 board of trustees as appropriate.

8 (6) This part [~~shall apply~~] applies to [~~all authorities~~] any
 9 authority created, [~~projects~~] project undertaken, leasing [~~contracts~~]
 10 contract executed, and [~~bonds~~] bond issued after this part takes effect.

11 (7) [~~All proceedings heretofore~~] Any proceeding taken prior to the
 12 effective date of this part by a public body in connection with the
 13 creation and operation of a public building authority [~~are hereby~~] is
 14 validated, ratified, approved, and confirmed.

15 Section 3. Section 54-2-1, Utah Code Annotated 1953, as last amended
 16 by Chapter 227, Laws of Utah 1992, is amended to read:

17 54-2-1. In general.

18 When used in this title:

19 (1) "Aerial bucket tramway corporation" includes every corporation
 20 and person, their lessees, trustees, and receivers, owning, controlling,
 21 operating, or managing any aerial bucket tramway for public service in
 22 this state, except where the aerial tramway is used only for the purpose
 23 of delivering raw material to an industrial or manufacturing plant from
 24 its customers.

1 (2) "Aircraft carrier" includes every corporation and person, their
2 lessees, trustees, and receivers, operating for public service for hire
3 engaged in intrastate transportation of persons or property. It does not
4 include air carriers operating with a certificate of convenience and
5 necessity issued by the federal government.

6 (3) "Automobile corporation" includes every corporation and person,
7 their lessees, trustees, and receivers, engaged in or transacting the
8 business of transporting passengers or freight, merchandise, or other
9 property for public service by means of automobiles or motor stages on
10 public streets, roads, or highways along established routes within this
11 state.

12 (4) "Avoided costs" means the incremental costs to an electrical
13 corporation of electric energy or capacity or both which, due to the
14 purchase of electric energy or capacity or both from small power
15 production or cogeneration facilities, the electrical corporation would
16 not have to generate itself or purchase from another electrical
17 corporation.

18 (5) "Cogeneration facility":

19 (a) means a facility which produces:

20 (i) electric energy; and

21 (ii) steam or forms of useful energy, such as heat, which are used
22 for industrial, commercial, heating, or cooling purposes; and

23 (b) is a qualifying cogeneration facility under federal law.

24 (6) "Commission" means the Public Service Commission of the state of
25 Utah.

- 1 (7) "Commissioner" means a member of the commission.
- 2 (8) "Common carrier" includes every:
- 3 (a) railroad corporation;
- 4 (b) street railroad corporation;
- 5 (c) automobile corporation;
- 6 (d) scheduled aircraft carrier corporation;
- 7 (e) aerial bucket tramway corporation;
- 8 (f) express corporation;
- 9 (g) dispatch, sleeping, dining, drawing-room, freight, refrigerator,
- 10 oil, stock, and fruit car corporation;
- 11 (h) freight line, car-loaning, car-renting, car-loading, and every
- 12 other car corporation, and person;
- 13 (i) their lessees, trustees, and receivers, operating for public
- 14 service within this state; and
- 15 (j) every corporation and person, their lessees, trustees, and
- 16 receivers, engaged in the transportation of persons or property for
- 17 public service over regular routes between points within this state.
- 18 (9) "Corporation" includes an association, and a joint stock company
- 19 having any powers or privileges not possessed by individuals or
- 20 partnerships. It does not include towns, cities, counties, conservancy
- 21 districts, improvement districts, or other governmental units created or
- 22 organized under any general or special law of this state.
- 23 (10) "Electrical corporation" includes every corporation,
- 24 cooperative association, and person, their lessees, trustees, and
- 25 receivers, owning, controlling, operating, or managing any electric

1 plant, or in any way furnishing electric power for public service or to
2 its consumers or members for domestic, commercial, or industrial use,
3 within this state, except independent energy producers, and except where
4 electricity is generated on or distributed by the producer solely for his
5 own use, or the use of his tenants, or for the use of members of an
6 association of unit owners formed under Title 57, Chapter 8, Condominium
7 Ownership Act, and not for sale to the public generally.

8 (11) "Electric plant" includes all real estate, fixtures, and
9 personal property owned, controlled, operated, or managed in connection
10 with or to facilitate the production, generation, transmission, delivery,
11 or furnishing of electricity for light, heat, or power, and all conduits,
12 ducts, or other devices, materials, apparatus, or property for
13 containing, holding, or carrying conductors used or to be used for the
14 transmission of electricity for light, heat, or power.

15 (12) "Express corporation" includes every corporation and person,
16 their lessees, trustees, and receivers, engaged in or transacting the
17 business of transporting any freight, merchandise, or other property for
18 public service on the line of any common carrier or stage or auto line
19 within this state.

20 (13) "Gas corporation" includes every corporation and person, their
21 lessees, trustees, and receivers, owning, controlling, operating, or
22 managing any gas plant for public service within this state or for the
23 selling or furnishing of natural gas to any consumer or consumers within
24 the state for domestic, commercial, or industrial use, except in the
25 situation that:

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1 (a) gas is made or produced on, and distributed by the maker or
2 producer through, private property, solely for his own use or the use of
3 his tenants and not for sale to others;

4 (b) gas is compressed on private property solely for the owner's own
5 use or the use of his employees as a motor vehicle fuel; or

6 (c) gas is compressed by a retailer of motor vehicle fuel on his
7 property solely for sale as a motor vehicle fuel.

8 (14) "Gas plant" includes all real estate, fixtures, and personal
9 property owned, controlled, operated, or managed in connection with or to
10 facilitate the production, generation, transmission, delivery, or
11 furnishing of gas, natural or manufactured, for light, heat, or power.

12 (15) "Governmental entity" means any governmental unit created or
13 organized under any general or special law of the state.

14 [~~15~~] (16) "Heat corporation" includes every corporation and
15 person, their lessees, trustees, and receivers, owning, controlling,
16 operating, or managing any heating plant for public service within this
17 state.

18 [~~16~~] (17) "Heating plant" includes all real estate, fixtures,
19 machinery, appliances, and personal property controlled, operated, or
20 managed in connection with or to facilitate the production, generation,
21 transmission, delivery, or furnishing of artificial heat. Heating plant
22 does not include either small power production facilities or cogeneration
23 facilities.

24 [~~17~~] (18) "Independent energy producer" means every electrical
25 corporation, person, corporation, or government entity, their lessees,

1 trustees, or receivers, that own, operate, control, or manage a small
 2 power production or cogeneration facility.

3 [~~18~~] (19) "Private telecommunications system" includes all
 4 facilities for the transmission of signs, signals, writing, images,
 5 sounds, messages, data, or other information of any nature by wire,
 6 radio, lightwaves, or other electromagnetic means, excluding mobile radio
 7 facilities, that are owned, controlled, operated, or managed by a
 8 corporation or person, including their lessees, trustees, receivers, or
 9 trustees appointed by any court, for the use of that corporation or
 10 person and not for the shared use with or resale to any other corporation
 11 or person on a regular basis.

12 [~~19~~] (20) (a) "Public utility" includes every common carrier, gas
 13 corporation, electrical corporation, wholesale electrical cooperative,
 14 telephone corporation, telegraph corporation, water corporation, sewerage
 15 corporation, heat corporation, independent energy producer not described
 16 in Subsection (e), and warehouseman where the service is performed for,
 17 or the commodity delivered to, the public generally, or in the case of a
 18 gas corporation or electrical corporation where the gas or electricity is
 19 sold or furnished to any member or consumers within the state for
 20 domestic, commercial, or industrial use.

21 (b) (i) If any common carrier, gas corporation, electrical
 22 corporation, telephone corporation, telegraph corporation, water
 23 corporation, sewerage corporation, heat corporation, independent energy
 24 producer not described in Subsection (e), or warehouseman performs a
 25 service for or delivers a commodity to the public; or

1 (ii) if a gas corporation, independent energy producer not described
 2 in Subsection (e), or electrical corporation sells or furnishes gas or
 3 electricity to any member or consumers within the state, for domestic,
 4 commercial, or industrial use, for which any compensation or payment is
 5 received, that common carrier, gas corporation, electrical corporation,
 6 telephone corporation, telegraph corporation, water corporation, sewerage
 7 corporation, heat corporation, independent energy producer, and
 8 warehouseman is considered to be a public utility, subject to the
 9 jurisdiction and regulation of the commission and this title.

10 (c) If any person or corporation performs any such service for or
 11 delivers any such commodity to any public utility as defined in this
 12 section, that person or corporation is considered to be a public utility
 13 and is subject to the jurisdiction and regulation of the commission and
 14 to this title, except as exempted in Subsection (e).

15 (d) Any corporation or person not engaged in business exclusively as
 16 a public utility as defined in this section is governed by this title in
 17 respect only to the public utility owned, controlled, operated, or
 18 managed by it or by him, and not in respect to any other business or
 19 pursuit.

20 (e) An independent energy producer is exempt from the jurisdiction
 21 and regulations of the commission if it meets the requirements of (i),
 22 (ii), or (iii), or any combination of these:

23 (i) the commodity or service is produced or delivered, or both, by
 24 an independent energy producer solely for the uses exempted in Subsection

25 (10) or for the use of state-owned facilities;

1 (ii) the commodity or service is sold by an independent energy
 2 producer to an electrical corporation; or

3 (iii) (A) the commodity or service delivered by the independent
 4 energy producer is delivered to an entity which controls, is controlled
 5 by, or affiliated with the independent energy producer or to a user
 6 located on real property managed by the independent energy producer; and

7 (B) the real property on which the service or commodity is used is
 8 contiguous to real property which is owned or controlled by the
 9 independent energy producer. Parcels of real property separated solely
 10 by public roads or easements for public roads shall be considered as
 11 contiguous for purposes of this Subsection [~~(19)~~] (20) (e) (iii) (B).

12 (f) If any person or corporation not engaged in business as a public
 13 utility as defined by this section is able to produce a surplus of
 14 electric energy or power, gas, or water beyond the needs of its own
 15 business and desires to sell, exchange, deliver, or otherwise dispose of
 16 the surplus to or with any public utility as defined in this section, the
 17 public utility desiring to effect a purchase or exchange of the surplus
 18 shall submit to the commission, for authorization by the commission, a
 19 proposed contract covering the purchase or exchange. The commission
 20 shall then determine, after a public hearing, whether, in the public
 21 interest it is advisable that the contract be executed and, if not
 22 adverse to the public interest, the commission shall authorize the
 23 execution of the contract. The public utility shall then have the right
 24 to purchase and receive or exchange the surplus product in accordance
 25 with the terms of the contract. The person or corporation selling or

1 exchanging the surplus product under the authorized contract is not
2 considered a public utility within the meaning of this section, nor is it
3 subject to the jurisdiction of the commission.

4 (g) Any person or corporation defined as an electrical corporation
5 or public utility under this section may continue to serve its existing
6 customers subject to any order or future determination of the commission
7 in reference to the right to serve those customers.

8 (h) (i) "Public utility" does not include any person that is
9 otherwise considered a public utility under the provisions of this
10 Subsection [~~(19)~~] (20) solely because of its ownership of an interest in
11 an electric plant, cogeneration facility, or small power production
12 facility in this state if all of the following conditions are met:

13 (A) the ownership interest in the electric plant, cogeneration
14 facility, or small power production facility is leased to:

15 (I) a public utility, and that lease has been approved by the
16 commission; or

17 (II) a person or government entity that is exempt from commission
18 regulation as a public utility; or

19 (III) a combination of (I) and (II);

20 (B) the lessor of the ownership interest identified in Subsection
21 [~~(19)~~] (20)(h)(i)(A) is:

22 (I) primarily engaged in a business other than the business of a
23 public utility; or

1 (II) a person whose total equity or beneficial ownership is held
2 directly or indirectly by another person engaged in a business other than
3 the business of a public utility; and

4 (C) the rent reserved under the lease does not include any amount
5 based on or determined by revenues or income of the lessee.

6 (ii) Any person that is exempt from classification as a public
7 utility under Subsection [~~19~~] (20)(h)(i) shall continue to be so exempt
8 from classification following termination of the lessee's right to
9 possession or use of the electric plant for so long as the former lessor
10 does not operate the electric plant or sell electricity from the electric
11 plant. If the former lessor operates the electric plant or sells
12 electricity, the former lessor shall continue to be so exempt for a
13 period of 90 days following termination, or for a longer period that is
14 ordered by the commission. This period may not exceed one year. No
15 change in rates that would otherwise require commission approval may be
16 effective during the 90-day or extended period without commission
17 approval.

18 (i) "Public utility" does not include any person that provides
19 financing for, but has no ownership interest in an electric plant, small
20 power production facility, or cogeneration facility. In the event of a
21 foreclosure in which an ownership interest in an electric plant, small
22 power production facility, or cogeneration facility is transferred to a
23 third-party financier of an electric plant, small power production
24 facility, or cogeneration facility, then that third-party financier is
25 exempt from classification as a public utility for 90 days following the

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1 foreclosure, or for a longer period that is ordered by the commission.
 2 This period may not exceed one year.

3 (j) (i) The distribution or transportation of natural gas for use as
 4 a motor vehicle fuel does not cause the distributor or transporter to be
 5 a "public utility," unless the commission, after notice and a public
 6 hearing, determines by rule that it is in the public interest to regulate
 7 the distributors or transporters, but the retail sale alone of compressed
 8 natural gas as a motor vehicle fuel may not cause the seller to be a
 9 "public utility."

10 (ii) In determining whether it is in the public interest to regulate
 11 the distributors or transporters, the commission shall consider, among
 12 other things, the impact of the regulation on the availability and price
 13 of natural gas for use as a motor fuel.

14 [~~(20)~~] (21) "Purchasing utility" means any electrical corporation
 15 that is required to purchase electricity from small power production or
 16 cogeneration facilities pursuant to the Public Utility Regulatory
 17 Policies Act, 16 U.S.C. Section 824a-3.

18 [~~(21)~~] (22) "Railroad" includes every commercial, interurban, and
 19 other railway, other than a street railway, and each branch or extension
 20 of a railway, by any power operated, together with all tracks, bridges,
 21 trestles, rights-of-way, subways, tunnels, stations, depots, union
 22 depots, yards, grounds, terminals, terminal facilities, structures, and
 23 equipment, and all other real estate, fixtures, and personal property of
 24 every kind used in connection with a railway owned, controlled, operated,

1 or managed for public service in the transportation of persons or
2 property.

3 [~~22~~] (23) "Railroad corporation" includes every corporation and
4 person, their lessees, trustees, and receivers, owning, controlling,
5 operating, or managing any railroad for public service within this state.

6 [~~23~~] (24) "Sewerage corporation" includes every corporation and
7 person, their lessees, trustees, and receivers, owning, controlling,
8 operating, or managing any sewerage system for public service within this
9 state. It does not include private sewerage companies engaged in
10 disposing of sewage only for their stockholders, or towns, cities,
11 counties, conservancy districts, improvement districts, or other
12 governmental units created or organized under any general or special law
13 of this state.

14 [~~24~~] (25) "Small power production facility" means a facility
15 which:

16 (a) produces electric energy solely by the use, as a primary energy
17 source, of biomass, waste, renewable resources, geothermal resources, or
18 any combination of them;

19 (b) has a power production capacity which, together with any other
20 facilities located at the same site, is not greater than 80 megawatts;
21 and

22 (c) is a qualifying small power production facility under federal
23 law.

24 [~~25~~] (26) "Street railroad" includes every railway, and each
25 branch or extension of a railway, by any power operated, being mainly

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1 upon, along, above, or below any street, avenue, road, highway, bridge,
2 or public place within any city or town, together with all real estate,
3 fixtures, and personal property of every kind used in connection with a
4 railway, owned, controlled, operated, or managed for public service in
5 the transportation of persons or property. It does not include a railway
6 constituting or used as a part of a commercial or interurban railway.

7 [~~26~~] (27) "Street railroad corporation" includes every corporation
8 and person, their lessees, trustees, and receivers, owning, controlling,
9 operating, or managing any street railroad for public service within this
10 state.

11 [~~27~~] (28) "Telegraph corporation" includes every corporation and
12 person, their lessees, trustees, and receivers, owning, controlling,
13 operating, or managing any telegraph line for public service within this
14 state.

15 [~~28~~] (29) "Telegraph line" includes all conduits, ducts, poles,
16 wires, cables, instruments, and appliances, and all other real estate,
17 fixtures, and personal property owned, controlled, operated, or managed
18 in connection with or to facilitate communication by telegraph, whether
19 that communication be had with or without the use of transmission wires.

20 [~~29~~] (30) "Telephone corporation" includes every corporation and
21 person, their lessees, trustees, and receivers, owning, controlling,
22 operating, or managing any telephone line for public service within this
23 state, provided, however, that all corporations, partnerships, or firms
24 providing intrastate cellular telephone service shall cease to be
25 "telephone corporations" nine months after both the wire-line and the

1 nonwire-line cellular service providers have been issued covering
 2 licenses by the Federal Communications Commission. It does not include
 3 any person which provides, on a resale basis, any telephone or
 4 telecommunication service which is purchased from a telephone
 5 corporation.

6 [~~30~~] (31) "Telephone line" includes all conduits, ducts, poles,
 7 wires, cables, instruments, and appliances, and all other real estate,
 8 fixtures, and personal property owned, controlled, operated, or managed
 9 in connection with or to facilitate communication by telephone whether
 10 that communication is had with or without the use of transmission wires.

11 [~~31~~] (32) "Transportation of persons" includes every service in
 12 connection with or incidental to the safety, comfort, or convenience of
 13 the person transported, and the receipt, carriage, and delivery of that
 14 person and his baggage.

15 [~~32~~] (33) "Transportation of property" includes every service in
 16 connection with or incidental to the transportation of property,
 17 including in particular its receipt, delivery, elevation, transfer,
 18 switching, carriage, ventilation, refrigeration, icing, dunnage, storage,
 19 and hauling, and the transmission of credit by express companies.

20 [~~33~~] (34) "Warehouseman" includes every corporation and person,
 21 their lessees, trustees, and receivers, owning, controlling, operating,
 22 or managing any grain elevator or any building or structure in which
 23 property is regularly stored for public use within this state, in
 24 connection with or to facilitate the transportation of property by a
 25 common carrier or the loading or unloading of that property.

1 ~~{34}~~ (35) (a) "Water corporation" includes:

2 (i) every corporation and person, their lessees, trustees, and
3 receivers, owning, controlling, operating, or managing any water system
4 for public service within this state~~{---~~~~te~~; and

5 (ii) any municipality or other governmental entity, its lessees,
6 trustees, and receivers, owning, controlling, operating, or managing any
7 water system for public service within this state, if the municipality or
8 governmental entity:

9 (A) provides retail water service to customers outside the
10 municipality's or entity's boundaries; and

11 (B) is within a county of the first or second class.

12 (b) A water corporation as defined in Subsection (35)(a)(ii) is
13 subject to the jurisdiction of the commission only to the extent the
14 municipality or other governmental entity provides retail water service
15 to customers outside the municipality's or entity's boundaries.

16 (c) "Water corporation" does not include any private irrigation
17 [companies] company engaged in distributing water only to [their] its
18 stockholders[;--or--towns;--cities;--counties;--water-conservancy-districts;
19 improvement-districts;--or--other-governmental-units-created--or--organized
20 under-any-general-or-special-law-of-this-state].

21 ~~{35}~~ (36) "Water system" includes all reservoirs, tunnels, shafts,
22 dams, dikes, headgates, pipes, flumes, canals, structures, and
23 appliances, and all other real estate, fixtures, and personal property
24 owned, controlled, operated, or managed in connection with or to
25 facilitate the diversion, development, storage, supply, distribution,

1 Section 5. Section 54-4-30, Utah Code Annotated 1953, Utah Code
2 Annotated 1953, is amended to read:

3 54-4-30. Acquiring properties of like utility only on consent of
4 commission.

5 [Hereafter-no] A public utility [~~shall~~], municipality, or other
6 governmental entity may not acquire by lease, purchase, or otherwise the
7 plants, facilities, equipment, or properties of [~~any--other~~] a public
8 utility engaged in the same general line of business in this state,
9 without the consent and approval of the Public [~~utilities~~] Service
10 Commission. [~~Such--consent~~] Consent shall be given only after an
11 investigation and hearing and finding that [~~said~~] the purchase, lease, or
12 acquisition of [~~said~~] the plants, equipment, facilities [~~and~~] , or
13 properties [~~will-be~~] is in the public interest.

January 28, 1993

MANAGEMENT AND FISCAL ANALYSIS

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FUND	REVENUE		APPROPRIATION	
	FY 1994	FY 1995	FY 1994	FY 1995
General Fund			\$19,000	\$19,000
Commerce Service Fund			\$38,000	\$38,000
Total			\$57,000	\$57,000

This bill puts additional public entities under the jurisdiction of the Public Service Commission. It is estimated that additional hearings and audits will result in additional costs of \$57,000 for 1.5 FTE's, funded from the General Fund (\$19,000) and the Commerce Service Fund (\$38,000). The full amount can be applied to the Public Utility Regulatory Fee.

OFFICE OF THE LEGISLATIVE FISCAL ANALYST

