

Decision No. R04-0358-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03F-470W

CASCADE VILLAGE CONDOMINIUM ASSOCIATION, INC., AND MORE
THAN 25 INDIVIDUAL UTILITY CUSTOMERS OF MILL CREEK WATER
SALES & DISTRIBUTION, LLC,

COMPLAINANTS,

V.

MILL CREEK WATER SALES & DISTRIBUTION, LLC,

RESPONDENT.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING JOINT MOTION, SETTING
HEARING, ESTABLISHING PROCEDURAL
SCHEDULE, AND WAIVING RESPONSE TIME**

Mailed Date: April 6, 2004

I. STATEMENT

1. On October 27, 2003, Cascade Village Condominium Association, Inc., and more than 25 individual customers of Mill Creek Water Sales & Distribution, LLC (Complainants), filed the Complaint which commenced this docket.

2. On December 2, 2003, Mill Creek Water Sales & Distribution, LLC (Respondent), filed its Answer and Motion to Dismiss.

3. On December 2, 2003, by Decision No. R03-1347-I, the undersigned Administrative Law Judge (ALJ) granted the petition of Staff of the Commission (Staff) for leave to intervene.

4. By Decision No. R03-1379-I the ALJ established a procedural schedule in this matter. By Decision No. R03-1432-I, upon motion of the parties, the ALJ vacated that schedule and held this matter in abeyance while the Complainants and Respondent explored the possibility of settlement. *See also* Decision No. R04-0125-I.

5. On March 24, 2004, Complainants and Respondent advised the ALJ that the settlement discussions had not been successful.

6. On March 31, 2004, a Joint Motion of the Parties to Reinstate Proceedings, to Establish a Hearing Schedule, and to Confirm Certain Other Agreed Procedural Understandings (Joint Motion) was filed. The Joint Motion contained a proposed procedural schedule, a proposed date for a prehearing conference, and proposed hearing dates. This filing also contained a request for waiver of response time.

7. In the Joint Motion at ¶ 5, and in accordance with Rule 4 *Code of Colorado Regulations* (CCR) 723-1-72(a)(4), Complainants certified that they desire to proceed to hearing on the Complaint.

8. There is an issue in this proceeding with respect to whether or not Respondent is a public utility under Colorado statute. As this is a question of the Commission's subject matter jurisdiction, the parties propose to address this issue first. Because there are both disputed issues of fact and disputed issues of law pertaining to this question, the parties propose a procedural schedule and hearing focused only on this question.

9. The Joint Motion states good cause and is consistent with the procedure adopted in Decision No. R03-1379-I, previously entered in this proceeding. The parties' suggestion that there be a hearing to determine the Commission's subject matter jurisdiction because there are

disputed issues of fact concerning that question is consistent with the established and preferred practice in Colorado. *See, e.g., Larry H. Miller Corporation-Denver v. Board of County Commissioners*, 77 P.3d 870 (Colo. App. 2003). Granting the Joint Motion will not prejudice any party. The Joint Motion will be granted. The procedural schedule, the prehearing conference date, and the hearing dates proposed in the Joint Motion will be adopted.

10. The following procedural schedule and hearing dates will be adopted for this subject-matter jurisdiction phase of the proceeding: (a) Complainants shall file their direct testimony and exhibits on or before May 3, 2004; (b) Respondent and Staff shall file answer testimony and exhibits on or before June 1, 2004; (c) Complainants shall file their rebuttal testimony and exhibits on or before June 14, 2004; (d) Respondent and Staff shall file cross-answer testimony¹ and exhibits on or before June 14, 2004; (e) a final prehearing conference, if necessary, will be held on June 22, 2004; and (f) hearing in this docket shall be scheduled for June 29 and 30, 2004. At the conclusion of the hearing, the opportunity to file post-hearing statements of position will be discussed.

11. Pre-filed testimony and exhibits are to be served, no later than 5:00 p.m. on the due date, by hand-delivery on the following persons, provided these persons have offices in the Denver metropolitan area: counsel, designated testimonial and advisory Staff, the parties' designated testimonial experts, and non-attorney party representatives. For those persons who reside or have offices outside the Denver metropolitan area, pre-filed testimony and exhibits are to be served by overnight delivery.

¹ Cross-answer testimony and exhibits can address, and respond to, *only* answer testimony and exhibits.

12. Parties shall serve all motions, discovery requests, discovery responses, and objections to discovery on opposing counsel simultaneously by: (a) either hand-delivery or facsimile; and (b) e-mail. Service on persons on the service list who are not counsel shall be by first-class mail.

13. Rule 4 CCR 723-1-77 governs discovery served on any party prior to the due date of that party's first pre-filed testimony and exhibits.

14. Except as stated in this Order, Rule 4 CCR 723-1-77 governs discovery pertaining to all pre-filed testimony and exhibits.

15. The cut-off date for service of discovery pertaining to pre-filed direct testimony is June 1, 2004. For discovery served between May 3, 2004 (due date of Complainants' direct testimony) and June 1, 2004 (due date of answer testimony), the following governs: (a) written objections are due within two business days; (b) responses are due within five business days; and (c) hearings on motions to compel response to discovery (the motions may be written or oral) may be held by telephone or in person at the earliest available time, subject to the ALJ's availability.²

16. The cut-off date for service of discovery pertaining to pre-filed answer testimony is June 14, 2004. For discovery served between June 1, 2004 (due date of answer testimony) and June 14, 2004 (due date of rebuttal and cross-answer testimony), the following governs: (a) written objections are due within two business days; (b) responses are due within four business days; and (c) hearings on motions to compel response to discovery (the motions may be

² The ALJ shall be provided with copies of the discovery to which objection is made and of the written objections no later than four hours before the hearing on the motion to compel.

written or oral) may be held by telephone or in person at the earliest available time, subject to the ALJ's availability.³

17. The cut-off date for service of discovery pertaining to pre-filed rebuttal testimony and cross-answer testimony is June 23, 2004. For discovery served on a party sponsoring rebuttal testimony or cross-answer testimony between June 14, 2004 (due date of rebuttal testimony and cross-answer testimony) and June 23, 2004 (due date of rebuttal and cross-answer testimony), the following governs: (a) written objections are due within two business days; (b) responses are due within four business days; and (c) hearings on motions to compel response to discovery (the motions may be written or oral) may be held by telephone or in person at the earliest available time, subject to the ALJ's availability.⁴

18. Copies of all discovery requests and responses must be served on all counsel. Except in testimony or as necessary to support a motion, parties shall not file discovery requests and responses with the Commission and shall not serve discovery requests and responses on the Commission advisors (including Commission counsel) identified by Staff in the Rule 9(d) Notice filed in this docket.

19. With respect to the pending Motion to Dismiss, the Joint Motion proposes the following procedure: Respondent to file a supplemental brief on or before April 15, 2004; and, should Respondent file a supplemental brief, Complainants to file a supplemental brief on or before April 22, 2004.⁵ These additional filings are not mandatory.

³ The ALJ shall be provided with copies of the discovery to which objection is made and of the written objections no later than four hours before the hearing on the motion to compel.

⁴ The ALJ shall be provided with copies of the discovery to which objection is made and of the written objections no later than four hours before the hearing on the motion to compel.

⁵ By a telephone call, the parties requested these dates, which are later than those in the Joint Motion.

20. The Joint Motion is unopposed and contains a request for waiver of response time. That request will be granted, and response time to the Joint Motion will be waived.

21. There is an additional matter discussed in the Joint Motion. Given the importance of the matter, the ALJ quotes the relevant language, from ¶ 6 of the Joint Motion:

The Parties hereby reaffirm their previously announced agreement that pending a determination of the question of whether Mill Creek Water is a public utility, there shall be no change in the rates or terms of service under which water and sewer service are now being provided at Cascade Village and Twilight Meadows at Cascade Village. In addition, pending such determination water and sewer service shall not be provided to any locations or customers other than condominium units at Cascade Village, homes at Twilight Meadows, the Benchmark Building and other common elements and grounds of Cascade Village (all as described in the complaint).

22. This is in the nature of a stand-still agreement. If it should develop that this agreement is changed during the course of the proceeding, the parties shall inform the ALJ immediately of this fact and shall provide the changed agreement.

23. Rule 4 CCR 723-1-22(d)(3) states: “If a pleading refers to new court cases or other authorities not readily available to the Commission, six copies of each case or other authority shall be filed with the pleading.” If a party wishes the ALJ to consider a cited authority, *other than* an opinion of the United States Supreme Court, a reported Colorado state court opinion, or a Commission decision, the party must provide copies of that cited authority.

24. The parties are requested to provide the decision number when referring to a Commission decision.

II. ORDER

A. It Is Ordered That:

1. The Joint Motion of the Parties to Reinstate Proceedings, to Establish a Hearing Schedule, and to Confirm Certain Other Agreed Procedural Understandings is granted.

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

DATE: June 22, 2004

TIME: 9:00 a.m.

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

3. Hearing shall be conducted in this matter at the following dates, time, and place:

DATES: June 29 and 30, 2004

TIME: 9:00 a.m.

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

4. The procedural schedule, the notification requirement, and the filing, service, and other requirements set out above are adopted.

5. Absent further order, the parties shall comply with the procedural schedule, the notification requirement, and the filing, service, and other requirements set out above.

6. The request for waiver of response time is granted.

7. Response time to the Joint Motion of the Parties to Reinstate Proceedings, to Establish a Hearing Schedule, and to Confirm Certain Other Agreed Procedural Understandings is waived.

8. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge