

Decision No. R14-0591-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14F-0336EG

DEVELOPMENT RECOVERY COMPANY LLC ON BEHALF OF THE RYLAND GROUP,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
GRANTING IN PART AND DENYING IN PART MOTION
TO DISMISS; ORDERING RESPONDENT TO ANSWER
COMPLAINT; SCHEDULING PREHEARING
CONFERENCE; AND VACATING HEARING**

Mailed Date: June 3, 2014

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I. STATEMENT

1. On April 14, 2014, Development Recovery Company LLC (DRC) on behalf of the Ryland Group (Ryland) filed a Complaint against Public Service Company of Colorado (Public Service oRespondent). That filing commenced this proceeding.

2. On April 18, 2014, the Public Utilities Commission (Commission) issued an Order to Satisfy and Answer and a hearing was set in this matter for July 1, 2014.

3. On April 23, 2014, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

4. On May 2, 2014, Public Service filed its Motion to Dismiss or in the Alternative Motion for More Definite Statement (Motion to Dismiss).

5. On May 14, 2014, DRC filed its Response to Public Service Company of Colorado’s Motion to Dismiss oin the Alternative Motion for More Definite Statement.

6. On May 16, 2014, Public Service filed its Motion for Leave to File a Reply and Reply to Development Recovery Company’s Response to Motion to Dismiss.

7. On May 22, 2014, DRC filed its Response to Public Service Company of Colorado’s Motion for Leave to File a Reply and Reply to Development Recovery Company’s Response to Motion to Dismiss.

II. MOTION TO DISMISS

A. **Applicable Law**

8. Commission Rule 1308(e) of the Rules of Practice and Procedure 4 *Code of Colorado Regulations* (CCR) 723-1 provides that “[a] respondent may file a motion to dismiss a complaint or counterclaim within 14 days of service except in an accelerated complaint proceeding ...” Rule 1308(e) specifically states that a motion to dismiss tolls the time in which to file an answer to a complaint until 14 days after a decision denying such motion.

9. Commission Rule 1400(f) provides that a motion to dismiss may be made in accordance with Colorado Rule of Civil Procedure (C.R.C.P.) 12.

10. C.R.C.P. 12(a) requires that an answer or “other response” be filed within 21 days after the service of a complaint. However, if an affirmative defense is asserted (such as failure to state a claim upon which relief can be granted (Rule 12(b)(5)), such a motion asserting an affirmative defense must be filed “before pleading, if a further pleading is permitted.” C.R.C.P. 12(b)(5).

11. “A motion to dismiss for failure to state a claim upon which relief can be granted...the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.” C.R.C.P. 12(b).

12. “Summary judgment is a drastic remedy and is never warranted except on a clear showing that there is no genuine issue as to any material fact.” *People v. Hernandez & Associates, Inc.*, 736 P.2d 1238 (Colo. App. 1986). Even if “it is extremely doubtful that a genuine issue of [material] fact exists[,] ... summary judgment is not appropriate in cases of doubt.” *Abrahamsen v. Mountain States Telephone and Telegraph Company*, 494 P.2d 1287, 1290 (Colo. 1972).

13. In *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 713 (Colo. 1987), the Supreme Court outlined the burden of proof applicable in a motion for summary judgment. The “initial burden of production on the moving party, which burden when satisfied then shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party.” *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 713 (Colo. 1987), citing 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983).

14. A fact is “material,” for purposes of a motion for summary judgment, if it will affect the outcome of the case. *Gadlin v. Metrex Research Corporation*, 76 P.3d 928 (Colo. App. 2003).

B. First Claim for Relief

15. DRC alleges in their first claim for relief that Public Service has violated its tariff by failing to abide by the terms and conditions on line extension refunds. DRC claims that Ryland has not received reimbursement of Construction Payments and Line Extension agreements as permitted under Public Service’s tariff. *DRC Complaint*, p. 11

16. Public Service argues that the first claim for relief is not sufficiently specific to adequately advise Public Service as to which agreements and meters are in dispute. Public Service does not allege that there is no genuine issue as to any material fact in dispute. *Public Service Motion to Dismiss* p 8.

17. Public Service’s failure to allege that there is no genuine issue as to any material fact requires that the Motion to Dismiss as to claim one be denied.

18. The undersigned ALJ also finds that the claim gives sufficient notice to Public Service. The Motion for a More Definitive Statement as to claim one is also denied.

C. Second Claim for Relief

19. DRC alleges in their second claim for relief that Public Service has violated *Rule 3210 of the Rules Regulating Electric Utilities, 4 CCR 723-3* and *Rule 4210 of the Rules Regulating Gas Utilities and Pipeline Operators, 4 CCR 723-4*. DRC alleges that this violation is due to Public Service's failure to provide a "means of reporting the refund, outstanding Construction Payment, or any related calculations to customers." DRC alleges that this information is never provided to customers. *DRC Complaint, p. 13*.

20. Public Service argues that the second claim for relief should be "dismissed for failure to allege any facts that demonstrate a violation of the rules." Public Service also argues that it does provide "specific information on the addresses being awarded and the amounts awarded with Construction Allowance awards *Public Service Motion to Dismiss p. 10 fn 16*."

21. Public Service in their Motion to Dismiss specifically points out a material fact in dispute. Since a material fact is in dispute, the Motion to Dismiss as to claim two is denied.

22. The undersigned ALJ also finds that the claim gives sufficient notice to Public Service. The Motion for a More Definitive Statement as to claim two is also denied.

D. Third Claim for Relief

23. DRC alleges that Public service breached the implied covenant of good faith and fair dealing by its failure "to timely refund amounts due to Ryland following the setting of electric and gas meters at the 468 Ryland subdivisions covered by the line extension agreements." *DRC Complaint, p. 15*.

24. Public Service argues that the third claim for relief is not sufficiently specific to adequately advise Public Service as to which agreements and meters are in dispute.

Public Service does not allege that there is no genuine issue as to any material fact in dispute.

Public Service Motion to Dismiss p 11.

25. Public Service's failure to allege that there is no genuine issue as to any material fact requires that the Motion to Dismiss as to claim three be denied.

26. The undersigned ALJ also finds that the claim gives sufficient notice to Public Service. The Motion for a More Definitive Statement as to claim three is also denied.

E. Fourth Claim for Relief

27. DRC requests that Public Service be ordered to provide its calculation for the gross embedded investment per customer (GEIM). DRC alleges that withholding this information is "detrimental to efforts to determine a proper refund. *DRC Complaint, p. 16.*

28. DRC fails to state how withholding this information is "detrimental" to efforts to determine a proper refund.

29. Public Service argues that the fourth claim for relief "does not assert the Company violated any statute, Commission Rule or Commission Decision." *Public Service Motion to Dismiss p. 12.*

30. The undersigned ALJ agrees with Public Service's assertion that the fourth claim of DRC fails to assert a violation of any statute, Commission Rule, or Commission Decision.

31. The GEIM was last determined by Public Service in Proceeding No. 14F-0336EG. In that proceeding exceptions were filed requesting the same information about the GEIM. The exceptions were denied by the Commission.

32. The fourth claim is a collateral attack upon this prior decision of the Commission and all other Commission decisions concerning the GEIM.

33. Pursuant to § 40-6-112(2), C.R.S., which states, “[i]n all collateral actions or proceedings, the decisions of the commission which have become final shall be conclusive”, DRC’s fourth claim of relief shall be dismissed as a collateral attack upon a prior decision of the Commission.

34. Public Service’s Motion for a More Definitive Statement as to claim four is deemed moot.

F. Fifth Claim of Relief

35. DRC requests that Public Service be ordered to provide a full accounting of service lateral costs Public Service has used to offset and markup Ryland Construction Allowances. DRC alleges that the offsets against the Construction Allowance by Public Service has violated the terms of Tariff Sheet No. R110. *DRC Complaint, p. 17*

36. Public Service argues that DRC’s statement in regards to all of Ryland’s extension agreements is “factually inaccurate” and that DRC has failed to state specifically which extension agreements cometers have potential claims. *Public Service Motion to Dismiss p 13.*

37. Public Service in their Motion to Dismiss specifically points out a material fact in dispute. Since a material fact is in dispute, the Motion to Dismiss as to claim five is denied.

38. The undersigned ALJ also finds that the claim gives sufficient notice to Public Service. The Motion for a More Definitive Statement as to claim five is also denied.

G. Sixth Claim for Relief

39. DRC requests that Public Service be ordered to provide a full accounting of all monies held by Public Service under Ryland’s line extension agreements for both main line and service laterals; refunds due Ryland, the calculations upon which the determinations were made and interest Public Service collected on the funds. *DRC Complaint, p. 18.*

40. Public Service argues that it should not be responsible for providing this information to DRC. Public Service argues that this information should be possessed by Ryland and that the request is unreasonable. *Public Service Motion to Dismiss p 14*.

41. Public Service's failure to allege that there is no genuine issue as to any material fact requires that the Motion to Dismiss as to claim six be denied.

42. The undersigned ALJ also finds that the claim gives sufficient notice to Public Service. The Motion for a More Definitive Statement as to claim six is also denied.

III. FILING OF AN ANSWER

43. Commission Rule 1308(e) provides the following:

A respondent may file a motion to dismiss a complaint or counterclaim within 14 days of service except in an accelerated complaint proceeding, in which case the respondent shall file any motion to dismiss with the respondent's answer. Unless the Commission orders otherwise, a motion to dismiss tolls the time to answer the complaint or counterclaim until 14 days after [a] decision denying the motion to dismiss.

44. Public Service has 14 days from the date of service of this Decision to Satisfy or Answer the Complaint filed by DRC Ryland as to all claims not dismissed by this Decision.

IV. EVIDENTIARY HEARING AND PREHEARING CONFERENCE

45. An evidentiary hearing in the above captioned proceeding is currently scheduled for July 1, 2014.

46. Due the filing of the Motion to Dismiss filed by Public Service, the time to answer the Complaint has been tolled until the issuance of this Decision.

47. In order to allow the parties enough time to prepare for a hearing, the evidentiary hearing scheduled for July 1, 2014 shall be vacated.

48. In anticipation of the hearing, the undersigned ALJ is setting a prehearing conference in accordance with Rule 1409(a) of the Rules of Practice and Procedure, 4 CCR 723-1.

49. The ALJ expects the Parties to come to the prehearing conference with proposed dates for the procedural schedule and evidentiary hearing. The Parties must consult prior to the prehearing conference with respect to the matters to be discussed at the prehearing conference. The ALJ encourages the Parties to present, if possible, a procedural schedule and hearing dates that are satisfactory to all Parties.

V. ORDER

A. It Is Ordered That:

1. Public Service Company of Colorado's Motion to Dismiss as to claims one, two, three, five, and six is denied.
2. Public Service Company of Colorado's Motion to Dismiss as to claim four is granted.
3. Public Service Company of Colorado's Motion for More Definite Statement as to claims one, two, three, five, and six is denied.
4. Public Service Company of Colorado's Motion for More Definite Statement as to claim four is deemed moot.
5. The evidentiary hearing in this matter scheduled for July 1, 2014 is vacated.
6. Public Service Company of Colorado is ordered to satisfy or answer the Complaint filed by Development Recovery Company LLC on behalf of the Ryland Group, with the exception of claim four, within 14 days of the date of this Decision.

7. A prehearing conference in this matter is rescheduled as follows:

DATE: July 14, 2014

TIME: 9:00 a.m.

PLACE: Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

8. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director