Decision No. R04-1311-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04F-475CP

CRAIG S. SUWINSKI,

COMPLAINANT,

V.

VAIL SUMMIT RESORTS, INC.,
KEYSTONE RESORT, INC.,

RESPONDENTS.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DENYING MOTION TO DISMISS,
FINDING FOR COMPLAINANT ON ONE
CLAIM OF VIOLATION OF RULES,
SETTING PREHEARING CONFERENCE,
AND STATING ISSUES TO BE DISCUSSED**

Mailed Date: November 5, 2004

I. STATEMENT

1. On September 15, 2004, Craig S. Suwinski (Complainant) filed a Formal Complaint Regarding Non Filing of Schedule Changes and Providing Service Without Legal Authority (Complaint). Complainant requested an expedited process pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 723-1-61(j)(1). The Complaint commenced this proceeding.

2. On September 20, 2004, the Commission issued its Order to Satisfy or Answer addressed to Vail Summit Resorts, Inc., doing business as Keystone Resorts, Inc. (Respondent). On that same date the Commission issued its Order Setting Hearing and Notice of Hearing. That

Order set the hearing in this matter for October 7, 2004, and established a procedural schedule. By Decision No. R04-1163-I the undersigned Administrative Law Judge (ALJ) vacated the hearing and the procedural schedule.

3. The only parties in this proceeding are Complainant and Respondent.

4. On September 30, 2004, Respondent filed a Motion to Dismiss the Complaint (Motion).[1] Response to the Motion was due on or before October 14, 2004. Review of the Commission file in this matter reveals that, although the ALJ informed Complainant of the response date (*see* Decision No. R04-1163-I), Complainant has not filed a response as of the date of this Order. Thus, the Motion is unopposed.

5. The Complaint alleges two separate violations by Respondent: first, that Respondent provided call-and-demand service without authorization from the Commission (*see* Complaint at ¶¶ 1, 2, and 9); and, second, that Respondent discontinued scheduled service without authorization from the Commission (*see* Complaint at ¶¶ 1, 3 through 8). As the basis for its Motion, Respondent asserts that, for various reasons, the Complaint fails to state a claim upon which relief can be granted and, thus, should be dismissed.

6. A motion to dismiss based on the failure of a complaint to state a cause of action is disfavored and is "rarely granted under our 'notice pleadings.'" *Berenergy Corporation v. Zab, Inc.*, 94 P.3d 1232, 1236 (Colo. App. 2004) (internal citations omitted). 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 ruling on such a motion, these principles apply: The allegations in the complaint must be viewed

[1] As permitted by Rule 4 CCR 723-1-61(d)(2), Respondents filed the Motion in lieu of answering the Complaint. Respondents need not file an answer to the Complaint until and unless the Motion is denied. *See id.*

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. For the reasons discussed below, the ALJ finds that neither claim should be dismissed. The Motion will be denied, an answer to the Complaint will be required, and a hearing will be held as to both claims. In addition, as to the second claim (*i.e.*, discontinuing scheduled service without Commission authorization), the ALJ finds that the Motion itself is an admission of the alleged violative conduct. With respect to the second claim, therefore, the hearing will be limited to the issues of the duration of the violation and the penalty or corrective action to be ordered to address the violation.[2]

8. Turning to the first claim (*i.e.*, providing call-and-demand service without Commission authorization), the Complaint states that Respondent provided call-and-demand service without first obtaining Commission authorization. Respondent asserts that dismissal of this claim is appropriate because Respondent received the required authorization from the Commission by Decision No. R04-0490 entered in Docket No. 04A-120CP-Extension. Specifically, Respondent states that "Keystone's provision of *call-and-demand, or charter, service*" was approved by the Commission when it amended Respondent's then-existing Certificate of Public Convenience and Necessity (CPCN) to include charter service. Motion at ¶ 4 (emphasis supplied).

[2] This does not affect the scope of the issues to be heard with respect to the first claim.

9. As to the first claim, the ALJ finds that the Motion should be denied. Decision No. R04-0490 extends Respondent's authority to include charter service, but the extended authority does not include all types of call-and-demand service. Contrary to Respondent's apparent understanding, charter service and call-and-demand service are not synonymous. Call-and-demand service is a broad term that encompasses transportation of persons not on schedule. *See* Rule 4 CCR 723-31-2.8 (definition of call-and-demand service). That Rule lists four[3] types of call-and-demand service, one of which is charter service. *See* Rule 4 CCR 723-31-2.8.1 (definition of charter service). The Complaint does not specify the type of call-and-demand service which Respondent allegedly provided without authorization, and Respondent has not established that it has authority to provide all types of call-and-demand service. Absent such a showing, the Motion must be denied as to the first claim because it is possible for Complainant to establish at hearing that Respondent provided some other type of call-and-demand service for which Respondent lacked authority.

10. Turning to the second claim (*i.e.*, discontinuing scheduled service without authorization), the Complaint alleges that, on or about September 6, 2004, Respondent stopped providing scheduled service without first obtaining Commission authorization. Respondent moves to dismiss on the basis of mootness (Motion at ¶ 7), stating:

> Mr. Suwinski is correct in his observation, as Keystone temporarily suspended its scheduled service and inadvertently did so without first obtaining Commission approval. Keystone is duly appreciative of Mr. Suwinski's bringing this omission to its attention, and will seek leave of the Commission in a subsequent filing to cure its initial oversight and provide the Commission with proper notice of its intent to suspend its operations for a limited duration. Consequently, with the Commission's permission, this discrete matter raised in the Complaint will be satisfied,

[3] The Rule states that "[s]pecific types of call-and-demand transportation include" the four listed types of transportation. The wording suggests that there might be more than the four specified types. This is not an issue which needs to be decided here.

and therefore renders the issues raised in paragraphs 3 through 8 of the Complaint moot.

11. As to the second claim, the ALJ finds that the assertion of mootness is without foundation and, thus, provides no support for the Motion. A cause of action based on *past and perhaps continuing* action of a respondent, such as the one here, is not rendered moot by the respondent's promise to take *future* action. This is especially true when, as here, Respondent admits to having violated the applicable rules by its actions.[4] A promise of future corrective action goes, at most, to the issue of the remedial action to be ordered or the penalties to be assessed. Such a promise does not vitiate the violation which has already occurred and which may be on-going. For this reason the ALJ will deny the Motion as to the second claim and will find that Respondent's violation of Commission rules is established. The issues remaining for hearing with respect to the second claim, then, are: (a) the duration of the violation; and (b) the penalty to be assessed or the remedial action to be ordered to address the violation.

12. Further, Respondent argues that ¶¶ 10-11 of the Complaint should be dismissed as moot because they pertain to matters previously resolved by the Commission. *See* Motion at ¶ 5. As Respondent notes in its Motion, the cited paragraphs in the Complaint seek to have the Commission take administrative notice of two other proceedings. Whether to take administrative notice is a matter of admissibility of evidence; it is not a matter of mootness. Because we are not in hearing at present, consideration of a request to take administrative notice is premature. Thus, the Motion will be denied with respect to ¶¶ 10-11 of the Complaint; and Respondent may raise

[4] The quotation from the Motion (set out above) is such an admission; it was made by counsel in a filing in a formal docket before the Commission and admitted the facts necessary to support one of the claims made in the Complaint. This is sufficient to "preclude the pleader [that is, Respondent] from later taking a position inconsistent with the existence of the facts admitted." *Skeens v. Kroh*, 489 P.2d 347, 348 (Colo. App. 1971). Like a factual admission made by counsel during the course of an opening statement, this admission is binding on Respondent. *See, e.g., La Rocco v. Fernandez*, 277 P.2d 232, 235 (Colo. 1954).

its objection if and when, during the hearing in this matter, Complainant seeks to have the ALJ take administrative notice of the materials referenced in ¶¶ 10-11 of the Complaint.

13. Finally, Respondent argues that ¶¶ 12-13 of the Complaint should be dismissed because they do not state a claim upon which relief can be granted and because they are more suited for resolution in a pending Show Cause proceeding (referencing Docket No. 04C-452CP) than in the instant Complaint proceeding. *See* Motion at ¶ 8. As Respondent states in the Motion, the cited paragraphs in the Complaint are part of the prayer for relief. The ALJ finds this last argument unpersuasive because the "prayer for relief is not considered a component of a … claim." *Berenergy Corporation*, 94 P.3d at 1238.

14. For these reasons, the ALJ will deny the Motion in its entirety. Pursuant to Rule 4 CCR 723-1-61(d)(2), Respondent's answer to the Complaint will be due on or before **November 15, 2004**.

15. It is necessary to schedule a hearing and to establish a procedural schedule in this matter. To do so, a prehearing conference will be held on **November 22, 2004**. The provisions of Rules 4 CCR 723-1-79(b)(3) and 4 CCR 723-1-79(b)(4) govern this prehearing conference.

16. The parties should be prepared to discuss these matters at the prehearing conference: (a) date by which Complainant will file his list of witnesses and copies of his exhibits; (b) date by which Respondent will file its list of witnesses and copies of its exhibits; (c) date by which each party will file its prehearing motions;[5] (d) whether a final prehearing conference is necessary and, if it is, the date for that prehearing conference; (e) date by which the

[5] This date should be at least 10 days before the final prehearing conference or, if there is no final prehearing conference, 14 days before the hearing.

parties will file any stipulation reached;[6] (f) hearing date(s); and (g) whether the parties wish an opportunity to file post-hearing statements of position and, if so, the date on which the parties will file their post-hearing statements of position. In addition, the parties should be prepared to discuss any matters pertaining to discovery if the procedures of Rule 4 CCR 723-1-77 are not sufficient. Further, the parties should review, and be prepared to discuss to the extent relevant, the matters contained in Rule 4 CCR 723-1-79(b)(5). Finally, any party may raise any additional issue.

17. The ALJ expects the parties to come to the prehearing conference with proposed dates for all deadlines. In addition, the parties must consult prior to the prehearing conference with respect to the listed matters. Finally, the parties are encouraged to present, if possible, a procedural schedule and hearing date(s) which are satisfactory to both parties.

18. If they wish to do so, the parties may agree upon a proposed procedural schedule and propose that schedule for the ALJ's consideration in advance of the prehearing conference. If the parties opt to propose a procedural schedule, the proposal must be filed on or before **November 15, 2004**. If it is acceptable, the ALJ will vacate the scheduled prehearing conference.[7]

II. ORDER

A. It Is Ordered That:

1. The Motion to Dismiss the Complaint is denied.

2. The issues for hearing are limited as set forth above.

[6] This date should be at least seven calendar days before the first day of hearing.

[7] The ALJ suggests that the parties contact her directly (telephone: 303.894.2842) with respect to the hearing date before they file the proposed schedule.

3. The answer to the Complaint shall be filed on or before November 15, 2004.

4. A prehearing conference in this docket is scheduled as follows:

DATE: November 22, 2004

TIME: 1:00 p.m.

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

5. The parties must be prepared to discuss the matters set forth above. If they wish to do so, the parties may make a filing pursuant to ¶ I.18, above.

6. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____
Administrative Law Judge

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