

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-120CP-EXTENSION

IN THE MATTER OF THE APPLICATION OF VAIL SUMMIT RESORTS, INC., DOING BUSINESS AS KEYSTONE RESORT, INC., POST OFFICE BOX 38 (K-42), KEYSTONE, COLORADO 80435, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AUTHORIZING AN EXTENSION OF OPERATIONS UNDER PUC CERTIFICATE NO. 20195.

DECISION DENYING EXCEPTIONS

Mailed Date: June 29, 2004
Adopted Date: June 16, 2004

I. BY THE COMMISSION

A. Background

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R04-0490 filed by Craig S. Suwinski (Suwinski) on May 27, 2004. On March 16, 2004, Vail Summit Resorts, Inc. doing business as Keystone Resort, Inc. (Vail Summit) filed an application to extend operations under PUC CPCN No. 20195. Public notice was provided in the Commission's "Notice of Applications Filed." The matter was set for hearing on June 1, 2004.

2. On April 23, 2004, Suwinski filed a pleading requesting permissive intervenor status. On April 28, 2004, Vail Summit filed a motion to strike the request for permissive intervention, and on May 7, 2004, Suwinski filed a response to the motion to strike.

3. In Recommended Decision No. R04-0490 issued May 11, 2004, the Administrative Law Judge (ALJ) granted Vail Summit's motion to strike the request for intervention, determined that because the application was thus uncontested, it could be decided

without a hearing pursuant to § 40-6-109(5), Colorado Revised Statutes, and granted Vail Summit's application. Suwinski filed exceptions to the Recommended Decision in a timely fashion on May 27, 2004. In the exceptions, Suwinski asks that the Commission find the ALJ's Recommended Decision to be "erroneous in its findings of fact and of law." Exceptions, page 1. We deny the Exceptions, but clarify the Commission's reasons for declining to grant permissive intervenor status.

B. Discussion

4. The ALJ notes that § 40-6-109, C.R.S. and Rule 64 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 govern requests for intervention. Section 40-6-109, C.R.S. provides:

...and such persons, firms, or corporations as the commission may allow to intervene and such persons, firms, or corporations as will be interested in or affected by any order that may be made by the commission in such proceeding and who shall have become parties to the proceeding shall be entitled to be heard...

5. Rule 4 CCR 723-1-64 implements the statutory provisions governing intervention in Commission proceedings. Pursuant to statute and Commission rule, there are two types of interventions, those allowed by the Commission, or permissive interventions, and interventions of right.

6. Rule 4 CCR 723-1-64(a), intervention by right, is as follows:

(1) To intervene as a matter of right, one who has a statutory or legally protected right in the subject matter which may be affected by the proceeding, shall timely file an entry of appearance and notice of intervention.

Rule 4 CCR 723-1-64 (b), intervention by permission, is as follows:

(1) To intervene by permission one who has a substantial interest in the subject matter of a proceeding shall timely file a petition to intervene. The Commission shall either grant or deny the petition.

7. Thus, a person who has a legally protected interest may intervene by right, and a person who has a substantial interest in the proceedings may receive permission to intervene from the Commission.

8. The ALJ in the recommended decision states that: “[I]n applications of this type the Commission and its administrative law judges have traditionally held that the lack of overlapping or duplicative operating rights deprives a party of sufficient legal standing to intervene in such proceedings, either as a matter of right or permissively.” However, the lack of overlapping authority or duplicative operating rights does not *necessarily* deprive an entity of legal standing to participate in a proceeding of this type.

9. An individual holding overlapping or duplicative operating rights would be granted intervention by right because the entity would hold a legally protected interest, namely the authority to operate. Such an individual would not need to petition for permissive intervention. However, there could potentially be entities with a substantial interest in applications for certificates of public convenience who do not hold overlapping or duplicative operating rights. These individuals could be allowed to participate in Commission proceedings permissively, not as of right.

10. In this matter, however, Suwinski has not asserted a substantial interest in the proceeding. He notes that he is a customer of Vail Summit, but does not assert how the proceedings relating to the application will affect his interests. The ALJ noted that, initially, Mr. Suwinski seemed more concerned with obtaining a “refund of previously collected revenue for non-permitted services to the original payors.” Request to Intervene, page 4. Indeed, Suwinski

offered to withdraw his request to intervene if the refund were forthcoming. Suwinski also asserts that he should be allowed to intervene because he "...falls within the category of the public that *will be* subject to Applicant's permitted activities and is concerned that Applicant fully complies with PUC regulations" (emphasis added). Request to Intervene, page 3. As noted by the ALJ, a hearing on an application for a CPCN is not the proper setting to request a refund. Suwinski's assertion that he is an individual that will be subject to the Applicant's permitted activities also does not demonstrate a substantial interest in the current proceeding, because his interests are speculative in nature. Mr. Suwinski needs to show a current non-speculative interest that will be affected in order to receive intervenor status. In his request to intervene, Suwinski asserts no substantial interest that could be affected by a Commission order or decision.

11. In the Exceptions, Suwinski asserts for the first time, "Suwinski's sole interest is in ensuring that Applicant shows itself to be fit to operate, similar to Archibold's intervenor interest in ensuring 'that any remedial action taken by the commission is consistent with current Colorado law.'" This issue was not before the ALJ and is put into question by his statements in his motion to intervene. Nonetheless, we will address it here.

12. Requests for intervention are subject to PUC's statute and rules. Section 40-6-109(1) creates two classes of intervenors who may participate in PUC proceedings: (1) those who may intervene as of right and (2) those whom PUC permits to intervene. *See Yellow Cab Coop. Ass'n v. Public Utils. Comm'n*, 869 P.2d 545, 550 (Colo.1994); *RAM Broad. of Colorado v. Public Utils. Comm'n*, 702 P.2d 746, 749 (Colo.1985); *De Lue v. Public Utils. Comm'n*, 169 Colo. 159, 164, 454 P.2d 939, 941-42 (1969); *Public Service Co. of Colorado v. Trigen-Nations*, 982 P.2d 318, 327 (Colo. 1999). In *Trigen*, Trigen-Nations requested permissive intervenor status. The Supreme Court held the PUC did not abuse its discretion by upholding the ALJ's

decision not to allow the permissive intervention. Trigen did not show that it had a substantial interest in the subject matter of the proceeding, and would not be affected by Commission decisions.

13. Suwinski's reliance on *Archibold v. PUC*, 58 P.3d 1031 (Colo. 2002), is misplaced. In *Archibold*, the permissive intervenors were Xcel retail customers who could be affected by the Commission decisions in a hearing concerning retail service quality standards. The Commission in that case denied permissive interventions to entities who were not retail customers. See Commission Decision No. C99-1049. Here, we believe that Suwinski asserted no existing substantial interest that could be affected by a Commission decision extending Vail Summit's CPCN. As noted above, a hearing on a CPCN extension will not address the refunds that Suwinski apparently seeks, and, although he asserts that he will be affected by Vail Summit's future operations, those operations are not currently at issue before the Commission.

C. Conclusions

14. Mr. Suwinski cites no substantial interest in the application for an extension of CPCN PUC No. 20195 that would provide a basis for permissive intervenor status under the Commission's rules. He does not demonstrate how he could be affected by a Commission decision or order pertaining to that matter. We therefore deny the Exceptions.

II. ORDER.

A. The Commission Orders That:

1. The Exceptions filed by Crag. S. Suwinski are denied.

2. The application of Vail Summit Resorts, Inc. doing business as Keystone Resort, Inc. for an extension of its CPCN PUC No. 20195 is granted, consistent with the discussion in Recommended Decision No. R04-0490.

3. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Order.

4. This order is effective on its mailed date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
June 16, 2004**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER POLLY PAGE
ABSENT.