Decision No. R14-0594-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14F-0129E

ANN MARIE DAMIAN AND JOHN M. TAYLOR, JR.,

COMPLAINANTS,

V.

MOUNTAIN PARKS ELECTRIC, INC.,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
PAUL C. GOMEZ
DENYING MOTION TO DISMISS
AND SETTING PRE-HEARING CONFERENCE**

Mailed Date: June 3, 2014

TABLE OF CONTENTS

I. STATEMENT

A. Background

1. On February 12, 2014, Ann Marie Damian and John M. Taylor, Jr. (Complainants) filed a Formal Complaint against Mountain Parks Electric, Inc. (Respondent). Complainants

allege that Respondent's increase of its Time of Use (TOU) rates, as well as other rates, was improper and without proper notice to its customers resulting in unfair prejudice to Complainants. Complainants also allege that the off-peak hours originally established by Respondent were improperly curbed. Finally, Complainants allege that Respondent improperly elected members to its Board of Directors without a proper quorum of co-operative members in attendance at annual meetings where the elections took place. Complainants provide no claim for specific relief in the Formal Complaint.

2. On March 4, 2014, Respondent filed its Answer to the Complaint in the form of a Response. Respondent denies any allegations of wrongdoing on its part. In addition, Respondent asserts several defenses including failure of Complainant to comply with statutory requirements regarding cooperative electric associations; the Colorado Public Utilities Commission (Commission) may not impose requirements on Respondent regarding member voting rules; the Complaint is barred by applicable statutes of limitation and "any other applicable rule of equity for failure to timely pursue these claims" Answer at 4; and, that the Complaint is barred by *res judicata* and collateral estoppel because the issues raised have been decided in a previous Commission proceeding. Respondent also seeks to recover its costs and reasonable attorney's fees.

3. On March 14, 2014, Respondent filed a Motion to Dismiss Complaint and Request for Attorney's Fees (Motion to Dismiss). Respondent states that the TOU rate at issue in this Complaint has been changed on numerous occasions since 2003; however, Complainants did not begin complaining about those changes until Complainants first filed a complaint in the Summit County District Court in 2007, which was subsequently dismissed. Complainants filed a

Complaint with the Commission in 2009 in Proceeding No. 09F-839E, which was dismissed by Decision No. R10-0616, issued June 17, 2010.

4. According to Respondent, the basis of Complainants' previous complaints was that Respondent cannot change the terms of the agreement entered into with Respondent regarding TOU rates or extending the peak hours under the TOU rate. In addition, contrary to Complainants' allegations, Respondent represents that it has provided notice of all changes to rates effective January 1, 2014 by publishing such notices in local newspapers, and making them available for inspection in Respondent's business offices in Granby and Walden, Colorado pursuant to Respondent's applicable tariff.

5. Respondent argues that the Complaint should be dismissed pursuant to the doctrine of collateral estoppel since Complainants are attempting to relitigate the exact same issues litigated and adjudicated in Proceeding No. 09F-839E pursuant to § 40-6-106(2), C.R.S., in an attempt to roll back Respondent's amendments to its TOU rate.

6. According to Respondent, Complainants argue the same issue here as they did in the previous proceeding, that as owners of an Electric Thermal Storage (ETS) heater unit and members of Respondent's TOU rate class, Complainants have been discriminated against as compared to non-TOU residential rate class members. As for the second prong of determining collateral estoppels, Respondent notes that the Complainants here are the same parties as Complainants in the previous complaint proceeding. Respondent takes the position that the decision dismissing the complaint in Proceeding No. 09F-839E was a final judgment on the merits of the proceeding, and Complainants had a full and fair opportunity to litigate the issues in that proceeding. Respondent concludes that for those reasons, this Complaint should be dismissed in conformance with the doctrine of collateral estoppel.

7. Respondent also seeks to have the Complaint dismissed because while Complainants brought the Complaint under the provisions of § 40-9.5-106(2), C.R.S., Respondent argues that Complainants failed to properly allege a violation under the provisions of that statute. Respondent argues that the claim is based solely on its unilateral change on the level of electric rates and on the change in conditions of service under the TOU rate, rather than whether Complainants are being treated differently than any other person in that rate class, which is insufficient to bring the claim within the requirements of § 40-6-106(2).

8. Finally, Respondent seeks an award of attorney's fees because Complainants have filed complaints before four different tribunals, represented by legal counsel at each prior proceeding without a grant of the relief sought. Under such circumstances, Respondent urges the Commission to award costs and attorney's fees to it for defending this action.

9. Complainants filed a response on April 8, 2014. Complainants take the position that collateral estoppel is inapplicable here because the prior dismissal of the Complaint was based on jurisdiction and not the merits of the Complaint. Complainants argue that a judgment based on procedural rather than substantive grounds is not a final judgment on the merits and does not give rise to the application of collateral estoppel.

10. Additionally, Complainants argue that Respondent has failed to meet three of the four prongs necessary to invoke the doctrine of collateral estoppel. Complainants concede that the first prong has been met since they brought the previous complaint dismissed by Decision No. R10-0616; however, because the complaint was dismissed on jurisdictional grounds, Complainants maintain that the ultimate justiciable issues as to the unreasonable, disparate treatment between the TOU rate class and the residential class of customers was not determined by the Commission. As a result, the merits of the previous claims were not finally determined by

the Commission. As a result, Complainants assert that they did not have a full and fair opportunity to litigate the issues.

11. Complainants assert an additional claim that, "[p]laintiff's [sic] – if not before – hereby levies [sic] charges that Defendants' peak hour changes were both unreasonable and prejudicially disadvantegous [sic], thus establishing jurisdiction." Complainants' response at 4. Complainants maintain Respondent changed the TOU rates in such a way as to implicate the jurisdictional elements of § 40-9.5-106. Complainants also specifically state that they were "prejudiced and disadvantaged" customers who purchased heaters by increasing kilowatt hour rates unreasonably and in a prejudicial and disadvantageous manner in comparison to non-meter-purchasing customers. Complainants compare the increase to the off-peak rate increase of one-third when compared to the peak hours, to a one-half cost ratio compared to peak hours as being a drastic, disproportionate, and therefore unreasonable increase. Additionally, Complainants assert that it was prejudicial and disadvantageous for Respondent to increase kilowatt hour rates by 7.9 percent compared to the 3.9 percent increase for non-TOU customers.

12. Complainants also take issue with Respondent's request for attorney's fees and costs, as the claims brought here are neither frivolous nor groundless, according to Complainants.

II. FINDINGS

13. In order to invoke the doctrine of collateral estoppel, a party must prove that: 1.) the issue in the subsequent proceeding is identical to the issue actually adjudicated in the prior proceeding; 2.) the party against whom estoppel is asserted is a party or in privity with a party in the prior proceeding; 3.) there was a final judgment on the merits; and, 4.) the party against whom estoppels is asserted had a full and fair opportunity to litigate the issues

in the prior proceeding. *Shelter Mutual Insurance Company v. Vaughan*¸ 300 P.3d 998 (Colo. App. 2013).

14. It is apparent that the second prong of the doctrine is met as Complainants here are the identical parties in the prior complaint proceeding.

15. The determination of whether collateral estoppel applies in this case hinges on whether the first prong of the doctrine is met, that is, whether the issue on which Respondent seeks estoppel, is identical to the issue determined previously. The determination of that prong will also determine the disposition of prongs 3 and 4 as set out above.

16. As stated previously, the first prong of collateral estoppel requires that the issues on which a person is to be stopped must have been identical to those actually litigated in prior litigation. *Guest Mansions, Inc. v. Arapahoe County Board of Equalization*, 899 P.2d 944 (Colo. App. 1995). However, the concept of issue preclusion does not apply if the issue on which preclusion is sought was not actually decided in the prior litigation, even if the parties had an opportunity to raise the issue. *Bebo Construction Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 85 (Colo. 1999).

17. For purposes of issue preclusion, a court will find that an issue was actually litigated in the prior case only if the parties raised the issue in the prior action through an appropriate pleading, and the issue was ultimately submitted for, and actually determined by the tribunal. Further, the issue must be one that was necessary to the adjudication in the sense that it must have affected the disposition of the case. *Natural Energy Resources Co. v. Upper Gunnison River Water Conservancy District*, 142 P.3d 1265 (Colo. 2006).

18. In assessing the nature of the identity of the issues, not only must the nature of the issue itself be assessed, but also the basis on which the issue is advanced. While issue preclusion

may apply to bar relitigation of factual determinations which are identical in both cases (*Huffman v. Westmoreland Coal Co*., 205 P.3d 501, 506 (Colo. App. 2009)), issue preclusion may not apply where different standards govern determination of the issue in question. *People v. Hearty*, 644 P.2d 302, 311-12 (Colo. 1982).

19. In addition to determining whether the issue has been **actually** decided, it must also be determined whether the issue was **necessarily** decided in order to establish the identity of the issues prong of collateral estoppel. An issue is necessarily adjudicated when it is properly raised by a party in a previous litigation and a determination of that issue is necessary to the tribunal's ultimate judgment. *Huffman* at 507. If an issue is actually decided, but is not necessary to the ultimate disposition of the first case, it will not be given preclusive effect. *Grynberg v. Arkansas Oklahoma Gas Corp*., 116 P.3d 1260 (Colo. App. 2005). An issue is necessarily adjudicated when a party properly raised the issue and a determination on the issue was necessary to the tribunal's judgment in the initial proceeding. *Bebo Construction Co.* at 86.

20. By Decision No. R10-0616 in Proceeding No. 09F-839E issued June 17, 2010 the complaint there was dismissed on jurisdictional grounds. The finding was that while Complainants sought relief pursuant to § 40-9.5-106(2), the complaint alleged that the Complainants were harmed due to a unilateral change by Respondent to its TOU rates. It was pointed out in that Decision that § 40-9.5-106(2) the statue under which the complaint was brought, provides in relevant part that: "[n]o cooperative electric association shall establish or maintain any unreasonable difference as to rates, charges, service, or facilities or as to any other matter, either between localities or between any class of service." It was further found that the statute is violated, and Commission jurisdiction established, when a cooperative electric association singles out a customer or group of customers for advantageous or disadvantageous

treatment. The Decision held that Complainants failed to properly allege such discriminatory treatment, and as a result, the Commission was without jurisdiction to hear the complaint as couched by the Complainants.

21. In making a determination in Decision No. R10-0616 that the Commission did not have jurisdiction to pass on the matter based on the claim for relief in the initial complaint, no finding was made as to the merits of the complaint. Therefore, the underlying issue was not actually decided in that previous proceeding. Neither was the issue necessarily decided, since a determination of whether the TOU rates in the previous case were improper was not necessary to the ultimate disposition of that case. Rather, the initial decision was based on the wording of the complaint which failed to invoke Commission jurisdiction. As a result, it is found that the issue here was neither actually nor necessarily decided in the previous complaint proceeding.

22. Further, it is noted that Complainant, in the previous complaint, while bringing the complaint pursuant to § 40-9.5-106(2), alleged that as a result of the unilateral changes to the contract made by Respondent in 2006 regarding the summer and winter peak periods, Complainant was negatively impacted as a result of the increased rates and charges Complainant was required to pay for the use of the ETS heater system. Complainant alleged that the 2006 change in TOU rates resulted in significant economic loss and damage.

23. However, in the instant Complaint, Complainants allege that the 2013 TOU rates (Complainant's rate class) increased approximately 7.9 percent as compared to a 3.9 percent rate increase for residential class customers. Complainant alleges that the increase is prejudicial and discriminatory to it as well as to the TOU rate class.

24. It is evident that the allegations and claim for relief sought here are not identical to the claim for relief in the initial complaint. In the initial complaint, Complainant stated that

the issue was an increase in 2006 TOU rates, while in this matter, Complainant seeks relief regarding 2013 TOU rates. In the previous case, it was found that the Commission was without jurisdiction to hear the complaint because Complainant sought relief not available pursuant to § 40-9.5-106(2). However, in this instance, Complainant correctly invoked the terms of § 40-9.5-106(2) by alleging the 2013 TOU rates are discriminatory. As a result, it is found that issue preclusion does not apply to this proceeding since different standards govern the determination of the issue here.

25. Consequently, the Motion to Dismiss will be denied. A pre-hearing conference will be scheduled as set out below in order to determine the proper scope of this proceeding, and whether, based on the scope of the proceeding, whether it will be appropriate to establish a procedural schedule. Therefore, Complainant is on notice that it will be required to establish the proper authority for consideration of each claim for relief set out in the Complaint at the pre-hearing conference.

III. <u>ORDER</u>

A. It Is Ordered That:

1. The Motion to Dismiss Complaint filed by Mountain Parks Electric, Inc. is denied consistent with the analysis above.

2. A pre-hearing conference is scheduled as follows:

DATE: June 12, 2014

TIME: 9:00 a.m.

PLACE: Hearing Room
Colorado Public Utilities Commission
1560 Broadway, Suite 250
Denver, Colorado

3. Complainants Ann Marie Damian and John M. Taylor, Jr. shall be prepared to provide support for each claim for relief contained in the Formal Complaint in order to establish the scope of this proceeding.

4. This Decision is effective immediately.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

____
Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean

Doug Dean,
Director