

Decision No. C03-0766

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 95F-446W

DURANGO WEST METROPOLITAN DISTRICT NO. 1,

COMPLAINANT,

V.

LAKE DURANGO WATER COMPANY, INC.,

RESPONDENT.

DOCKET NO. 97S-182W

RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY LAKE
DURANGO WATER COMPANY, INC. WITH ADVICE LETTER NO. 2-WATER.

DOCKET NO. 97A-273W

IN THE MATTER OF THE APPLICATION OF LAKE DURANGO WATER COMPANY, INC.
TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO
PROVIDE DOMESTIC WATER IN AN AREA WEST OF THE CITY OF DURANGO,
LA PLATA COUNTY, COLORADO.

**ORDER GRANTING, IN PART, MOTION FOR AWARD OF
ATTORNEY'S FEES AND COSTS INCURRED ON APPEAL**

Mailed Date: July 11, 2003
Adopted Date: June 11, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of a motion filed by
Durango West Metropolitan District No. 1 (District) on May 23, 2003, for an award of attorney's

fees and costs incurred as a result of Lake Durango Water Company, Inc.'s (Lake Durango) appeal of our Decision Nos. C00-1265, C00-1467, and C01-0134. Specifically, the District seeks attorneys' fees and costs in the amount of \$79,240.76 incurred as a result of Lake Durango's appeal to the La Plata County District Court and the Colorado Supreme Court of our award of \$276,461.45 in attorney's fees and costs to the District in these dockets.

2. Now, being duly advised in the matter, we grant the District's motion in part, consistent with the discussion below.

B. Background

3. The District is a special district providing water and sewer utility service and road maintenance for users within the District. Lake Durango provides water to numerous households, including approximately 200 customers through the District.

4. The attorney's fees and costs sought by the District here arise from an appeal by Lake Durango of three related proceedings before the Commission involving Lake Durango and the District: 1) Docket No. 95F-446W, in which the Commission determined that Lake Durango was a public utility and therefore subject to its jurisdiction; 2) Docket No. 97S-182W, in which the Commission established rates for Lake Durango; and 3) Docket No. 97A-273W, in which Lake Durango applied for a Certificate of Public Convenience and Necessity.

5. In July 1998, the District filed a motion for fees and costs in the above three proceedings to recover the attorney's fees and costs it incurred. The District presented numerous witnesses regarding hours expended, hourly rates, costs, and reasonableness of the rates, hours, and costs relative to the three proceedings. Lake Durango did not challenge the reasonableness of the District's attorneys' rates, but did challenge hours expended and costs.

6. Based upon credible expert testimony, voluminous support on the record, and Lake Durango's failure to challenge the matter, an administrative law judge (ALJ) found (in Recommended Decision No. R00-78) the hourly rates of the District's attorneys to be reasonable. The ALJ further found that for all three proceedings, the District adequately documented its fee requests; the amount of time expended by the District's attorneys was reasonable; and the costs of the District were reasonable and appropriate. The ALJ therefore granted the District \$281,035.41 in attorney's fees and costs.

7. Both parties filed exceptions to the ALJ's order. The District disputed the amount granted, and Lake Durango generally objected to the granting of any fees at all, arguing that a grant of fees would be retrospective legislation as well as an unconstitutional taking, is time barred and is simply unfair. In Decision No. C00-1265, the Commission affirmed the granting of the fees and costs, but adjusted the amount awarded by the ALJ.

8. The District and Lake Durango both filed applications for rehearing, reargument, or reconsideration (RRR) of the Commission's decision on exceptions. Lake Durango repeated its legal arguments. The District contested specific amounts awarded or not awarded by the Commission. In Decision No. C00-1467, the Commission denied the arguments of Lake Durango, but slightly adjusted the amounts awarded to the District to \$276,461.45. Lake Durango requested a second RRR, which was denied by the Commission in Decision No. C01-0134.

9. Lake Durango then filed a *writ of certiorari* for review of the Commission's decision by the La Plata County District Court. On February 8, 2002, the district court wholly affirmed the Commission's decision finding that the Commission was well within its authority to

award attorney's fees in this matter. Thereafter, Lake Durango filed an appeal with the Colorado Supreme Court, asserting the same claims it argued in the district court, namely, that an award of attorney's fees was retrospective legislation, an unconstitutional taking, is time barred, and the award involved illegal *ex parte* communications.

10. On April 30, 2003, the Colorado Supreme Court wholly affirmed the district court with regard to the Commission's authority to award attorney's fees. The Supreme Court found the award within the jurisdiction and discretion of the Commission, and under the circumstances, found the amount awarded reasonable. The District now seeks \$79,240.76 in attorney's fees and costs it claims to have incurred during Lake Durango's appeal of the Commission's decisions.

C. District's Motion

11. The District cites previous Commission decision, *O'Bryant v. U.S. West Communications, Inc.*, Decision No. C93-39, January 14, 1993 in support of its request for attorney's fees incurred as a result of Lake Durango's appeals. The District points out that in *O'Bryant*, the Commission held that allowing legal fees for the judicial review of a Commission decision is necessary to give full effect to the Colorado Supreme Court's decisions in *Mountain States Tel. & Tel. Co v. PUC*, 502 P.2d 945 (Colo.1972) (*Mountain States I*) and *Mountain States Tel. & Tel. Co. v. PUC*, 576 P.2d 544 (Colo. 1978) (*Mountain States II*).¹

12. The District further indicates that the Commission noted in *O'Bryant* that allowing attorney's fees for defending appeals from Commission decisions is necessary to

¹ In *Mountain States I* and particularly *Mountain States II*, the court recognized the jurisdiction of the Commission to award attorney's fees in matters before the Commission if the party seeking the fees met a three-pronged test. First, the party seeking legal fees must have represented the consumer interest in the matter in which it seeks fees. Second, the party seeking fees must have materially assisted the Commission in reaching its decision. Third, the fees sought must be reasonable.

prevent the initial award from being substantially depleted by appellate legal fees. *See O'Bryant* at 34. Moreover, if fees were not awarded for an appeal, utilities might appeal every case as a wise litigation strategy to wear down the opposition, which would serve as a powerful incentive to prolong fee litigation. *Id.* at 40-41.

13. The District urges that an award of fees incurred during Lake Durango's appeal is necessary "to fulfill the underlying basis for the initial award of fees and costs, to avoid depletion of that success through a prolonged appeals process designed as a legal strategy to wear down the opposition, to continue to encourage the private bar to represent the general consumer interest, and materially assist the PUC, and to promote settlement of fee litigation."

D. Lake Durango's Response

14. Lake Durango, on the other hand, objects to any further award of fees and costs in this matter. Lake Durango argues that the attorney's fees awarded by the Commission, and upheld by the supreme court, including accrued interest which totals \$326,814.86, is substantially more than its total gross revenue in any of the three preceding years.

15. Lake Durango reasons that the since the Attorney General's Office (AG) appeared in support of the Commission's orders, this was in effect similar to the situation where the Colorado Office of Consumer Counsel (OCC) represents the public. Intervenors may only be paid fees and expenses for issues not argued by the OCC. Since the District did not assert in its motion that the AG's representation was in any respect deficient, Lake Durango concludes there was no public need for a further appearance by the District, and therefore its appearance was entirely redundant.

16. Additionally, Lake Durango maintains that since the contingent fee agreement between the District and its attorneys provides that the District will receive 65 percent of any award for fees or expenses, this will now be a profit-making venture for the District. Finally, Lake Durango concludes that *O'Bryant* is not applicable here, because in that case, *O'Bryant* obtained a reversal of a Commission decision which was being defended by the AG, which is exactly contrary to the facts here.

E. Analysis

17. We find persuasive the District's arguments that an award of attorney's fees and costs for its counsel's appellate work is appropriate. It is well settled through *Mountain States I* and particularly *Mountain States II* that it is within this Commission's discretion and authority to award attorneys fees. In order to award fees and costs, however, the Commission must find that the party seeking fees and costs meets a three-pronged test. First, the party seeking legal fees must have represented the consumer interest in the matter in which it seeks fees. Second, the party must have materially assisted the Commission in reaching its decision. Finally, the fees sought must be reasonable.

18. The Commission found in Decision No. C00-1265 that the ALJ was correct in awarding attorney's fees and costs to the District. Despite adjusting the amount of the award, the Commission nonetheless upheld the ALJ's findings that the District met the three-pronged *Mountain States II* criteria and was therefore entitled to recover fees and costs.

19. We agree with the District that the Commission's holdings in *O'Bryant* are on point here. *O'Bryant* held that the award of legal fees for judicial review of a Commission decision necessarily follows from *Mountain States I* and *II*. We concur with the findings in *O'Bryant* that the award of legal fees for appellate review necessarily follows from the *Mountain*

States decisions, otherwise, “the initial award would be substantially depleted by appellate legal fees ...” *Id.* at 38. As the Commission concluded in *O’Bryant*, “if fees are allowed at the [C]ommission, it is essential that the [C]ommission award legal fees for appellate review ... to complete the logical circle.” *Id.* at 40.

20. Further, the Colorado Court of Appeals, while not articulating a new standard, has upheld the award of attorney’s fees to the prevailing appellate party by a lower tribunal. In *Giampapa v. Family Mut. Ins. Co.*, 12 P.3d 839 (Colo.App. 2000), the court found that there was no statute, rule, or precedent in Colorado “specifying the tribunal before which the issue of the award of prevailing party appellate attorney fees is to be presented. There is no statute limiting the jurisdiction of the trial courts with respect to the issue. There is no rule establishing a procedure for requesting or awarding prevailing party appellate attorney fees.” *Id.* at 843-44. As such, the appellate court concluded that there was little reason to limit the application for prevailing party attorney’s fees to any tribunal, and therefore the application of the prevailing plaintiff in that matter to the trial court for an award of attorney’s fees was appropriate. *Id.* We therefore find that an award of appellate attorney’s fees in this matter is appropriate.

21. We are not persuaded by Lake Durango’s second argument that there was no public purpose for the District to appear in the judicial review proceedings. Lake Durango, not the District, was the party bringing the appellate proceedings. The District, as a named party in Lake Durango’s appeals to the district court and supreme court, was consequently obligated to participate and litigate the Commission’s decisions on appeal. The Commission noted in Decision No. C00-1265 that the legal fees incurred by the District were the result of Lake Durango’s tactics.

22. To the extent Lake Durango attempts to liken the representation of the AG's Office to OCC representation in order to invoke the provisions of § 40-6.5-105, C.R.S., we find that argument misplaced. That statutory provision applies only when the OCC is a party to a matter along with other intervenors. The OCC did not participate in this matter, nor was the District an intervenor, but rather a named party in both appellate matters. Therefore, we find the provisions of § 40-6.5-105, C.R.S., unavailing.

23. Lake Durango further argues that since the District's counsel was working under a contingent fee agreement, no attorney's fees or costs should be awarded because any further award would provide a profit to the District. However, the Colorado Supreme Court, in *City of Wheat Ridge v. Cervený*, 913 P.2d 1110 (Colo. 1996), found that the court's task in assessing reasonable attorney's fees under the circumstances of the case is not linked to the nature of compensation negotiated between the party and his or her attorney. *Id* at 1117 (citing *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989)). *Blanchard* (which involved whether an attorney was limited to compensation as set forth pursuant to the contingent arrangement) rejected the argument that a windfall would result if the court awarded fees. The Supreme Court noted that properly calculated attorney's fees are reasonable under the circumstances of the case. *Id*. The Court explained, however, that the nature of the agreed-upon compensation was a factor that could be considered in determining what constitutes reasonable attorney fees. *Id*.

24. Therefore, we find that although we may not reject an award of attorney's fees when a contingent fee agreement exists between counsel and client, we may nonetheless consider it as a factor in determining the reasonableness of the fees awarded.

25. Lake Durango also argues that the District should not receive an award of fees because its involvement in the appellate process was redundant. We find this position without merit. As we pointed out earlier, the District was a named party in both appellate proceedings brought by Lake Durango. Although both attorneys for the District and the AG addressed several overlapping issues, the District did address certain issues exclusive to it such as the breach of agreement between the District and Lake Durango, and a cross-appeal issue on post-judgment interest. Further, the District along with the AG fully briefed the other appellate issues raised by Lake Durango and argued them at the district court level. Therefore, although there is some overlap, we find that the District's participation in the appellate process was not redundant.

26. Having determined that an award of attorney's fees and costs to the District is appropriate, we must now determine what amount to award. As the Supreme Court held in *Blanchard*, although contingency agreements may not be grounds for refusing an award of attorney's fees, the agreement may be considered in determining the amount to be awarded. Paragraph 1 of the fee agreement between the District and its counsel states as follows:

The claim, controversy, and other matters with reference to which the services are to be performed are the District's claims against Lake Durango Water Company and Robert Johnson for attorneys' fees and other expenses incurred in proceedings before the Colorado Public Utilities Commission ("PUC"), *and any appeal therefrom.* (emphasis added)

Clearly, the District and its attorneys contemplated that the contingency arrangement would extend to any appeals by Lake Durango that would arise from a Commission decision awarding attorney's fees and costs to the District. The fee agreement further provides that the attorneys for the District shall receive 35 percent of any amounts awarded (with presumably, the remainder minus costs going to the District). Any distribution of attorney's fees here should be equitable under the circumstances. Given that attorneys for the District were compensated adequately

pursuant to the agreement for seeking attorney's fees at the Commission, and will be compensated adequately pursuant to the agreement for the required appellate work, we find that equity dictates that any determination of an award of attorney's fees and costs here should be reduced in part by virtue of the contingency arrangement between the District and its attorneys. To do so reduces the possibility of any award of fees and costs resulting in a profit-making venture for the District, as Lake Durango urges us to avoid.

27. We must next examine the appellate work performed by the District's attorneys in conjunction with the appellate work of the AG on behalf of the Commission, to determine whether any redundancies or overlap exist that would also reduce the amount of fees and costs sought. As we stated earlier, although the AG and the District's attorney both addressed some issues, other issues were addressed solely by the District. For example, at the district court, both parties fully briefed and argued the following issues: 1) standard of review; 2) retrospective legislation; 3) unconstitutional takings; 4) *res judicata*; 5) the repudiated contract; 6) alleged *ex parte* communications; and 7) the method utilized to calculate Lake Durango's rates.

28. In response to Lake Durango's appeal to the Colorado Supreme Court, the AG and the attorney for the District again fully briefed the following issues: 1) standard of review; 2) retrospective legislation; 3) unconstitutional takings; 4) the repudiated contract; and 5) alleged *ex parte* communications. The District also filed a cross-appeal questioning the district court's calculation of interest on the amounts owed. During oral arguments at the Supreme Court, the AG argued the standard of review, retrospective legislation, unconstitutional takings, and alleged *ex parte* communications issues. The District argued the repudiated contract issue and its cross-appeal issue on the correct interest calculations.

29. Therefore, we find there was significant overlap of the issues addressed by the AG and the District's attorney on appeal. The only matter exclusively argued by the District was its cross-appeal claims. Consequently, we find that this overlap also weighs against an award to the District of the full amount it requests.

30. Finally, in order to determine the correct award, we must look at the reasonableness of the charges counsel submitted to the District. A review of the billing records submitted reveals several areas of concern. For example, counsel has billed the District for 31 hours of research on a single issue - the standard of review of Commission decisions on appeal. Dozens of hours also were spent on other research projects and preparation for oral argument at both the District Court and Supreme Court levels. We find the number of hours and amount of such billings unreasonable.

31. As a result, we determine that based on the existing contingency fee arrangement between the District and its attorneys, the overlapping appellate work with the AG, and considering the reasonableness of the charges invoiced to the District, an equitable award to be 50 percent of the District's request, or \$39,620.38.

II. ORDER

A. The Commission Orders That:

1. The motion of Durango West Metropolitan District No. 1 for an award of fees and costs is granted in part consistent with the analysis above.

2. Lake Durango Water Company, Inc., shall pay attorney's fees and costs to Durango West Metropolitan District No. 1 in the amount of \$39,620.38 for fees and costs incurred on appeal.

3. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

4. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
June 11, 2003.**

(S E A L)



ATTEST: A TRUE COPY

**Bruce N. Smith
Director**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

Commissioners

COMMISSIONER JIM DYER RECUSED
HIMSELF.