

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UP 384**

4 In the Matter of the Joint Application for
5 Approval of the Sale of

6 SUNRIVER WATER, LLC,

7 to

8 NW NATURAL WATER OF OREGON,
9 LLC,

10 Pursuant to ORS 757.480 and
OAR 860-036-2120.

**JOINT APPLICANTS' RESPONSE TO
SUNRIVER OWNERS ASSOCIATION'S
PETITION TO INTERVENE**

11 Pursuant to OAR 860-001-0300(5) and ALJ Power's Ruling issued December 6, 2018,
12 Sunriver Water, LLC ("SRW") and NW Natural Water of Oregon, LLC ("Oregon Water")
13 (collectively, "Joint Applicants") respectfully submit this objection to the petition to intervene of
14 the Sunriver Owners Association ("SROA") filed November 19, 2018 (the "Petition"). Joint
15 Applicants recognize that SROA is an important stakeholder and do not object to SROA's
16 intervention and participation in this proceeding; however, Joint Applicants do request that the
17 Commission limit the scope of SROA's participation. Specifically, the Commission should rule
18 that SROA may not raise any issues relating to a purported right of first refusal or a first offer
19 right to acquire the ownership interests in SRW.

20 In its Petition, the SROA indicated that the issues it plans to raise are limited to ensuring
21 that SROA "and its members receive safe and adequate service at fair and reasonable rates" and
22 "assist[ing], as appropriate, the investigation of issues raised by the Commission staff and other
23 parties in the proceeding." See Petition at ¶5. Joint Applicants do not object to SROA's
24 intervention and participation in this proceeding insofar as it relates to the issues of whether
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1 Oregon Water’s acquisition of SRW will meet the “no harm” standard and whether SROA and
2 its members will continue to receive safe and adequate service at fair and reasonable rates.

3 However, the need to limit the scope of SROA’s participation arises from a statement in
4 the Petition that SROA’s interest in this proceeding includes its belief that it has “a right of first
5 refusal or a first offer right in . . . of the ownership interests in Sunriver Water LLC” (Petition at
6 ¶4). SROA and SRW’s owner, Sunriver Resort Limited Partnership (“SRLP”), have had prior
7 communications pertaining to SROA’s assertion that it has a right of first refusal or a first offer
8 right in the ownership interests in Sunriver Water, LLC (the “ROFR”). Neither the SROA,
9 SRLP, nor SRW has been able to locate an executed ROFR, and SRLP and SRW do not believe
10 that one exists.

11 In contradiction of the fact that SROA does not assert in the Petition that it intends to
12 raise any issues in this proceeding regarding the alleged ROFR, on November 28, 2018, SROA’s
13 attorneys sent a letter to SRLP’s attorneys (attached as Exhibit A), stating that “SROA intends to
14 avail itself of discovery rights [in this docket] to locate additional information relating to the
15 right of first refusal.” Exhibit A at 2. This statement alerted Joint Applicants for the first time
16 that SROA actually does intend to raise issues concerning the alleged ROFR in this case.

17 Contractual issues relating to the existence or alleged breach of a ROFR between SROA
18 and SRW’s owner are not within the Commission’s jurisdiction. ORS 756.040(2) (“The
19 commission is vested with power and jurisdiction to supervise and regulate every public utility
20 and telecommunications utility in this state....”). The alleged ROFR would be a contract between
21 the SROA and SRW’s current owner, SRLP, successor to Lowe Development Corp. *See* Exhibit
22 A at 1. SRLP is not a public utility, is not subject to the Commission’s jurisdiction, and is not a
23 party to this proceeding. Adjudicating the existence of a disputed contract between two non-
24 utility entities is not within the subject-matter jurisdiction of the PUC. If the SROA intends to
25 pursue claims against SRLP relating to the alleged ROFR, it must do so in court and not in this
26 proceeding.

1 Nor are issues relating to an alleged ROFR relevant to the ultimate issue before the
2 Commission in this case, whether Oregon Water’s acquisition of SRW will result in “no harm”
3 to SRW’s customers. In evaluating an application to acquire a regulated utility, the Commission
4 does not compare the proposed acquisition to a theoretical acquisition by another party. *In the*
5 *Matter of the Application of Scottish Power plc and PacifiCorp for an Order Authorizing*
6 *Scottish Power plc to Exercise Substantial Influence Over the Policies and Actions of*
7 *PacifiCorp*, Docket UM 918, Order No. 99-00616 at 10 (“the proposed merger must be
8 compared with the status quo and not some hypothetical merger.”). Thus, it is not relevant to this
9 case whether SROA’s acquisition of SRW would somehow be preferable to the proposed
10 acquisition by Oregon Water.

11 At this point, it is unclear how SROA intends to raise issues concerning the alleged
12 ROFR in this proceeding, though SROA has clearly indicated that it intends to seek additional
13 information related to the alleged ROFR in discovery. In the Ruling issued December 6, 2018,
14 ALJ Powers characterized this issue as an unripened discovery issue. However, Joint Applicants
15 believe that establishing the scope of SROA’s participation in this proceeding is ripe at this time
16 since the ALJ will likely soon issue a ruling on their intervention and has the opportunity to
17 appropriately limit the scope of SROA’s participation to those issues articulated in its Petition at
18 ¶5 and to specifically exclude issues related to the ROFR.

19 For the foregoing reasons, Joint Applicants respectfully request that the Commission
20 grant SROA’s Petition, limited to the scope of the issues identified in the Petition at ¶5, and on
21 the condition that SROA may not raise any issue in this proceeding relating to its alleged ROFR
22 and not seek any discovery relating to an alleged ROFR.

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DATED: December 12, 2018

PERKINS COIE LLP

By: /s/ Lawrence H. Reichman

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Attorneys for Sunriver Water, LLC



November 28, 2018

Via Email Only

Christopher Hall
Perkins Coie
1120 NW Couch Street
Portland, OR 97209-4128

Re: Sale of Sunriver Environmental LLC and Sunriver Water LLC – Right of First Refusal

Dear Mr. Hall:

Thank you for your correspondence dated November 8, 2018 in response to the inquiry by Sunriver Owners Association (“SROA” or “Association”) into the records of your client, Sunriver Resort Limited Partnership (“SRLP”), and its affiliated entities in regards to a signed copy of a right of first refusal or first offer right granted by Lowe Development Corporation (“Lowe”) to SROA of the ownership interests in both Sunriver Environmental LLC and Sunriver Water LLC.

SROA is the governing body for Sunriver. As indicated in my earlier correspondence, an article dated January 1994 in the paper of record for the community quoted SROA’s General Manager as saying that the Association “declined to purchase Sunriver Utilities [pursuant to SROA’s right of first refusal] at th[e] time [Sunriver Resort was sold by Connecticut Mutual] and it was subsequently taken over by Lowe. Lowe has, in turn, also extended to us a similar right of first refusal should they decide to sell.” This article explains that SROA had valuable legal rights in the form of a right of first refusal and was willing to forego exercising those rights which facilitated the sale to Lowe Development, provided SROA was granted a right of first refusal by Lowe for any subsequent sale.

While SROA has been unable to locate a signed right of first refusal agreement, this newspaper account is confirmed by other records in SROA’s files that track the following chronology:

October 1992: Under the terms of a Right of First Refusal Agreement, dated August 3, 1977 by and among Sunriver Properties Oregon Inc., Sunriver Utilities Company and Sunriver Owners Association, Sunriver Properties Oregon Ltd. notified the Association of its agreement with Lowe for the sale and purchase the Sunriver Utilities among other assets and of SROA’s right of first refusal on that sale.

5539.109\ Letter to C. Hall re Right of First Refusal

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November 1992: The Association's legal counsel prepared a Board of Directors Resolution whereby SROA agreed not to exercise its right of first refusal "upon the understanding that Lowe shall enter into a Right of First Refusal Agreement with SROA granting to SROA a right of first refusal [to] purchase either the Assets or the Stock, which Agreement shall become effective upon Lowe's acquisition of the stock, and which Agreement shall be binding upon the Assets and the Stock." At the same time a draft "Right of First Refusal" appears to have been developed by the Association's legal firm.

December 15, 1992: Correspondence confirms that the Association "decided against a 'preemptive' exercise of the existing right of first refusal in reliance on Lowe's promise of a good faith proposal."

June 1993: Fax correspondence from SRLP's legal counsel to the Association of a "First Offer Agreement."

Given the foregoing evidence of robust consideration, engagement of legal counsel to assist the parties on this issue and the subsequent newspaper article, it is unlikely that the parties did not complete this transaction of granting a right of first refusal or first offer agreement to the Association.

SROA's Board owes its members a fiduciary duty to fully understand and evaluate its rights with respect to the sale. To that end, SROA has petitioned to intervene in In the Matter of: Sale of Sunriver Water LLC To NW Natural Water, Oregon Public Utilities Commission Case No. UP 384. We understand that the Commission intends to handle UP 384 as a contested case hearing. SROA intends to avail itself of discovery rights to locate additional information relating the right of first refusal.

We would like to coordinate the discovery process, and suggest that we schedule a call to confer regarding the discovery issues. My partner Josh Newton and John Stephens of Esler, Stephens & Buckley are counsel of record for SROA in UP 384 and would participate in the call.

We are generally available the remainder of this week if there is a time that works for you.

Kind regards,



ELLEN H. GROVER

EHG/njh

Enclosures

cc: Josh Newton John Stephens