

(Decision No. C90-326)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

RE: WATER SERVICES FURNISHED BY	)	
CASCADE PUBLIC SERVICE COMPANY,	)	DOCKET NO. 89C-194W
P.O. BOX 57, CASCADE, COLORADO	)	
80909.	)	COMMISSION DECISIONS UPON
	)	EXCEPTIONS

March 21, 1990

STATEMENT AND FINDINGS

BY THE COMMISSION:

On January 18, 1990, Administrative Law Judge Ken F. Kirkpatrick entered Recommended Decision No. R90-71 in this docket. The recommended decision ordered Cascade Public Service Company (Cascade) to enter into a contract with the City of Colorado Springs, the terms of which are substantially in accordance with Exhibit 1 in this proceeding, for the purpose of obtaining treated water for the ratepayers of Cascade.

On February 7, 1990, Cascade filed exceptions to Recommended Decision No. R90-71 which state that during October and November of 1989, (after the hearing in this docket) Cascade and the City of Colorado Springs negotiated an agreement which is substantially different in important respects from Exhibit 1 which was entered in the proceeding. A copy of the new agreement that was negotiated between Cascade and the City of Colorado Springs was attached to Cascade's exceptions as Appendix C.

On February 2, 1990, the Staff filed a motion for an extension of time to file response to exceptions. The motion sought a 14-day extension of time within which to file its response to exceptions filed by Cascade on February 7, 1990. On March 2, 1990, Administrative Law Judge Ken F. Kirkpatrick entered Interim Order No. R90-293-I which denied the Staff's motion on the basis that the motion had failed to state good cause.

On March 6, 1990, the Staff filed two pleadings: (1) a motion for reconsideration and other appropriate relief, and (2) response to respondent's exceptions. In its motion for reconsideration and other appropriate relief, the Staff states that once Administrative Law Judge

Kirkpatrick entered his recommended decision on the merits on January 18, 1990 (Decision No. R90-71), his jurisdiction over this docket ended and that he was without authority to rule further on the issues in this docket or on any motions made by the parties. Therefore, according to Staff, Administrative Law Judge Kirkpatrick was without jurisdiction to rule upon Staff's motion for an extension of time in which to file a response to Cascade's exceptions. Staff further states that it believed and continues to believe that an extension of time based upon negotiations by the parties is good cause for the extension of time.

In its filed response to Cascade's exceptions, the Staff states that it does not have a problem with the Commission modifying the administrative law judge's order to reflect that Cascade could enter into a contract which is evidenced by Exhibit C, attached to Cascade's exceptions, rather than Exhibit 1 which was referenced in Decision No. R90-71.

The Staff is generally correct that once an administrative law judge enters a recommended decision, jurisdiction over the docket reverts back to the Commission itself. However, § 40-6-101(2), C.R.S., provides that the Commission may by order direct that any of its work, business, or functions under any provision of law, except functions vested solely in the Commission under of Title 40, be assigned or referred to an individual commissioner or to an administrative law judge to be designated by order for action and the Commission may by order at any time amend, modify, supplement, or rescind any such assignment or reference. The Commission, from time to time, has referred a number of routine functions to its administrative law judges for actions to be taken both before and after a recommended decision has been entered. This docket was one of them insofar as it pertained to requests for extensions of time. In any event, the issue is a moot one because the Commission believes that the Staff should have been allowed the extension of time within which to file a response to Cascade's exceptions. Accordingly, we shall grant the relief asked by the Staff in its motion for reconsideration on this point.

Turning to the merits of Cascade's exceptions, it now appears that both Staff and Cascade are amenable to Cascade entering into a contract with the City of Colorado Springs in the form evidenced by Exhibit C to Cascade's exceptions. Of course, Exhibit C was not part of the record that came before the administrative law judge. However, the Commission may consider not only the testimony and exhibits that were adduced at the hearing itself, but may also consider information secured on its own initiative. See § 40-6-113(6), C.R.S. On our own initiative, we have now considered Exhibit C, attached to Cascade's exceptions, and consider it an appropriate vehicle for resolving the issues in this docket. Accordingly, to that extent, we will grant the exceptions of Cascade. In all other respects, the Commission finds that the exceptions do not set forth sufficient factual or legal grounds which would justify

reconsideration begins on the first day after the mailing or serving of this Decision and Order.

This Decision and Order shall be effective 30 days from this date.

DONE IN OPEN MEETING March 21, 1990.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Samuel H. Cook
Ronald L. Lehn
Larry J. Nakarado
Commissioners

AGREEMENT BETWEEN THE CITY OF COLORADO SPRINGS,
AND CASCADE PUBLIC SERVICE COMPANY AND
THE CASCADE TOWN COMPANY

THIS AGREEMENT made and entered into by and between the City of Colorado Springs, Colorado, a home rule municipal corporation, hereinafter referred to as the "City", and The Cascade Town Company and the Cascade Public Service Company, a privately owned utility and subsidiary of The Cascade Town Company, hereinafter collectively referred to as "CPSC".

WHEREAS, CPSC owns and operates a water system which supplies water to the Town of Cascade and may eventually be enlarged to supply water to adjoining lands owned or controlled by The Cascade Town Company and its individual shareholders in the surrounding area; and,

WHEREAS, pursuant to a Contract dated July 12, 1934, a copy of which is attached hereto as Exhibit "A", between the City and The Cascade Town Company and its individual owners, the City agreed to take certain steps to control its diversions of water from Cascade Creek such that certain quantities of water would be present and available for diversion by The Cascade Town Company at certain times, with additional consideration, in exchange for settlement of all past, present, and future damages which The Cascade Town Company or its individual owners might suffer upon construction of certain of the City's facilities and by reason of the City's diversions on Cascade Creek; and

WHEREAS, the City has furnished water to CPSC, under said Contract, which provides for delivery of water to the CPSC water system by a pipeline constructed by the City which is connected to and supplies the distribution system of CPSC an amount of water not exceeding 0.4 cubic feet per second, which CPSC in turn disinfects and sells to its customers; and

WHEREAS, the City and CPSC desire to enter into an agreement whereby the City shall provide water treatment services for water delivered into the CPSC water system; and

WHEREAS, the City is willing to construct, or contract for construction of a water pipeline from a point on CPSC's water distribution system to a point on the City's water distribution system as generally shown on Exhibit "B"; and

WHEREAS, the City has experience and expertise to properly construct, operate, and maintain the necessary facilities, including pipelines, to provide filtered water to CPSC for the consideration set forth herein.

NOW, THEREFORE, in consideration of the premises and the mutual covenants of the parties hereinafter set forth, it is agreed:

1. The City shall provide water treatment to the water owned by CPSC for the consideration stated herein. Water treatment shall mean such treatment of water as is required to comply with all applicable current and future federal and state regulations for drinking water served to the public.
2. The City shall install, or contract for the installation of, a pipeline from the City's water distribution system to a point on CPSC's water distribution system. The alignment and approximate limits are shown on Exhibit "B". The City shall install, or contract for the installation of, a master meter, flow control valve, and pressure regulators with associated piping, valving, and vaults at locations to be determined by the City. CPSC shall be allowed to install at CPSC expense its own meter and associated connections below the City's master meter at pressure regulator 2, but at the same location.

Likewise space and access will be provided at the City meter location for a CPSC chlorination station vault to be constructed and maintained by CPSC.

3. The City shall pay the material and installation cost of the pipeline and appurtenances as shown on Exhibit "B". The City shall also pay for all engineering costs including surveying, inspection, and design of the facilities.
4. The new pipeline and all appurtenances shall be the property of the City from the existing City distribution system to the existing CPSC distribution system to the point of delivery of water to CPSC. The City shall be responsible for all maintenance and operating expenses of the new pipeline and its appurtenances. Additional connections to the City's pipeline shall be at the sole discretion of the City, but located on the City pipeline above pressure regulator 2. The City shall be entitled to all applicable fees regarding connection thereto, including cost of recovery of the pipeline installation. The City will guarantee a flow of treated water into the CPSC system at a pressure not to increase or decrease by a tolerance of 10% from such standard delivery pressure as agreed to by the parties from time to time. In the event such treated water is delivered into the CPSC system in violation of these tolerances, and the City is negligent in its operation of the City's distribution system, then the City will be held responsible for any damages caused to the CPSC system.
5. CPSC hereby relieves the City of any bypass obligation, such as that contained in Section 2 of the July 12, 1934 Contract, Exhibit "A" attached hereto.
6. The City on behalf of CPSC, shall divert CPSC's water rights on Cascade Creek, described in Exhibit "C" attached hereto and incorporated herein, into the City's water collection system up to the amount to which CPSC is entitled. CPSC shall not exercise any water right priority on the stream as long as this Agreement is in effect. CPSC shall take appropriate legal action to secure an additional or alternate point of diversion of CPSC's water rights from its existing diversion point to location(s) on the City's water collection system. Nothing herein shall be construed as the sale of any portion of the parties water rights or the parties priorities to the use of water they now own or may hereafter acquire; provided, however, that CPSC hereby agrees to subordinate its rights to the rights of Colorado Springs, so that Colorado Springs may continue diversion of its water rights without call from CPSC, as long as this Agreement remains in effect. The City will properly account for the operation of CPSC's water rights and make such reports as required by law. It is understood that nothing said in this paragraph will result in diminishing or terminating any part of the CPSC water rights.
7. CPSC shall pay the City \$2.00 per one thousand (1000) gallons of treated water up to 550 acre feet of water per year delivered by the City at the City's master meter. Such fee shall continue on a yearly basis and shall be subject to adjustments as determined by the Colorado Springs City Council in a manner similar to the determination of rates for service to all other customers outside the City limits. Any water delivered by the City to CPSC above 550 acre feet per year shall be charged at the City's then prevailing suburban (outside City) rate. If in any calendar year, the volume of water delivered to CPSC exceeds 550 acre feet, CPSC will cease to connect additional customers to its distribution system.

8. CPSC and all parties with an interest in CPSC water rights described in Exhibit C tender their interests in such rights to the City to assure performance of this Agreement subject to the default provisions of paragraph 12. The City shall have the right to use any remaining quantity of CPSC's water for its own purposes without compensation to CPSC. CPSC shall cooperate with the City in obtaining any necessary approvals required for the City's use of CPSC's water rights under the terms of this agreement.
9. CPSC shall be responsible for the quality of the water from the point of delivery (master meter) into its water distribution system. For purposes of conservation, CPSC shall take steps to insure that within five (5) years the amount of unaccounted for water in the CPSC distribution system shall be no more than thirty (30%) percent of the total supply of treated water delivered annually by the City to CPSC. For purposes of this Agreement, regardless of other meanings of unaccounted for water, the term unaccounted for water shall mean the difference in the amount of water delivered through the City's master meter and the total amount of water metered to CPSC customers. In the event there has been an amount of unaccounted for water in excess of 30% in the CPSC distribution system during any calendar year after the five year period, the contract rate per 1000 gallons for the following year shall be increased by the percentage of unaccounted for water above thirty percent (30%). The increase in contract rate on this percentage basis shall not compound from year to year. At the request of the City, CPSC shall make its books and records that pertain to the calculation of unaccounted for water in the CPSC system available to the City for an audit thereof.
10. For purposes of billing pursuant to this Agreement, the City's master meter shall be furnished, installed, and maintained by the City at the point of delivery into the CPSC distribution system. The City shall bill CPSC for water treatment service as of the last day of each month following delivery of treated water. CPSC shall pay all monthly invoices within twenty (20) days of receipt thereof. In the event CPSC fails to make any payment within the time herein specified, interest on such delinquent amount shall accrue at the rate of one percent (1%) per month from the date such payment becomes due until paid in full, and the City shall have the right to terminate service hereunder in the event of failure to pay within a reasonable time frame. Errors in billing shall be corrected within a reasonable time after their delivery. CPSC shall not be relieved from its obligation to pay for service provided in the event of an error in billing and the City shall make an appropriate adjustment in the next succeeding month's statement, which shall include situations of underbilling or overbilling to CPSC.
11. It is mutually agreed between the parties hereto that all litigation of any kind now pending between CPSC and the City shall be dismissed with prejudice; that no appeals shall be prosecuted by either party from the decree or judgment of any court with regard to any litigation pending between them and all claims, administrative proceedings, demands, or any other claims made by either party against the other, shall be withdrawn and dismissed with prejudice. It is mutually agreed between the parties that neither this Agreement nor any other service provided by the City to CPSC constitutes acknowledgment of jurisdiction of the Public Utilities Commission of the State of Colorado or any other regulatory body, other than the Council of the City of Colorado Springs, concerning the establishment of rates for water delivered by the City to the CPSC water system. This Agreement

supersedes the Agreement dated July 12, 1934, between the City, CPSC and its individual owners.

12. If CPSC fails or defaults in meeting the terms and conditions of this Agreement, and such default continues for a period of thirty (30) days, the City may give notice in writing to CPSC. CPSC shall have fifteen (15) days from the date of mailing such notice to cure the default. If CPSC does not cure its default within such period, then the City shall be entitled to control and receive the full benefit of such water rights until the default is fully cured and the City may exercise its right to terminate all services to CPSC. Additionally, termination of service hereunder shall not reduce or change the obligations of CPSC under the provisions of this Agreement.
13. If the City fails or defaults in meeting the terms, conditions, or covenants of this Agreement, except its covenant to use reasonable diligence to provide water treatment contained herein, and such default continues for a period of thirty (30) days after CPSC has given the City notice of such default, and the City has failed to cure the default within that time period, then CPSC may terminate the service provided by the City under this Agreement, and shall have all of the rights and remedies provided by law. In the event of such termination, the City shall take action to control its diversions of water from Cascade Creek above the original intake of CPSC as described in the decree dated May 2, 1927, so that there will be available for CPSC's use at least two cubic feet of water per second (2 cfs) from June 15 to October 1 of each year and one cubic foot of water per second (1 cfs), during the remaining portions of each year. CPSC shall not at any time demand greater amounts than above specified for or accounted for under all priorities now owned or hereafter acquired by them. It will be the intent to assure CPSC that the City will not through exercise of its rights deprive CPSC of the presence of the above quantities of water at the above described CPSC intake for such use as CPSC may make of such water by virtue of such priorities as they now own or may hereafter acquire. In addition the City through its existing pipeline and pipeline connection at Mother's Rest will feed in and supply to the distribution system of CPSC an amount of water not to exceed .4 cubic feet per second (.4 cfs). Such amount so fed by the City into the CPSC distribution system shall be deducted from the quantities which are to be left available to CPSC at their original Cascade Creek intake.
14. CPSC covenants that during the term of this Agreement, or any extension thereof, it will not sell or otherwise dispose of its water rights or its water utility distribution system in whole or in part, to any individual or entity unless such individual or entity can legally assume and does assume in writing all obligations of CPSC hereunder. Any encumbrances of the property or water rights shall be specifically subject to the rights of the City under this Agreement.
15. If for any reason of "force majeure" any party hereto shall be unable, wholly or in part, to carry out its obligations under this Agreement, other than the obligation of CPSC to make the payments required under the terms of this Agreement, then if such party shall give notice and the full particulars of the reasons in writing to the other party within a reasonable time after such occurrence of the event or cause relied on, the obligation of the party giving such notice, so far as it is effected by such force majeure, shall be suspended during the continuation of the inability then claimed,

but for no longer period, provided that such party shall endeavor to remove or overcome such inability with all reasonable dispatch. The term "force majeure" as employed herein shall mean acts of God, strikes, walk outs, or other industrial disturbances, acts of the public enemy, orders, regulations, laws or actions of any kind of the government of the United States, of the State of Colorado, of El Paso County, or any civil or military authority, insurrections, riots, earthquakes, fires, storms, floods, restraints of government, civil disturbances, explosions, breakage or accidents of dams, machinery, pipelines, or canals or other structure or machinery, contamination or pollution of water supply, or on account of any other cause not reasonably within the control of the party claiming such inability. No damage shall be recoverable from either party by reason of the causes stated herein as force majeure.

16. The City shall keep accurate records and accounts of the water service provided hereunder in accordance with generally accepted accounting procedures as applied to governmental entities. Any questions concerning the accuracy of the City's master meter shall be resolved by independent third party testing. The meter shall be considered accurate if such testing confirms it operates within two per cent, plus or minus, of the actual measurement at rated capacity. The meter shall be repaired or replaced at City's cost when necessary. Costs of the testing shall be borne equally by the parties. The City shall have the right to enter CPSC premises at reasonable times during regular business hours for the purpose of repairing or removing its own facilities, or performing work incidental to delivery of treated water furnished hereunder, provided an authorized representative of CPSC accompanies or approves such action. Likewise CPSC will have equal access to City facilities at pressure regulator 2 station only when authorized or accompanied by City personnel. CPSC agrees that the City or its agents shall, when authorized by CPSC, have full access to easements or over any easements, rights-of-way or property held by CPSC to the extent required by the City for any and all purposes required for the services provided under this Agreement.
17. This Agreement shall be subject to all federal, state, and local rules, regulations, and laws as applicable thereto, which rules, regulations, and laws shall not impair the obligations under this Agreement.
18. The financial commitments contained herein are subject to annual appropriation by the City Council of the City of Colorado Springs.
19. Any notice, request, demand, or statement provided for in this Agreement shall be in writing and shall be considered to have been duly delivered when sent by registered or certified mail, provided that bills sent hereunder may be sent by first class mail, addressed as follows, in writing, by the party entitled to receive the same:

City of Colorado Springs
Manager, Water Division
Mail Code 630
Post Office Box 1103
Colorado Springs, Colorado 80947

Cascade Public Service Company
Post Office Box 57
Cascade, Colorado 80809

20. The parties hereto agree that if any of the provisions of this Agreement should contravene or be held invalid under

the laws of the State of Colorado, such contravention or invalidity shall not invalidate the whole Agreement but it shall be construed as though not containing that particular provision, and the rights and obligations of the parties shall be construed and enforced accordingly.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

ATTEST:

CITY OF COLORADO SPRINGS

By: _____

Mayor

ATTEST:

CASCADE PUBLIC SERVICE COMPANY

By: _____

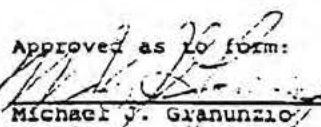
ATTEST:

THE CASCADE TOWN COMPANY

By: _____

Approved By: _____

Approved as to form:


Michael J. Granunzio