

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission,) Application No. W-014/PI-221
on its own motion, regarding the)
regulation of Green Acres MHP,)
LLC.) ORDER
)
)
) Entered: December 18, 2018

BY THE COMMISSION:

On September 25, 2018, The Nebraska Public Service Commission (Commission), on its own motion, opened the present docket to determine whether Green Acres MHP, LLC (Respondent) is a private water company subject to Commission regulation, and, if so, to determine what steps Respondent would need to take to come into compliance with Commission requirements.

Pursuant to the Water Service Regulation Act, Neb. Rev. Stat. §§ 75-1001 - 1012, as well as 291 Neb. Admin. Code, Chapter 6, private water companies' rates and charges are regulated by the Commission. The Commission is authorized to access all books, records, and other information of a private water company which may be necessary for the Commission to exercise its regulatory authority. Neb. Rev. Stat. § 75-1004.

The Commission's September 25th Order asked Respondent to address eight questions relating to the question of whether Respondent is a private water company. In that order, the Commission requested the Respondent submit written responses to the questions, along with supporting documentation. Respondent filed with the Commission a set of written responses and exhibits on October 17, 2018.

A hearing was scheduled for October 30, 2018, in the Commission Hearing Room in Lincoln, Nebraska. On that day, prior to the hearing, George and Laurie Dunlop ("the Dunlops"), through counsel, moved for formal intervention in the proceeding, on the basis that they have in the past received water from Respondent and have been billed for that water by Respondent. The Dunlops were granted formal intervention and were allowed to participate at hearing.

EVIDENCE

All parties to the above-captioned docket had an opportunity to review the order opening the docket and the filings of the parties, and to conduct discovery.

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On October 30, 2018, a hearing was held in the above-captioned matter. David Hartmann appeared on behalf of Respondent. Michael Wiseman appeared on behalf of the Dunlops. Sallie Dietrich appeared on behalf of Commission staff. Commission exhibits numbered 1 through 16 were offered and received into evidence. Respondent's exhibit 17 and late-filed exhibit 18 were offered and received.

The Respondent, through counsel, presented a statement regarding its position that based upon the statutory language contained in Neb. Rev. Stat. § 75-1002(2), Respondent should not be regulated as a private water company by the Commission. The Commission and staff engaged in discussion on this position. Following that discussion, the Respondent presented the oral testimony of Brett Burris, manager of Green Acres MHP, LLC.

Mr. Burris testified that he is the manager of an entity named B2CK, LLC, which is the parent company of Respondent, and which manages three mobile home parks, a corporate office, and one apartment complex. Of these properties, only Respondent is located in Nebraska.

Mr. Burris further testified that in his role managing B2CK, LLC, he purchased Respondent in 2007. Prior to this purchase, the property had been sold two or three times since its founding by William Oliver and Lois Oliver, the original owners of the property. At the time Mr. Burris purchased Green Acres MHP, fourteen residential lots, collectively referred to as "Whispering Pines," were already in existence.

Mr. Burris further testified that the Whispering Pines lots are not owned by Respondent. Twelve of the fourteen lots are occupied by residents living in single family manufactured homes, and the remaining two lots are unoccupied. Mr. Burris testified that Respondent serves sixty-five mobile home lots with water, as well as the twelve occupied Whispering Pines lots. In total, Respondent provides water to seventy-seven (77) homes.

Mr. Burris further testified that Respondent owns two wells, which he referred to as the North Well and the South Well. The North Well originally served all of the Whispering Pines homes, as well as five mobile homes. The South Well originally served only mobile homes. In July of 2018, pursuant to a Nebraska Department of Environmental Quality (NDEQ) order, Respondent installed a water treatment system which collects water from both wells and distributes the water to all seventy-seven properties, including the Whispering Pines lots. The costs for installing this water system were covered

through a loan to Respondent, and have not been recouped from customers at the time of hearing.

Mr. Burris further testified that the rates and charges for water service vary among the twelve Whispering Pines subscribers. Mr. Burris explained that this variation arises from the individual contracts reached with each subscriber, and that some of the contracts were renegotiated recently.

At the conclusion of Mr. Burris' testimony, no further witnesses were called. The hearing was then adjourned. Following the hearing, Respondent submitted to the Commission late-filed Exhibit 18, consisting of the Respondent's Permits to Operate its two wells, which was accepted and made part of the record.

FINDINGS AND OPINION

Respondent is a privately owned entity which has been providing water to approximately twelve private residences within the State of Nebraska, in the city of Nickerson, Nebraska. Respondent has been providing water to these residences since the year 1998, or thereabouts. The Joint Use and Maintenance Agreement signed on June 12, 1998, shows that Respondent was originally formed for purposes other than providing water.¹ Later, in September of 2007, a Certificate of Formation for Green Acres MHP, LLC was filed with the Nebraska Secretary of State. This document states that Respondent's purpose of organization was "owning and operating the property commonly known as 'Green Acres MHC.'"²

Under Neb. Rev. Stat. § 75-1002(2), a private water company is defined as "a privately owned entity organized for the purpose of furnishing water for domestic use or sewer services or both to the public, cities, villages, special districts, or other political subdivisions."

The Commission hereby finds that the plain language of this statute requires that the entity in question be "organized for the purpose of furnishing water." In the present docket, the Respondent was not organized for this purpose, either at its founding in 1998 or when it was purchased by B2CK, LLC, in 2007 and the entity of Green Acres MHP, LLC was formed. The primary purpose for Respondent's formation in each instance was to manage a mobile home park. As such, the Commission finds that Respondent is not a private water company as defined by the Water Service Regulation Act, and the Commission therefore cannot exercise jurisdiction over Respondent.

¹ Exhibit 6.

² Exhibit 17.

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The Commission recognizes that this result does not provide recourse to Respondent's residential customers who may object to rate increases set by Respondent. However, the remedy for these residents does not lie with the Commission. The Commission is guided in this case by language from a recent Nebraska Supreme Court opinion, holding that the plain language of a rule must guide the Commission's application of the rule.³ Therefore, the Commission must consider the language of the Water Service Regulation Act which requires that an entity be "organized for the purpose of furnishing water" in order to be considered a private water company. Given this statutory requirement, the Commission finds that the evidence presented does not support a finding that Respondent is a private water company.


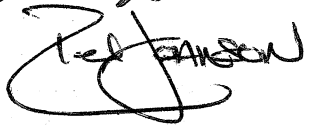
Based on the evidence presented, the Commission finds that Respondent has met its statutory requirements under the Water Service Regulation Act. Absent a statutory change to the definition of a private water company under the Water Service Regulation Act, or other circumstances as may arise, the Commission will not exercise regulatory authority over Respondent or require it to file annual reports as a private water company. Because of this, the Commission further finds that this investigation has been completed and the associated dockets can and should be closed.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that this investigation be considered closed, and that Green Acres MHP, LLC, be allowed to continue furnishing water to customers in accordance with Nebraska statutes and regulations.


ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 18th day of December, 2018.

COMMISSIONERS CONCURRING:

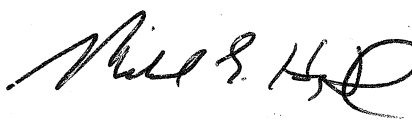



//s//Frank E. Landis
//s//Mary Ridder

NEBRASKA PUBLIC SERVICE COMMISSION


Chair

ATTEST:


Executive Director

³ Golden Plains Servs. Transp. v. Neb. Pub. Serv. Comm'n, 297 Neb. 105, 109 (2017).

D I S S E N T

By Commissioner Rhoades:

It is my view that the Commission is, by choosing not to regulate Green Acres as a private water company, failing to fulfill its statutory duty to oversee the provision of water by private entities.

The evidence presented in this docket shows, in no uncertain terms, that Green Acres is a private entity that is engaged in the business of furnishing water to private citizens. This is an activity that, per the Legislature's allocation of responsibilities in the Water Service Regulation Act, should be overseen by the Commission. The Water Service Regulation Act was passed in order to prevent private water companies from unfairly charging customers for the provision of an essential utility. Choosing not to regulate Green Acres is contrary to the intent of the Legislature, and will be to the detriment of Green Acres' residential customers.

The Commission is focused on language in the Act that they read to require a company to be founded "for the purpose of" providing water. This is not the correct reading of the statute. The moment Green Acres began to furnish water to customers who do not fall in one of the statutory exceptions to regulation, Green Acres became a private water company. The intent of the Water Service Regulation Act was to regulate this particular activity in which Respondent has engaged, and consequently, Respondent should be subject to the jurisdiction of the Commission.

Even if this were not the case, the effect of the Respondent's reorganization into a new legal entity after it had already begun furnishing water to customers cannot be ignored. The evidence presented shows that Respondent was purchased and subsequently reorganized into the entity known as Green Acres MHP, LLC in 2007. Because Green Acres had already begun furnishing water to residential customers prior to the reorganization, it cannot be said that the entity of Green Acres MHP, LLC was not organized for the purpose of providing water. If Green Acres did not wish to act as a private water company, it had the opportunity at the time the LLC was formed to stop doing so. However, this is not what took place. Green Acres chose instead to provide water to residential customers, which is clearly within the purview of the Water Service Regulation Act.

As a result of Green Acres' actions in providing water to residential customers, and by creating a new legal entity which


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furnishes water to customers, Green Acres falls under the statutory definition of a private water company. I therefore conclude that Green Acres MHP, LLC should be regulated by the Commission.

Accordingly, I dissent.



Commissioner Crystal Rhoades