BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UW 169

In the Matter of	)	
	)	**SUNRIVER OWNERS ASSOCIATION'S**
SUNRIVER WATER, LLC	)	**REPLY MEMORANDUM IN SUPPORT**
	)	**OF MOTION TO COMPEL**
	)	**PRODUCTION OF DOCUMENTS AND**
	)	**INFORMATION**

Sunriver Water's response misses or glides over the real issues before the Commission on SROA's motion to compel.[1]

First, ORCP 36 B(1), which applies via OAR 860-001-0000(1), provides that SROA has a right to "inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party." "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (OAR 860-001-0520(4) provides the same thing—that "[a] party may examine a deponent on any matter not privileged that appears reasonably calculated to lead to the discovery of relevant evidence.").

It is certainly correct that OAR 860-001-0500 provides that "[d]iscovery must be commensurate with the needs of the case, the resources available to the parties, and the

[1] *Cf. Clemons v. United States*, 408 F2d 1230, 1242 (DC Cir 1968)("the positiveness of the witness…is to be weighed warily and in the realization that the most assertive witness is not invariably the most reliable one.").

importance of the issues to which the discovery relates," and that "[d]iscovery that is unreasonably cumulative, duplicative, burdensome, or overly broad is not allowed," but first and foremost those limitations are designed to prevent one party from imposing the burden on another party of producing, say, tens of thousands of emails or other documents having little or no relevance to the issues in the proceeding. Those limitations have no application where the documents sought are relevant or appear reasonably calculated to lead to the discovery of relevant evidence. Those limitations have no application where the documents sought consist of a small number of existing, easily producible documents.

It is notable that nowhere does Sunriver Water claim the documents do not exist or offer any real detail about any actual burden to produce the documents. In fact, Request No. 6 was specifically designed to make sure it was not burdensome. The request asks for "books of account" and that which amount to a "report." It is apparent that all, or virtually all, the information sought can be found in Sunriver Environmental's balance sheet, income statement, plant account information, and depreciation schedules. All of this information can be easily retrieved from Sunriver Environmental's general ledger. SROA made it clear in its request that it is not asking for information that does not exist: "The reports should be in the same or similar level of detail as found in Sunriver Water's Annual [Results] of Operations Report to the Oregon Public Utility Commission, or as close to that level of detail as Sunriver Environmental has."

The only real issue before the Commission, then, is whether the documents sought are relevant or appear reasonably calculated to lead to the discovery of relevant evidence.

Second, the fact is and remains that the "charges" for water "service rendered" are required to be "reasonable and just," and "every unjust or unreasonable charge for such service is prohibited." ORS 757.020. The fact is and remains that the Commission is charged by the Legislative Assembly with the power and the responsibility to "represent the customers" of water utilities, to "make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices," and to "determine" whether new or increased rates or schedules" are "fair, just and reasonable." ORS 757.040(1); 757.210(1).

That, of course, means the Commission must examine and review the reasonableness of the components that go into water rates, including operating expenses, rate base, and rate of return. It also means the Commission must satisfy itself that a utility is not avoiding such examination or review for reasonableness by having an affiliated unregulated utility, here a wastewater utility, collect a water-related operating expense instead.

After all, over and over again the Oregon Public Utility Laws restrict utilities from acting "indirectly" just as much as they are restricted from acting "directly." *E.g.*, ORS 757.120(2)("Every public utility engaged directly or indirectly in any other business than that of a public utility shall, if required by the commission, keep and render separately to the commission, in like manner and form, the accounts of all such other business, in which

case all the provisions of this chapter shall apply with like force and effect to the accounts and records of such other business."); ORS 757.355(1)("a public utility may not, directly or indirectly, by any device, charge, demand, collect or receive from any customer rates that include the costs of construction, building, installation or real or personal property not presently used for providing utility service to the customer."); ORS 757.455(1)("When any public utility doing business in this state enters into any contract to make any payment, directly or indirectly, to any person or corporation having an affiliated interest…").

Third, SROA has shown that until just two years ago, Sunriver Environmental was, unquestionably, paying for electric and gas utility service for Sunriver Water at their joint offices. In other words, SROA has demonstrated there is a history of Sunriver Environmental's paying Sunriver Water's costs of providing water service.

Is the practice more extensive than that? SROA does not know, but that is why the rules permit discovery of documents that "appears reasonably calculated to lead to the discovery of relevant evidence." And SROA does know that in the last several years, Sunriver Environmental's unregulated rates have gone up much more dramatically than Sunriver Water's regulated rates. Nothing Sunriver Water claims changes that. Joe Healy explained in his Declaration that the rates shown were taken right from the billings by Sunriver Water and Sunriver Environmental to SROA from 2011 to the present. (On top of that, Sunriver Water attempted to minimize the size of the rate increases by running its

figures back to 2004, and running its percentage rate changes from 2004. This has the effect of obscuring the ups-and-downs.)

It is not enough to see a list of expenses. Not seeing the magnitude of the expenses may obscure what costs are being hidden in those expenses. Likewise, not seeing the relationship between revenues and expenses may obscure whether Sunriver Environmental is collecting water-related costs at all. After all, if expenses exceed revenues, it would suggest water-related costs are not being fully recovered in wastewater rates, even if they are being paid for by Sunriver Environmental.

Sunriver Water's main defense seems to be that Sunriver Water, not Sunriver Environmental is the particular Sunriver entity before the Commission, but that is no defense at all. As their PUC-approved Management Agreement shows, Sunriver Water (and Sunriver Environmental) management employees are under the common control of Sunriver Resorts. *Re Sunriver Water, LLC*, UI 378 Order No. 16-452 (OPUC 2016). It is nothing but a "fiction" that Sunriver Water does not have effective custody and control of those documents.

More important, the Oregon legislature has granted the Commission authority over businesses indirectly engaged in by water utilities, and over affiliates of water utilities. ORS 757.120(2):

> Every public utility engaged directly or indirectly in any other business than that of a public utility shall, if required by the commission, keep and render separately to the commission, in like manner and form, the accounts of all such other business, in

> which case all the provisions of this chapter shall apply with like force and effect to the accounts and records of such other business.

ORS 757.495(1):

> (1) When any public utility…enters into any contract to make any payment, directly or indirectly, to any person or corporation having an affiliated interest, for service…., the contract shall be filed with the Public Utility Commission….
>
> (2) When any public utility…enters into any contract, oral or written, with any person or corporation having an affiliated interest relating to the construction, operation, maintenance, leasing or use of the property…the contract shall be filed with the commission….

To finally dispose of the issue, even if the legislature had not so provided, the Commission has the authority to issue subpoenas. ORS 756.543(1) ("The Public Utility Commission shall issue subpoenas to any party to a proceeding before the commission upon request and proper showing of the general relevance and reasonable scope of the evidence sought."). If somehow Sunriver Water were found powerless to produce the documents sought, a subpoena to Sunriver Environmental or Sunriver Resorts should follow.

The documents sought are directly relevant to the determination whether rates are just and reasonable, a matter on which Sunriver Water has the burden of proof; and they are directly relevant to the arguments SROA intends to make on those matters. The

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information sought appears reasonably calculated to lead to the discovery of relevant and admissible evidence. The motion should be allowed.

DATED this 7th day of July, 2017.

ESLER, STEPHENS & BUCKLEY

By: /s/ John W. Stephens
John W. Stephens

Of Attorneys for Sunriver Owners Association