



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265
ISSUED: July 28, 2004

IN REPLY PLEASE
REFER TO OUR FILE
A-210117
A-230101

HIDDEN VALLEY UTILITY SERVICES LP
1 CRAIGHEAD DRIVE SUITE 300
HIDDEN VALLEY PA 15502

Application of Hidden Valley Utility Services, L.P.,
for approval to begin to offer, render, furnish or
supply water and wastewater service to the public
in Hidden Valley, Pennsylvania.

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge John H. Corbett, Jr. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions **MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2ND FLOOR KEYSTONE BUILDING, NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265**, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

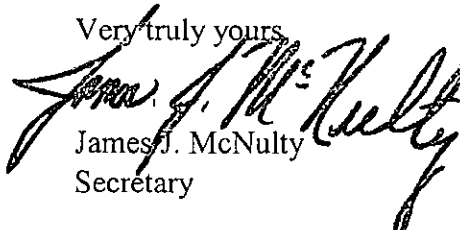
If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

**DOCUMENT
FOLDER**

Encls.
Certified Mail
Receipt Requested
JEH

Very truly yours,

James J. McNulty
Secretary

See Attached Listing For Additional Parties of Record

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Hidden Valley Utility Services, L.P., :
for approval to begin to offer, render, furnish or : A-210117 & A-230101
supply water and wastewater service to the public :
in Hidden Valley, Pennsylvania. :

INITIAL DECISION

Before
John H. Corbett, Jr.
Administrative Law Judge

HISTORY OF THE PROCEEDING

This decision grants the motion of Hidden Valley Utility Services, L.P. (“Applicant” or “HVUS”) to dismiss the protest/complaint of Edwin C. Miller, *et al.*,¹ from this application proceeding. Miller designates the complaint as a “protest” at the docket numbers for this proceeding, but names Hidden Valley Resort, L.P. (“HVR”) as the Respondent.

On February 12, 2004, HVUS filed two applications with this Commission seeking approval to begin to offer, render, furnish or supply water and wastewater service to the public for compensation in Hidden Valley, Pennsylvania. On March 4, 2004, Angela M. and H. David Boyter petitioned to intervene in this proceeding alleging they are homeowners residing in the proposed service territory of HVUS. They assert the present applications were filed as the direct result of an agreement to settle a complaint that they brought at Docket No. C-20028823 against HVR. Further, the Boyters aver HVR has provided water and wastewater service to about 1000 residents of the Hidden Valley community using the Hidden Valley Foundation as a billing agent since approximately 1985. The Boyters maintain they have

¹ In his answer to the motion, Miller names the other Complainants as: Jack Mautino, Jr., Douglas Brown, John Fiesta, Richard Brown and Edward Mackenzie.

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been aggrieved by the excessive rates and substandard services provided by HVR. They claim the present applications fail to redress any of these shortcomings. No response has been filed to their petition to intervene.

On March 4, 2004, Edwin C. Miller, *et al.*, filed a protest/complaint, reiterating the information that the Boyters provided. Miller concludes that since HVR was operating as a *de facto* public utility without obtaining a certificate of public convenience, Miller requests that HVR refund the monies collected for its services. The Commission's Office of Trial Staff ("OTS") filed a protest to the applications on March 18, 2004. The Office of Consumer Advocate ("OCA") followed with its intervention in this proceeding on March 19, 2004.

On June 22, 2004, HVUS answered the protest/complaint with new matter. HVUS also moved to dismiss the protest/complaint, noting it alleges wrongdoing on the part of HVR, which is not a party to this proceeding. HVUS is the Applicant here. HVR is an entirely separate entity. Therefore, any conduct allegedly performed by HVR, a non-party to this proceeding, raises issues outside the scope of this case. Since Miller fails to allege any violation by HVUS of any law, regulation or order that this Commission has jurisdiction to administer or regulate, 66 Pa. C.S. §701 and 52 Pa. Code §5.22(a)(4), HVUS argues the protest/complaint fails to state any claim for which the Commission can grant relief in this case.

On or about July 1, 2004, Miller answered the motion asserting HVR and HVUS "are one and the same for the purpose of this complaint." Miller reiterates that HVR was acting as a *de facto* public utility. The operators of HVR merely changed the company name to HVUS, when applying for these certificates of public convenience. Further, Miller and the five other named Complainants are customers of the existing water company.

DISCUSSION

Section 701 of the Public Utility Code, 66 Pa. C.S. §701, grants any person "having an interest in the subject matter" the right to file a complaint setting forth any act done or omitted to be done by a public utility in violation of any law, regulation or order, which the

Commission has jurisdiction to administer or regulate. On the other hand, the Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary motions. 52 Pa. Code §§5.101-103.

A preliminary motion to dismiss a complaint is analogous to a preliminary objection authorized by Rule 1028 of the Pennsylvania Rules of Civil Procedure. A preliminary objection seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. Interstate Travelers Services, Inc. v. Pa. Dept. of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 407 Pa. Superior Ct. 157, 595 A.2d 172 (1991). In reviewing this record, one must accept as true all well-pleaded facts in the non-moving party's pleadings, giving the non-moving party the benefit of all reasonable inferences to be drawn from the complaint. Anderson v. Colonial Country Club, 739 A.2d 1118 (Pa. Cmwlth. 1999); and Morning Call, Inc. v. Board of Directors of Southern Lehigh School District, 642 A.2d 619 (Pa. Cmwlth. 1994). The Commission has adopted this standard. Montague v. Philadelphia Electric Company, Docket No. C-850323 (Order entered November 11, 1985).

Taking, as we must, all of the allegations in the protest/complaint as true, together with all reasonable inferences therefrom, Miller alleges HVR, not HVUS, rendered illegal service, for which he and the other Complainants claim they are entitled to a refund. HVR and HVUS, however, appear to be two separate and distinct legal entities. Miller nowhere offers to prove the contrary. In contravention of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code §3.503(a)(1), Miller names HVR, instead of the Applicant HVUS, as the entity from which a refund is due. The protest/complaint names HVR as the Respondent, but HVR is not a party to this proceeding.

Moreover, HVR appears to be an indispensable party to any determination on Miller's refund claim. *See*, 52 Pa. Code §5.101(a)(3). Miller is not claiming that HVUS ever provided illegal service. Instead, Miller alleges HVR provided public utility service without a certificate of public convenience. Accordingly, only HVR can refund any purported illegal funds.

An indispensable party is one whose rights are so connected with the claims of the litigants that no relief can be granted without impairing or infringing upon those rights. The failure to join an indispensable party deprives a court of subject matter jurisdiction and renders null any subsequent judgment. An issue concerning the absence of an indispensable party may be raised at any time and may also be raised *sua sponte*. Church of Lord Jesus Christ of the Apostolic Faith, Inc. v. Shelton, 740 A.2d 751 (Pa. Cmwlth. 1999).

Obviously, an order cannot be entered against an entity, unless it has been given an opportunity to appear and be heard. Schneider v. Pa. P.U.C., 479 A.2d 10 (Pa. Cmwlth. 1984). Despite Miller's unexplained ruse that HVR and HVUS "are one and the same for the purpose of this complaint," the protest/complaint requests a refund from an entity that is not a party to this proceeding. Thus, HVR must be given an opportunity to respond to the charges that it owes a refund to the Complainants. Even if HVR is made an indispensable party to this action and HVR is given an opportunity to respond, the protest/complaint still fails to state a claim upon which relief can be granted in this proceeding.

Importantly, Miller's refund claim has no bearing on the issues for consideration in this proceeding, *i.e.*, the need for the service and the fitness of the Applicant to provide it. Certainly, nothing in the protest/complaint can be construed to challenge HVUS' assertion that the certificates are necessary or proper for the accommodation, convenience or safety of the public. *See*, 66 Pa. C.S. §1103(a). Consequently, Miller's contention that HVR owes customers a refund for providing illegal service is irrelevant to any determination on the merits of the applications of HVUS for authority to provide public utility service.

Therefore, accepting as true all of the protest/complaint's well-pleaded, material, relevant facts and every reasonable inference deducible therefrom, it remains clear that the protest/complaint is wholly deficient in establishing any entitlement to relief from HVUS in this application proceeding. For this reason, the motion will be granted and the protest/complaint will be dismissed. If Edwin C. Miller, *et al.*, wish to pursue their refund claim, they may do so by filing a separate complaint with this Commission against Hidden Valley Resort, L.P. at a different docket number.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding, except to the extent herein discussed.

2. Hidden Valley Resort, L.P. and Hidden Valley Utility Services, L.P. appear to be separate and distinct legal entities.

3. Since the protest/complaint of Edwin C. Miller, *et al.* is against Hidden Valley Resort, L.P., Hidden Valley Resort, L.P. is an indispensable party to this proceeding.

4. The failure to join Hidden Valley Resort, L.P. as an indispensable party to this proceeding deprives the Commission of subject matter jurisdiction to decide the question of whether customers are entitled to a refund from Hidden Valley Resort, L.P. for alleged illegal service.

5. Hidden Valley Resort, L.P. has not been given an opportunity to respond to the charges in the protest/complaint of Edwin C. Miller, *et al.*

6. The contention of the protest/complaint of Edwin C. Miller, *et al.*, that Hidden Valley Resort, L.P. owes customers a refund for providing illegal service is irrelevant to any of the cognizable issues in the pending applications of Hidden Valley Utility Services, L.P. to provide public utility water and wastewater service.

7. The protest/complaint of Edwin C. Miller, *et al.*, against Hidden Valley Resort, L.P. fails to raise any claim upon which the Commission can grant relief against Hidden Valley Utility Services, L.P. in this application proceeding.

ORDER

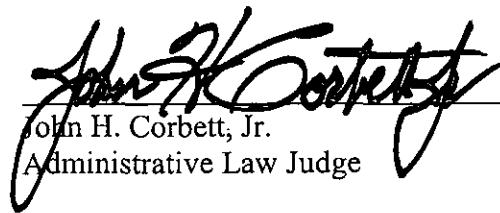
THEREFORE,

IT IS ORDERED:

1. That the motion of Hidden Valley Utility Services, L.P. to dismiss the protest/complaint of Edwin C. Miller, *et al.* at Docket Nos. A-210117 and A-230101 is hereby granted.

2. That the protest/complaint of Edwin C. Miller, *et al.* against Hidden Valley Resort, L.P. is hereby dismissed from the application proceeding of Hidden Valley Utility Services, L.P. at Docket Nos. A-210117 and A-230101.

Date: July 14, 2004



John H. Corbett, Jr.
Administrative Law Judge

HIDDEN VALLEY UTILITY SERVICES LP
✓ 1 CRAIGHEAD DRIVE SUITE 300
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✓ CHARLES DANIEL SHIELDS PROSECUTOR
OFFICE OF TRIAL STAFF
PA PUBLIC UTILITY COMMISSION
PO BOX 3265
HARRISBURG PA 17105-3265

A-210117 & A-230101
HIDDEN VALLEY UTILITY SERVICES LP

FOR APPROVAL TO OFFER, RENDER, FURNISH, OR SUPPLY WATER AND
WASTEWATER SERVICES TO THE PUBLIC IN HIDDEN VALLEY, PA

✓ HIDDEN VALLEY UTILITY SERVICES LP
1 CRAIGHEAD DRIVE SUITE 300
HIDDEN VALLEY PA 15502

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✓ OFFICE OF TRIAL STAFF
PA PUBLIC UTILITY COMMISSION
P O BOX 2365
HARRISBURG PA 17105-3265

JD 20/10

JUN 2 1 2004

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this 29th day of July, 2004,

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of Initial Decision an official Commission document entered, issued, or otherwise promulgated under date of July 28, 2004 at Docket No. A-210117 & A-230101 on behalf of:

CHRISTINE MALONI HOOVER ESQUIRE
OFFICE OF CONSUMER ADVOCATE
5TH FLOOR FORUM PLACE
555 WALNUT STREET
HARRISBURG PA 17101-1923

SECRETARY'S BUREAU

2004 JUL 29 PM 3:49

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Christine Maloni Hoover
Signature

Kindly sign and date this acceptance of service and acknowledgement of receipt, and, return the same for filing to:

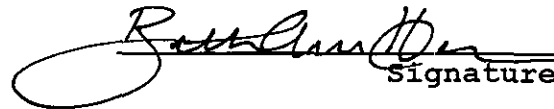
SECRETARY'S BUREAU RECORD RETENTION
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CHARLES DANIEL SHIELDS PROSECUTOR
OFFICE OF TRIAL STAFF
PA PUBLIC UTILITY COMMISSION
PO BOX 3265
HARRISBURG PA 17105-3265


Signature

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SECRETARY'S BUREAU

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Act 294

Case Identification:

A-210117, A-230101;
Application of Hidden Valley
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Initial Decision By:

ALJ John H. Corbett, Jr.

Deadline for Return to OSA:

August 11, 2004

This decision has not been reviewed by OSA.

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Commissioner

Date

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Terrance J. [Signature]

Commissioner

8/4/04

Date

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X Robert K. Bloomer

Commissioner

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Date

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*2nd
for WH*

Kim Lippincott

8/11/04

Commissioner

Date

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X *Kim Lippincott*

8/11/04

Commissioner

Date

Act 294

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Commissioner

Date

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Glen Thomas

Commissioner

8/11/04

Date

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Mendell J. Skelland

Commissioner

8/11/04

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Commissioner

Date