(Decision No. R96-631)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

DURANGO WEST METROPOLITAN DISTRICT NO. 1, Complainant, v. LAKE DURANGO WATER COMPANY, INC., Respondent.	)	DOCKET NO. 95F-446W

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM J. FRITZEL

- - - - - - - - - - - - - - - - - - -

Mailed Date: June 25, 1996

- - - - - - - - - - - - - - - - - - -

Appearances: John J. Conway, Esq., and John E. Archibold, Esq., for Complainant;

Mark G. Bender, Esq., for Respondent; and

Lynn Bolinske Dolven, Esq., Holland & Hart, LLP for Intervenor Customers Group (no appearance at hearing).

T A B L E O F C O N T E N T S

I. STATEMENT

1. On September 14, 1995, Durango West Metropolitan District No. 1 (hereinafter "the District"), Complainant, filed a complaint against Lake Durango Water Company, Inc. (hereinafter "the Company" or "Lake Durango"), Respondent. The complaint alleged generally that the Company: (1) is a public utility under § 40-1-103(1)(a), C.R.S.; (2) is threatening to cancel water service to the District; (3) is endangering continued water supply to the District by entering into agreements to serve additional customers and by negotiating or contracting to sell the Company; and (4) is providing water service to the District that does not meet the Commission's water purity requirements as set forth in the Commission's Rules Regulating the Service of Water Utilities (hereinafter "Water Rules").

2. An Order Setting Hearing and Notice of Complaint was given to the parties on September 15, 1995. Hearing was set for November 28, 1995 in Durango, Colorado.

3. On October 16, 1995, the Company filed a Motion for 30 Day Extension of Time in Which to File Answer. An Entry of Appearance was filed on the same day by counsel for the Company.

4. On October 20, 1995, the District filed a Response to the Company's Motion for 30 day Extension of Time in Which to File Answer, generally indicating that it did not object to the granting

of said Motion. The Motion was granted by Interim Order No. R95-1143-I dated November 21, 1995.

5. On November 20, 1995, the District filed a pleading stating that it concurred with the Company's request to vacate the November 28, 1995 hearing date, and that if statutory time limits were applicable, it (the District) would waive the same. On November 21, 1995, the Company filed a Motion to Dismiss and also an Answer. The Company also requested that the November 28, 1995 hearing date be vacated. On November 27, 1995, an Interim Order (Decision No. R95-1155-I) was entered vacating the November 28, 1995 hearing date.

6. On November 27, 1995, the District filed a Response to the Company's Motion to Dismiss, and on November 28, 1995, the District filed its Rule 72 Certification, List of Witnesses, and Exhibits. The Company filed its List of Witnesses and Exhibits on December 4, 1995.

7. On December 18, 1995, Interim Order No. R95-1271-I was issued, denying the Company's Motion to Dismiss.

8. By Interim Order No. R96-165-I dated February 9, 1996, hearing in this matter was reset for May 14, 15, 16, and 17, 1996 in Durango, Colorado, and for May 20, 1996 in Denver. The hearing commenced on May 14, 1996 in Durango, and concluded the next day on May 15, 1996.

9. Five days prior to the May 14, 1996 hearing date, on May 9, 1996, Shenandoah, Ltd., Durango West Metropolitan District No 2, La Plata Vista Estates Homeowners Association, Patton Corporation West/Long Hollow Unit No. 3 Homeowners Association, Shenandoah

Highlands Homeowners Association, The Peaks of La Plata County Homeowners Association and Trappers Crossing of Durango (all collectively referred to as the "Lake Durango Customers Group" or "Customers Group") filed: (1) a Petition to Intervene; (2) a Motion to Continue the Hearing Date; and (3) a Motion for Expedited Ruling with regard to the two foregoing Motions. On May 10, 1996, a conference call was held among the undersigned Administrative Law Judge, and counsel for the District, the Company, and the Customers Group. The Customers Group's Motion for Expedited Ruling was granted. The Customers Group's Petition to Intervene was also granted with the condition that said Group would take the case as it found it. The Motion to Continue the Hearing Date was denied.

10. At the hearing on May 14, 1996, counsel for the Customers Group did not appear. The District orally moved to dismiss the intervention of the Customers Group for lack of prosecution, which motion was denied. Public witnesses were permitted to comment at various times throughout the hearing. A renewed oral motion to dismiss the intervention of the Customers Group was made at the conclusion of the hearing by the District. Again, the motion was denied. As a preliminary matter, the District and Company offered stipulations of facts which were marked and admitted as Exhibits A and B.

11. At the hearing, the District presented 11 witnesses in its direct case, plus 3 witnesses in its rebuttal case (one of which also testified in the District's direct case). The Company presented one witness on both its direct case and surrebuttal case, to wit, the Company's president and sole stockholder. In addition,

five members of the public were allowed to present unsworn oral comments. Exhibits A through M were offered in evidence and admitted into the record.

12. Opening and closing arguments were presented by counsel for the District, and counsel for the Company, respectively. In addition, the parties were permitted to file simultaneous briefs, and, at their option, proposed findings of fact, conclusions of law, and order on or before June 3, 1996. At the conclusion of the hearing, the case was taken under advisement. The District filed a Brief and proposed Recommended Decision on June 3, 1996. The Company filed a Brief and proposed findings of fact on June 3, 1996. On June 4, 1996, The Customers Group filed comments.

A. Findings of Fact

1. The District is a special district organized and operating under Colorado statutory law for the purpose of providing water and sewer utility service and road maintenance for users within the District. Its address is 119 Holly Hock Trail, Durango, Colorado. There currently are approximately 181 households within the District, with an estimated population of about 500 people. The complaint in this Docket was filed by the District on behalf of itself and its approximately 181 households. [Exhibit A, Paragraph No. 1]

2. Lake Durango is a Colorado domestic, for profit corporation, whose address is 15312 U.S. Highway 160, P.O. Box 2401, Durango, Colorado. [Exhibit A, Paragraph No. 2]

3. Lake Durango first operated as a water company in December 1984, at which time its articles of incorporation were filed with and accepted by the Colorado Secretary of State. A copy of Lake Durango's Articles of Incorporation was attached to Exhibit A and incorporated therein as "Exhibit 1". [Exhibit A, Paragraph No. 3]

4. Lake Durango generally provides water service to customers in an area of approximately 15 square miles lying 5 to 10 miles west of the City of Durango in La Plata County in southwestern Colorado. [Exhibit A, Paragraph No. 4]

5. The District and Lake Durango entered into a Water Purchase Agreement on or about October 1, 1987, which Agreement, among other things, sets an initial rate and a minimum water purchase obligation on the part of the District. A copy of said Agreement was attached to Exhibit A and incorporated therein as "Exhibit 2". [Exhibit A, Paragraph No. 5] The Agreement initially provided for a rate of $2.85 per thousand gallons, with a minimum purchase of 750,000 gallons per month by the District. [Paragraph No. 2 of Exhibit 2 to Exhibit A] The current rate is $3.49 per thousand gallons; the minimum purchase obligation has remained the same. [Testimony of Janet Anderson]

6. Lake Durango has continuously provided service to the District since October 1987. [Exhibit A, Paragraph No. 6]

7. Lake Durango notified the District, by letter dated August 28, 1995, supplemented by letter dated August 30, 1995, that it was cancelling the aforesaid Agreement, effective six months from the date of the notice, unless a mutually acceptable new

Agreement was negotiated by the Parties. No mutually acceptable new Agreement has been negotiated. Copies of the aforesaid letters were attached to Exhibit A and incorporated therein as "Exhibit 4". [Exhibit A, Paragraph No. 7]

8. Lake Durango currently serves, either directly or through entities such as the District, approximately 736 units at the present time. Lake Durango has individual accounts, and also has commercial accounts with various homeowner associations and districts, like the District here, which distribute the water to the subdivision's homeowners. Residents of some subdivisions, such as Lake Durango Estates, Trapper's Crossing, Tomahawk Trail, and a portion of the Rafter J Subdivision, comprise Lake Durango's individual accounts, totaling 118 units. Other units are:

Shenandoah	31 units
Rafter J-Modern Management	95 units
La Plata Vista	19 units
Durango West Dist. No. 1	181 units
Durango West Dist. No. 2	292 units
Total Units Served	736 units

[Exhibit A, Paragraph No. 8]

9. The names and addresses of Lake Durango's current customers are shown on the document which was attached to Exhibit B and incorporated therein as "Exhibit 3". Each of the aforesaid customers received water service from Lake Durango commencing with a date on or after January 1, 1990. The first part of Exhibit 3 shows 127 customers, the second part shows 31 customers, and the third part shows 95 customers. As shown on said list, Lake Durango currently serves approximately 253 customers, including 7 subdivisions which purchase and receive water from Lake Durango. Of

these 253 customers, approximately 118 are directly billed by Lake Durango, and the balance are billed by subdivisions. [Exhibit B, Paragraph No. 1]

10. The officers and directors of Lake Durango are Robert P. Johnson (President and Director), and Michelle Cox (Director). [Exhibit A, Paragraph No. 10]

11. Lake Durango owns certain water rights, the nature of which rights is described in a document entitled "Safe Yield Analysis", which document was attached to Exhibit A and incorporated therein as "Exhibit 9". [Exhibit A, Paragraph No. 11]

12. Lake Durango does not own, lease, or otherwise have available to it any wells for use. [Exhibit A, Paragraph No. 12]

13. The total amounts or volumes of water sold or furnished by Lake Durango to various customers, during the years 1993 through 1994, showing the total amounts or volumes sold in each of said years to said customers, are set forth in the aforesaid "Exhibit 9", at Appendix 4, pages 1 through 4. [Exhibit A, Paragraph No. 13][1]

14. The total yearly capacities or capabilities of Lake Durango during the years 1990 through 1995 to either sell or furnish water to others is set forth in the aforesaid "Exhibit 9". A document entitled "Interrogatory No. 15", which was attached to Exhibit A and incorporated therein, sets forth for some of the customers monthly figures for the number of gallons of water sold or furnished to them by Lake Durango during the years 1989 through

---

[1] Exhibit A, Paragraph No. 13, incorrectly referenced the years 1990 through 1995.

1990, 1990 through 1991, and 1991 through 1992, respectively. Comparable figures for subsequent years currently are not available. [Exhibit A, Paragraph No. 14]

15. The precise amount of water retained by Lake Durango for its own use during each of the years 1990 through 1995, is not known, but Lake Durango, as an entity, uses very little water. Also, Mr. Johnson, the President of Lake Durango, personally owns several water rights that he uses on his ranch and/or leases to Lake Durango on an as-needed basis. Lake Durango has some excess water each year in one or more of its various reservoirs, but the amount thereof has not been measured. [Exhibit A, Paragraph No. 15]

16. A document entitled "Interrogatory 16", which was attached to Exhibit A and incorporated therein, sets forth in Table I thereof Lake Durango's treatment plant capacity, and in Table II thereof the present water use commitments and actual average water use for Lake Durango, Durango West Metropolitan District No. 1, Durango West Metropolitan District No. 2, and for the Shenandoah, Rafter J, and Trappers Crossing Subdivisions, respectively. [Exhibit A, Paragraph No. 16]

17. Lake Durango has received, since January 1, 1990, certain reports and letters from municipal, county, and state governmental agencies which are in the document attached to Exhibit A and incorporated therein as "Exhibit 18". The Parties stipulated as to the authenticity of said documents. [Exhibit A, Paragraph No. 17]

18. Lake Durango's policies for the termination of the sale, lease, or other disposition of its water to others are repre-

sented in the document entitled "Water Service Agreement", a copy of which Agreement was attached to Exhibit A and incorporated therein as "Exhibit 21".

19. The basic contract provisions and policies which underlie Lake Durango's Water Service Agreement, "Exhibit 21", have been in effect since the inception of the Company in 1984. [Exhibit A, Paragraph No. 19]

20. Only one customer of Lake Durango, a Mr. Michael Stelzel, was discontinued from receiving water service from Lake Durango since January 1, 1990, and such was done for non-payment of fees; however, his service was reinstated after he paid all balances due to Lake Durango. [Exhibit A, Paragraph No. 20]

21. Lake Durango has a one-line listing in the yellow pages of the Durango area telephone directory, under the heading "Water Companies". [Exhibit A, Paragraph No. 21]

22. The President of Lake Durango is authorized to inform prospective purchasers of water that Lake Durango is willing to provide water service to such purchasers, but such willingness has never been expressed without reservations as to the terms of service, and quantity and price of water to be furnished. [Exhibit A, Paragraph No. 22]

23. In the early 1980's, the current president of the Company, Bob Johnson, decided to build a lake on lands he acquired from his father. The engineering was costly, so he decided to sell lots in order to pay for the lake. Originally there were 18 units. In the late 1980's, both the District and Durango West Metropolitan District No. 2 ("District 2") asked the Company to serve them with

water. Separate contracts were entered into by the Company with each District. The Company's contract with the District has a six-month termination clause in it. The Company's contract with District 2 has no termination clause. [Testimony of Bob Johnson; cf. Exhibit 2 to Exhibit A, and Exhibit E]

24. Since the time the Company started providing water to the District, and to District 2, the Company has built water mains, new water pumps (increasing capacity from 17 gallons per minute to nearly 100 gallons per minute), and new treatment facilities. In addition, the Company has entered into contracts to serve five other residential developments as well as individual customers. The total number of customers served directly by the Company or indirectly through the two metropolitan districts and the five subdivisions is more than 700. The State of Colorado has authorized the Company to serve 1,151 taps. Currently the Company has 1,005 taps, but only about 700 of these are current users. The Company is looking for new and expanded water rights. The Company is in the business of selling water; and very little water is retained by the Company for its own use. In fact, the Company now has about 50 percent more taps on its Reservations for Taps List from persons desiring water from it. [Exhibit A, Paragraph 15, and Exhibits 2 and 9; Exhibits E, F, G and H; and testimony of Bob Johnson and Mark Reddy; and Exhibit K]

25. One of the agreements that the Company has with a subdivision, namely with Trappers Crossing at Durango (hereinafter "Trappers"), provides that upon the sale of a tap to a subdivision lot purchased by a customer, and a request to the Company by said

lot purchaser for commencement of service, the lot purchaser shall become the "user" under the terms of the agreement between the Company and Trappers. Thereafter the lot-purchaser user pays the Company rather than the subdivision for water. [Exhibit G, Paragraph 8]

26. The Water Processing Agreement between the Company and Shenandoah Ltd. contains reference to a 30-year commitment to supply water to District 2. The Agreement also provides that if Shenandoah Ltd. is more than two months delinquent, the Company can collect all sums due from water users by direct billing. [Exhibit F, Paragraph 13]

27. The County of La Plata, in the event that the Company terminated water service to the District, would not supply the District with water except for short term emergency situations such as fire danger. [Testimony of Robert Brooks and Joe Crain]

28. Water produced by wells in portions of the area west of the City of Durango is of poor quality and brackish; such areas include Rafter J and the District. [Testimony of Joe Crain and Ken Gross]

29. Water from wells owned by the District, of whatever quality, is not sufficient to meet the domestic water needs of the residents of the District. [Testimony of Ricky Monett, Ken Gross, and Steven Harris]

30. About three-quarters of the County of La Plata, including the area west of the City of Durango (which area includes the District area), is "water critical". [Testimony of Joe Crain]

31. There are no other water suppliers in the area west of the City of Durango, other than the Company, that can serve the District. [Testimony of Joe Crain, Ken Gross, Janet Anderson, and Steven Harris, and comment of Gene Bradley (unsworn)]

32. Other than obtaining water from its own wells, and from the Company, the District has no other practical or financially feasible alternatives for obtaining water. The other alternatives that were considered by the District and its water engineering consultant are not practical or financially feasible. These other alternatives included the following: obtaining water from the Animas River or from the La Plata River; waiting for the possibility of the Federally-sponsored Animas-La Plata Project (which may be 30 years away); buying water from the City of Durango (which declined to sell water to the District); drilling additional wells; and recycling water. [Testimony of Ricky Monett and Steven Harris]

33. Both by letters to the District (dated August 28, 1995 and August 30, 1995), and by filing a declaratory judgment lawsuit against the District on March 29, 1996 (seeking a determination that the Company's water purchase contract with the District is void), the Company seeks to terminate water service to the District. [Exhibit A, Exhibit 4; and testimony of Ricky Monett and Janet Anderson]

34. Because of the threatened loss of water service, a number of the residents of the District have concerns over the loss of their homes or the loss of the value of their homes, They also have concerns about being able to sell their homes, and some

have considered the possibility of moving out of the District to another place of residence. In addition, the situation in the District caused by uncertainty over the availability of water has inhibited the sale of lots and homes within the District. [Testimony of Ricky Monett, Janet Anderson, and Phil May; and comment of George R. Williams (unsworn)]

35. The water supplied by the Company to the District has not been uniformly free of bacteria and coliform, and the president of the Company was unable to state that the water supplied by the Company to the District complied at all times with the Commission's Water Rules with respect to purity. The president of the Company believed that the times the Company's water service to the District was not in compliance with purity requirements were not due to the fault of the Company or were due to conditions beyond its control. However, at least three samples of water furnished by the Company to the District and tested by the San Juan Basin Health Department in August 1995, September 1995, and May 1996, showed the presence of bacteria too numerous to count ("TNTC"). [Exhibit L; and testimony of Claudia Anesi, Clint Brooks, and Janet Anderson]

36. Letters from James B. Horn, District Engineer, Water Quality Control Division of the Colorado Department of Health, dated, respectively, February 19, 1991, July 17, 1992, February 8, 1994, and March 20, 1995, and addressed to the Company, mention, among other things, the following problems that needed to be taken care of by the Company:

1. Turbidity monitoring.

2. Treatment building in need of housekeeping and needing to be secured to keep varmints out.

3. Constructing a fence to keep livestock away from the Company's buried clearwell to prevent contamination.

4. Ventilating the chlorine room, and sealing the door, heat, light and fan switches.

5. Housing the gas chlorine line entering the treatment building.

6. Conditions at the Company's water treatment facility constituting an apparent violation of the Colorado Primary Drinking Water Regulations.

7. The chlorine room being in very poor condition due to its failure to provide as safe an environment as possible to the operator in dealing with a deadly gas, and its failure to provide accurate and continuous metering of chlorine disinfectant.

8. The chlorine room being in very poor condition from June 1992 to at least March 20, 1995 (the date of the last of the four letters referenced above).

[Exhibit C; testimony of Jim Horn]

37. Water supplied by the Company to the District and other customers of the Company, at certain times, has been "smelly". [Testimony of Phil May, and comment (unsworn) of George R. Williams]

38. The parents of a young infant who is a grandson of a direct customer of the Company used bottled water after the grandson got diarrhea following the drinking of water supplied by the Company. [Testimony of Phil May]

39. In the opinion of one customer of the Company who lives in an area adjacent to the District, two years ago the Company's water looked bad, smelled bad, and tasted bad. [Testimony of Phil May]

40. The water sold by the Company to the District and other customers is used for the most part, if not exclusively, for domestic use. [Testimony of Ricky Monett, Janet Anderson, and Phil May]

B. Discussion

There are three major issues to be determined, to wit:[2]

Issue 1: Is the Company a public utility subject to the jurisdiction, control and regulation of the Commission?

Issue 2: Has the Company threatened to discontinue water service to the District, and should it be ordered by the Commission not to do so?

Issue 3: Has the Company provided water to the District that does not meet the requirements of the Commission's Water Rules with regard to quality and purity?

1. Issue 1 - Public Utility Status of the Company

a. Public utility status is a mixed question of law and fact. Both the law, and the facts adduced in the hearing, establish that the Company **is** a public utility under Colorado law. The definitive Colorado case which governs is *Board of County Commissioners v. Denver Board of Water Commissioners*, 718 P.2d 235 (Colo., 1986) (hereinafter "*Tri-Counties*" or "*Water Board*"). That

[2] A fourth issue, that the Company is endangering water supply to the District by entering into agreements to serve additional customers and by negotiating or contracting to sell the Company, was withdrawn by the District at the end of the hearing.

case adopted the statutory test set out in § 40-1-103(1)(a), C.R.S., as to whether or not an entity is a public utility. The relevant part of that statute states:

> The term 'public utility' includes every water corporation operating for the purpose of supplying the public for domestic, mechanical or public uses ... and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the Commission and to the provisions of articles 1 to 7 of this title [Title 40; parenthetical added by the undersigned]

b. The factual record shows that the Company serves seven entities (five subdivisions and two metropolitan districts, including this District and District 2) and some 118 individual accounts. Including the 118 individual accounts, approximately 736 units are provided with water either directly or indirectly. This clearly indicates that the Company is serving the public. The Company argues that it is not a public utility because: (1) the great proportion of water sold is at wholesale (or "in bulk") to distributors rather than to end users; and (2) whatever water is sold to individual end users is merely "incidental". The Company's argument is without legal or factual merit for two basic reasons.

c. First of all, with regard to the "wholesale" issue, nothing in the relevant statute mentions, directly or by implication, that wholesalers are not included in the definition of the public. The case law, at least with regard to water and electric utilities, belies the Company's argument. In *Tri-Counties, supra*, the Denver Water Board was defined as a statutory public utility even though **all** of its customers (outside of Denver) were wholesale customers who distributed water to end-users. (*Tri-Counties* only

dealt with the Denver Water Board's provision of water service outside of Denver.) *See also Southgate Water v. City and County of Denver,* 862 P.2d 949, 957 (Colo. App., 1992).

d. Likewise, the Colorado Supreme Court, in the 1966 case of *Western Colorado Power Co. v. Public Utilities Commission,* 411 P.2d 78, 795, said:

> There is an abundance of authority to support the classification of a wholesaler of energy as a public utility. North Carolina Public Service Co. et al. v. Southern Power Co., 4th Cir., 282 F. 837; Boone County Rural Electric Membership Corporation et al. v. Public Service Company of Indiana et al., 239 Ind. 525, 159 N.E.2d 121; Orndoff v. Public Utilities Commission, 135 Ohio St. 438, 21 N.E.2d 334; Industrial Gas Company v. Public Utilities Commission of Ohio, 135 Ohio St. 408, 21 N.E.2d 166; Wisconsin Traction Light, Heat & Power Company v. Green Bay and Mississippi Canal Co., 188 Wis. 54, 205 N.W.551."

e. It is true that in the 1960 case of *Public Utilities Commission v. Colorado Interstate Gas Co.*, 351 P.2d 241, the Colorado Supreme Court held that an interstate gas utility that sold gas to eight large end-use customers and three resale customers was not a public utility. But that ruling does not help the Company in this Docket for the simple reason that the Court, in a 4-2 decision, used the "holding out" test in *City of Englewood v. City and County of Denver,* 123 Colo. 290, 229 P.2d 667 ("*Englewood*") to find that Colorado Interstate Gas was **not** holding itself out to serve the public generally, and thus was **not** a public utility. *Tri-Counties, supra,* definitively and without equivocation states that the *Englewood* common law test (generally "holding out" and "public right to demand" etc.) was **displaced** by the statutory test. It has already been shown that the "wholesale" argument, which may never have applied to electric companies, clearly no

longer applies to water companies or water entities by virtue of the opinion in *Tri-Counties, supra*. In addition, it is more than likely that such argument also no longer is applicable to gas companies since the later case of *Western Colorado, supra*, referenced a gas case from Ohio in support of its contention that even service to wholesalers supports classification as a public utility.

f. It is not at all unusual, of course, for the number of wholesale customers (sometimes known as distributors) to be considerably smaller than the number of retail customers or end users. *Western Colorado, supra*, also referenced the 1926 case of *Davis v. People ex rel Public Utilities Commission*, 79 Colo. 642, 247 P. 801 where the Colorado Supreme Court said:

> A service may effect (sic) so considerable a fraction of the public that it is public in the same sense in which any other may be called. ... The public does not mean everybody all the time.

See also Iowa State Commerce Commission v. Northern Natural Gas Co. ("*Iowa*"), 161 N.W. 111. In short, the fact that an entity sells a public utility commodity, such as water, gas, or electricity, only to wholesalers or in bulk for resale does not defeat classification as a public utility. On the contrary, it supports it. In any event, the Company here does not sell only to wholesalers. As indicated above, it also sells water **directly** to some 118 households, that is, end users or retail customers. It is not necessary to sell to retail or end-use customers in order to be classified as a public utility, but in the case here the Company does so.

g. Second, the Company contended in the hearing that its sales to the individual customers were merely "incidental" to its "main" business of selling water to wholesalers in bulk. The

evidence does not support the Company's contention. It hardly seems plausible that sales of water to some 118 individual customers of the Company are merely "incidental." The Company's agreement (Exhibit G) with Trappers provides in paragraph 8 thereof, that upon the sale of a tap to a subdivision lot purchaser by Trappers (the customer in the agreement), then the lot purchaser becomes the user thereafter (rather the initial customer Trappers) and the lot purchaser (that is, the new individual customer) becomes a direct payor to the Company for the water service. This is a further indication that service to individual user customers is **not** incidental.

h. Bob Johnson, the president of the Company, testified that his Company's selling of water commenced many years ago to 18 units on land that had belonged to his father, land which he described as a ranch. Be that as it may, there is no disputing the fact that the Company's water business has grown considerably. The evidence shows that directly, or indirectly, over 700 customers now are served by the Company either by direct sale or through intermediaries, such as the two districts and five subdivisions or homeowners' associations. When queried about the Company's attempts at acquiring new or expanded water rights, Mr. Johnson stated that his Company is doing so because it is "in the business of selling water." In addition, there was **no** evidence presented by anyone in the hearing that a customer, whether wholesale or retail, had ever been refused water service except for a potential customer's inability or unwillingness to pay for the water, or the physical impracticability or lack of capacity to serve such potential cus-

tomer. Under the statutory test, adopted by the Colorado Supreme Court in *Tri-Counties*, there are only three major elements: (1) a water corporation; (2) supplying the public; and (3) for domestic, mechanical or public uses. Elements (1) and (3) are uncontested. It is concluded, based upon the uncontroverted evidence in the Findings of Fact (more particularly Findings 1 through 27), that the Company is, in fact, supplying the public with water for domestic uses, and accordingly, is a public utility subject to the jurisdiction, control, and regulation of this Commission. Since the Colorado Supreme Court said that the Denver Water Board "clearly fit" the definition of a public utility, the same is even more true of the Company here. *See* 718 P.2d at page 244.

2. Issue 2 - Threatened Discontinuance of Water Service

a. It is uncontroverted that the Company has threatened to discontinue water service to the District. This was shown by the two letters to the District of August 28, 1995, and August 30, 1995, as well as the recently instituted (on March 29, 1996) declaratory judgment action in the La Plata County District Court. Finally, counsel for the Company, at the end of the evidentiary phase of the hearing, in closing argument, stated that even if the Company were held to be a public utility, it was the Company's intention to terminate service to the District once this case has been decided.

b. But as a public utility, the Company is bound by the provisions of § 40-3-101(2), C.R.S., which states:

> Every public utility shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and

the public, and as shall in all respects be adequate, efficient, just and reasonable.

c. In addition, as a water utility, the Company is bound by the provisions of Rule 13 of the Commission's Water Rules with regard to the discontinuance of service of any customer. Accordingly, the Company is without authority to discontinue service to the District unilaterally. Although people do not have an unqualified right to utility service, they do have a qualified right to utility service if they pay for it. *See Denver Welfare Rights Org'n. et al. v. PUC et al.*, 190 Colo. 329, 547 P.2d 239 (1976). Whatever contractual or tariff provisions, if any, govern the payment relationship between the District and the Company, the same are not issues in this Docket and will not be discussed here. However, because of the threat of cut off of service by the Company with respect to the District, notwithstanding the Company's status as a public utility, it shall be ordered in this Decision that the Company continue service to the District under its current Water Purchase Agreement until such time as a tariff or contract is filed with the Commission and is approved by the Commission or allowed to become effective by operation of law.

d. The Commission takes official notice of the fact that the Company currently has no tariffs or contracts on file with the Commission with respect to water service to any of the Company's customers, including the District. The Company should be ordered to file, within 60 days of the effective date of this Decision, either tariffs, contracts, or both, setting forth the rates, charges, and regulations with respect to water service to all of its customers.

e. It should be noted that the Company may elect to file individual contracts with its various wholesale customers, and individual contracts with its retail customers, or tariffs for some customers and contracts for other customers. The Commission is aware, of course, of the concern expressed by certain public witnesses that a finding of public utility status on the part of the Company may result in increased rates or increased expenses for those customers. The impacts, if any, on a particular entity or its customers, form no part of the legal test of whether a particular entity is, or is not, a public utility. In any event, the future impacts upon customers of the finding and conclusion herein that the Company is a public utility are speculative and unknown at this time.

f. This Docket is not a rate case, and the Commission, at this time, is in no position to speculate as to how the Company may elect to collect moneys for water service rendered to its various customers. The Company will be required to file tariffs or contracts or both with the Commission, in accordance with the applicable statutes and rules governing the same, setting forth its rates, charges, and regulations for the provision of water service to its customers. What the outcome or outcomes of these Company filings will be cannot be known at this time.

3. Issue 3 - Water Quality and Purity

a. There are two provisions that govern the furnishing of water to the District. The first is § 40-3-101(2), C.R.S., which is quoted above. That provision requires the utility to provide and maintain such service as shall promote the safety, health,

comfort, and convenience of its patrons and shall in all respects be adequate, efficient, just and reasonable. The other provisions are more technical in nature and are contained in the Commission's Water Rules 18 and 19.

b. Rule 18(a) requires the provision of water which is agreeable to sight and smell. The evidence shows that water furnished by the Company failed, on some occasions, that requirement. Rule 18(b) provides that water with reasonably low bacterial count under the usual standard test methods will ordinarily be considered safe from the standpoint of disease-producing organisms. Here, the evidence shows that the Company's water, at least on three occasions, failed to meet that requirement since the San Juan Basin Health Department testing showed bacteria that was too numerous to count. The testimony of a number of ultimate consumers of the Company's water clearly established that there have been sight and smell problems, and the testimony of Claudia Anesi of the San Juan Basin Health Department, as well as Exhibit L, show the presence of bacteria too numerous to count and "total coliform present." In sum, the District's complaint with regard to water quality and water purity is well taken. The District's request is reasonable and should be granted. As a public utility, as above indicated, the Company is subject to the provisions of § 40-3-101(2), C.R.S., as well as the Commission's Water Rules. The Company should be ordered to bring itself into compliance with the same within 60 days of the effective date of the Order herein.

C. Conclusions on Findings of Fact

Based upon the above Findings of Fact, and Discussion, it is hereby concluded that:

1. The Company is a public utility under the provisions of § 40-1-103(1)(a), C.R.S., and the applicable Colorado case law interpreting the same.

2. The Company has threatened to discontinue water service to the District, and should be ordered by this Commission not to do so, but to continue water service to the District under its current Water Purchase Agreement until such time as a tariff or contract is filed with the Commission and is approved by the Commission or allowed to become effective by operation of law.

3. The Company's provision of water service has not been in full compliance with § 40-3-101(2), C.R.S., and the Commission's Water Rules 18 and 19, and the Company should be ordered to come into compliance with the same within 60 days of the effective date of this Decision.

4. Pursuant to § 40-6-109, C.R.S., it is recommended by the Administrative Law Judge that the following Order be entered.

II. ORDER

The Commission Orders That:

1. The Complaint filed on September 14, 1995 by Durango West Metropolitan District No. 1 against Lake Durango Water Company, Inc., and the relief requested, is granted in accordance with the Decision and Order herein.

2. Lake Durango Water Company, Inc., as a public utility subject to the jurisdiction, control, and regulation of this Commission shall:

a. Continue to provide water service to Durango West Metropolitan District No. 1 pursuant to the provisions of the Water Purchase Agreement by and between Durango West Metropolitan District No. 1 and Lake Durango Water Company, Inc., dated October 1, 1987 until such time as a tariff or contract is filed with the Commission and is approved by the Commission or allowed to become effective by operation of law.

b. Come into full compliance with § 40-3-103(2), C.R.S., and Rules 18 and 19 of the Commission's Rules Regulating the Service of Water Utilities, within 60 days of the effective date of this Decision.

c. Comply with all other statutes, and rules and regulations of this Commission pertaining to the provision of service by water utilities.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the Decision is stayed by the Commission upon its own motion, the recommended decision shall become the Decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party

must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the Administrative Law Judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge

446W.WJF

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

DURANGO WEST METROPOLITAN DISTRICT NO. 1, Complainant, v. LAKE DURANGO WATER COMPANY, INC., Respondent.	)	DOCKET NO. 95F-446W

POST-HEARING BRIEF OF COMPLAINANT, DURANGO WEST METROPOLITAN DISTRICT NO. 1

This Brief consists of this cover page and the attached Proposed Recommended Decision. The Proposed Recommended Decision contains the following parts:

I. STATEMENT
II. FINDINGS OF FACT
III. DISCUSSION
IV. CONCLUSIONS ON FINDINGS OF FACT
V. ORDER

The legal issues involved in this Docket are addressed in Part III of the attached Proposed Recommended Decision.

Respectfully submitted this 3rd day of June, 1996.

JOHN E. ARCHIBOLD (#4388)
700 Lafayette St.
Denver, CO 80218
Phone: (303) 832-7498
FAX: (303) 839-8148

JOHN J. CONWAY (#35)
4704 Harlan St., #300
Denver, CO 80212
Phone: (303) 458-7117
FAX: (303) 433-1273

(Attorneys for Complainant,
Durango West Metropolitan District No. 1)

APPENDIX I - LIST OF WITNESSES

Witnesses Called by Complainant:

1. Robert B. Brooks, La Plata County Manager
2. Claudia A. Anesi, Lab Technician/Microbiologist, San Juan Basin Health Department
3. Jim Horn, former District Engineer, Water Quality Control Division, Colorado Department of Health
4. Ricky Monett, President, Durango West Metropolitan District No. 1
5. Joseph T. Crain, Director of Planning Services, La Plata County
6. Ken Gross, former Manager and former Board Member of Durango West Metropolitan District No. 1
7. Mark Reddy, Member of Rafter J Homeowners' Association
8. Janet Anderson, District Manager, Durango West Metropolitan District No. 1 (direct and rebuttal)
9. Steven C. Harris, P.E., of Harris Water Engineering
10. Clint Brooks, Water Manager, Durango West Metropolitan District No. 1
11. Phil W. May, resident of Lake Durango Estates and former resident of Durango West Metropolitan District No. 2
12. Frank J. Anesi, attorney for Durango West Metropolitan District No. 1 (rebuttal)
13. David Trautner, board member of Durango West Metropolitan District No. 1 (rebuttal)

Witness Called by Respondent

14. Robert (Bob) Johnson, president of Lake Durango Water Company, Inc. (direct and surrebuttal)

Members of the Public Who Commented

15. Donald Ricedorff, president of Durango West Metropolitan District No. 2

16. George R. Williams, resident of Durango West Metropolitan District No. 1

17. Jeff Switzer, regional vice-president of Patton Corporation West

18. Gene Bradley, for Shenandoah Homeowners' Association and Shenandoah Highlands

19. Naomi Riece, office manager and assistant to the managing partner of Shenandoah Ltd.

# # #

APPENDIX II - LIST OF EXHIBITS

EXHIBIT A - STIPULATION OF FACTS BY COMPLAINANT AND RESPONDENT

-- Exhibit 1 - Certificate of Incorporation to Lake Durango, Inc.
- Articles of Incorporation of Lake Durango, Inc.
- Articles of Incorporation of Lake Durango Water Company, Inc.
- Amended Articles of Lake Durango Water Company, Inc.
- Second Amended Articles of Incorporation of Lake Durango Water Company, Inc.
- By-Laws of Lake Durango Water Company, Inc.

-- Exhibit 2 - Water Purchase Agreement, Durango West Metropolitan District No. 1 and Lake Durango Water Company, Inc. dated October 1, 1987

-- Exhibit 4 - Letters dated August 28, 1995 and August 30, 1995, from James C. Anesi to Frank J. Anesi

-- Exhibit 9 - The Lake Durango Water Company - La Plata County, Colorado - Proposed System Safe Yield Analysis

-- Exhibit 15- (Interrogatory No. 15) - List of Water Usage by Certain Entities and Persons, 1989-1990, 1990-1991, 1991-1992

-- Exhibit 16- (Interrogatory No. 16) - Table I-Lake Durango Water Company Treatment Plant Capacity; Table II-Present Water Use Commitments

-- Exhibit 18- Miscellaneous Documents from Colorado Department of Health and Others re Water Supply

-- Exhibit 21- Water Processing Agreement (form) of Lake Durango Water Company, Inc.

EXHIBIT B - ADDITIONAL STIPULATION OF FACTS BY COMPLAINANT AND RESPONDENT

EXHIBIT C - FOUR (4) LETTERS FROM COLORADO DEPARTMENT OF HEALTH TO LAKE DURANGO WATER COMPANY DATED FEBRUARY 19, 1991, JULY 17, 1992, FEBRUARY 8, 1994, AND MARCH 20, 1995

EXHIBIT D - LETTER FROM FRANK J. ANESI TO DURANGO WEST METROPOLITAN DISTRICT NO. 1 DATED MARCH 15, 1988

EXHIBIT E - WATER PURCHASE AGREEMENT BETWEEN DURANGO WEST METROPOLITAN DISTRICT NO. 2 AND LAKE DURANGO WATER COMPANY, INC.

EXHIBIT F - WATER PROCESSING AGREEMENT BETWEEN SHENANDOAH, LTD. AND LAKE DURANGO WATER COMPANY, INC.

EXHIBIT G - WATER SERVICE AGREEMENT BETWEEN LAKE DURANGO WATER COMPANY, INC. AND TRAPPERS CROSSING AT DURANGO, L.P.

EXHIBIT H - WATER SERVICE AGREEMENT BETWEEN LAKE DURANGO WATER COMPANY, INC. AND LAUREY JAROS

EXHIBIT I - DEPARTMENT OF REGULATORY AGENCIES, PUBLIC UTILITIES COMMISSION'S RULES REGULATING WATER UTILITIES

EXHIBIT J - PORTION OF PUBLIC UTILITIES LAW, § 40-1-103(1)(A), PUBLIC UTILITY DEFINED

EXHIBIT K - LAKE DURANGO WATER TAP WAITING LIST, RESERVATIONS FOR TAPS LIST (LATE FILED)

EXHIBIT L - STANDARD BACTERIOLOGICAL WATER TEST DATED 5/7/96

EXHIBIT M - LETTER FROM COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT TO MR. FRANK ANESI, ATTORNEY, DATED MAY 15, 1996

# # #