

Decision No. R03-0048-I

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 02F-641E

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ROBERT L. HAWORTH AND MERI J. HAWORTH,

COMPLAINANTS,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

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**INTERIM ORDER OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
DENYING MOTION TO DISMISS,  
VACATING AND RESCHEDULING  
HEARING DATE, AND  
ESTABLISHING FILING REQUIREMENTS**

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Mailed Date: January 14, 2003

**I. STATEMENT**

1. On December 23, 2002, Respondent Public Service Company of Colorado (Respondent or PSCo) filed a Motion to Dismiss the Complaint in this docket (PSCo motion).

Respondent served a copy of its motion on Robert L. and Meri J. Haworth (Complainants).

2. On the same date Complainants, who appear in this proceeding *pro se*, filed a request to vacate and to reschedule the hearing in this docket. Complainants did not serve a copy of this request on PSCo.

3. By Decision No. R02-1462-I, the undersigned Administrative Law Judge (ALJ) provided notice of the request to vacate and to reschedule the hearing date. By that decision the

ALJ also enlarged the time for Complainants to respond to the PSCo motion and set out procedures to be followed regarding the request to vacate and to reschedule the hearing. All filings were made timely on January 10, 2003.

4. PSCo based its Motion to Dismiss on the assertion that the complaint fails to state a claim upon which relief can be granted. PSCo argues that the complaint asserts defenses to, and is “a transparent attempt to delay or defer[,]” an injunctive action which PSCo intends to file against Complainants.<sup>1</sup> PSCo motion at ¶¶ 2-3. Respondent avers that the complaint “fails to identify how any law, order, Commission rule, or public utility tariff provision may have been violated in connection with their allegations[,]” and, thus, does not comply with the requirements of 4 *Code of Colorado Regulations* (CCR) 723-1-61(a). PSCo motion at ¶¶ 1, 4.

5. Complainants respond that motions to dismiss for failure to state a claim are disfavored and that PSCo bears the heavy burden of establishing, beyond doubt, that Complainants can prove no facts in support of their claim which entitle them to relief. Complainants’ Response to Motion to Dismiss (Complainants’ response) at 1. Complainants argue that the complaint states a claim for relief under statute and Commission rule; and they provide a list of the statutory and rule provisions which they claim PSCo has violated.<sup>2</sup>

6. The ALJ agrees with Complainants that a motion to dismiss based on failure of the complaint to state a claim is disfavored and is difficult to sustain. A motion to dismiss for failure to state a claim upon which relief can be granted is a vehicle “to test the formal sufficiency of the complaint.” *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). In

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<sup>1</sup> This delay or deferral argument is not developed beyond the bald assertion. In the absence of that development, the relevance of this argument is not readily apparent.

<sup>2</sup> Complainants reserve the right to add alleged tariff violations to the proffered list. Complainants’ response at note 1.

ruling on a motion to dismiss based on a failure to state a claim, these principles apply: Allegations in the complaint must be viewed in the light most favorable to the complainant; all assertions of material fact must be accepted as true; and the motion is decided by looking only at the complaint. *Medina v. Colorado*, 35 P.2d 443, 452 (Colo. 2001). A motion to dismiss based on failure to state a claim must be denied “unless it appears beyond doubt that the [complainant] cannot prove facts in support of the claim that would entitle [complainant] to relief.” *Dorman*, 914 P.2d at 911; *see also Schoen v. Morris*, 15 P.3d 1094, 1096 (Colo. 2000) (same).

7. In addition, as noted by Complainants, Rule 4 CCR 723-1-4(a)(6) provides that the rules are to be liberally construed to secure a speedy, efficient, and just determination of all matters before the Commission. This is particularly true when, as here, a complainant appears *pro se*.

8. Judged against these standards, PSCo has not met its burden. The PSCo motion will be denied.

9. As the Complainants correctly state, the complaint and the attached documents (which are incorporated by reference into the complaint), when liberally read and interpreted as required, state facts which, if established, would entitle Complainants to relief pursuant to §§ 40-3-101(1) and 40-3-102, C.R.S., and 4 CCR 723-3.<sup>3</sup> Although this alone is sufficient basis to deny the PSCo motion, the ALJ notes that the complaint may contain facts which, if established, are sufficient to sustain a finding that PSCo has violated its tariffs filed with the Commission.<sup>4</sup>

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<sup>3</sup> These are the Commission’s Rules Regulating the Service of Electric Utilities.

<sup>4</sup> *See* note 1, *supra*.

10. Whether the complaint states facts that evidence PSCo's failure to abide by applicable tariffs is unknown at present, as are the tariff provisions which Complainants may allege that PSCo has violated. Respondent is entitled to disclosure of this information in order to prepare its defense to the complaint. To afford Respondent that reasonable opportunity, Complainants will be directed to file a list of the tariff provisions allegedly violated by PSCo's actions outlined in the complaint. Complainants will file this list of tariff provisions on the same day they file their list of witnesses and copies of exhibits. Complainants are advised that failure to comply with this filing requirement may be considered acknowledgment that PSCo violated no tariff provision by its actions alleged in the complaint.

11. Having determined that the PSCo motion will be denied, it is necessary to address the Complainants' request to vacate and to reschedule the hearing. At present, the hearing in this docket is scheduled for February 18, 2003. Complainants have requested that the Commission vacate this date and schedule the hearing later in February or the first week of March, 2003. Respondent has no objection to this request and states that it is available on all dates suggested by Complainants. The unopposed motion will be granted. The hearing date of February 18, 2003, will be vacated. The hearing will be rescheduled to March 6, 2003.

12. The filing and service requirements applicable to this proceeding are contained in Rule 4 CCR 723-1-72 and Rule 4 CCR 723-1-61 and are incorporated into the Order to Satisfy or to Answer dated December 11, 2002. For the convenience of the parties, the requirements are: (a) within ten days after the date of this Order, PSCo shall file and serve its answer to the complaint; (b) within ten *working* days after the answer is filed, Complainants shall file and serve a list containing the name, address, and title of each of their witnesses and two copies of

each exhibit they intend to present at the hearing;<sup>5</sup> (c) within 15 *calendar* days after the date PSCo's answer is due (whether or not an answer is filed), Complainants shall file and serve a statement either that they intend to proceed with the complaint or that they wish to withdraw the complaint; and (d) within ten *working* days after Complainants file their list and exhibits, PSCo shall file its list containing the name, address, and title of each of its witnesses and two copies of each exhibit it intends to present at the hearing.

13. A witness (except one offered in rebuttal) who is not identified according to these requirements will not be permitted to testify. An exhibit (except one offered in rebuttal) which is not filed and served in accordance with these requirements will not be received into evidence.

14. Parties are reminded that, absent a showing of good cause for the failure, a failure to meet the filing requirements may result in dismissal of the complaint or in striking the answer.

## **II. ORDER**

### **A. It Is Ordered That:**

1. The Motion of Public Service Company of Colorado to Dismiss the Complaint is denied.

2. The request to vacate and to reschedule the hearing date, filed by Complainants Robert L. and Meri J. Haworth is granted.

3. The hearing in this docket scheduled for February 18, 2003, is vacated.

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<sup>5</sup> At the same time, as discussed *supra*, Complainants shall file and serve a list of the tariff provisions allegedly violated by PSCo's actions outlined in the complaint.

4. Hearings shall be conducted in this matter at the following date and time:

DATE: March 6, 2003

TIME: 9:00 a.m.

PLACE: Commission Hearing Room  
1580 Logan Street, OL2  
Denver, Colorado

5. Parties shall follow the procedures and make the filings as set out above.

6. This Order is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge