

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-524W

IN THE MATTER OF THE APPLICATION OF LAKE DURANGO WATER COMPANY FOR AN ORDER AUTHORIZING LAKE DURANGO WATER COMPANY TO PROCEED WITH THE CONSTRUCTION OF THE LIGHTNER CREEK PROJECT AND ENTER INTO AN AGREEMENT WITH TIERRA HERMOSA LLC FOR TAPS AS PAYMENT FOR DEVELOPMENT OF THE LIGHTNER CREEK PROJECT AND ITS FUNDING.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING SOME INTERVENTIONS,
VACATING PROCEDURAL SCHEDULE,
REQUIRING APPLICANT TO OBTAIN COUNSEL,
SCHEDULING PREHEARING CONFERENCE,
AND LISTING ISSUES FOR DISCUSSION**

Mailed Date: December 9, 2004

I. STATEMENT

1. On October 15, 2004, Lake Durango Water Company (Applicant) filed an Application in which it seeks authorization to proceed with construction of the Lightner Creek Project, authorization to enter into an agreement with Tierra Hermosa, LLC for taps as payment for the development of the Lightner Creek Project, and other authorization as stated in the Application. Applicant did not file its direct testimony and exhibits with its Application. Applicant supplemented the Application by a filing made on November 1, 2004. The Application commenced this docket.

2. The Commission gave public notice of the Application. *See* Notice of Application Filed (Notice), dated October 20, 2004. In that Notice, the Commission established an intervention period and a procedural schedule. This Order will vacate that schedule.

3. Mr. Gene M. Bradley, “[a]s a member of the Water Committee of the Shenandoah Homeowner’s [sic] Association and the Lake Durango Water User Group Task Force, ... request[s] to intervene as a party” in this proceeding. Letter dated November 5, 2004, addressed to Bruce N. Smith, Director of the Commission. The letter was filed within the intervention period established by the Commission.

4. Mr. Richard G. Griffith, “[a]s a member of the Board of Directors of the Rafter J Association and the Lake Durango Water User Group Task Force, ... request[s] to intervene as a party” in this proceeding. Letter dated November 8, 2004, addressed to Bruce N. Smith, Director of the Commission. The letter was filed within the intervention period established by the Commission.

5. Mr. Thomas D. Brossia, Water Committee Chairman, Shenandoah Highlands Home Owners Association, in a letter states: “The [Shenandoah Highlands Home Owners Association] Board is hereby formally intervening” in this proceeding. Letter dated November 9, 2004, addressed to Bruce N. Smith, Director of the Commission. As relevant here, the letter states: “We [presumably the Shenandoah Highlands Home Owners Association] represent 43 owners serviced by [Applicant]. We were an original intervener & rely on this company for our water service.” The letter was filed within the intervention period established by the Commission.

6. Durango West Metropolitan District No. 1 filed a Petition to Intervene. The petition was filed within the intervention period established by the Commission and meets the requirements of Rule 4 *Code of Colorado Regulations* (CCR) 723-1-64(b). The petition, which was served and filed on November 16, 2004, is unopposed. Granting the petition will not

prejudice any party. The petition will be granted, and Durango West Metropolitan District No. 1 will be an intervenor in this proceeding.

7. Messrs. Roger Brown and Lawrence Woods ask the Commission to “accept this letter as a formal request for intervention” in this proceeding. Letter dated November 14, 2004, addressed to Bruce N. Smith, Director of the Commission. The letter identifies Mr. Brown as “Member Shenandoah Homeowners Association: Served on Board of Directors for four years, including two years as president” and Mr. Woods as “Member Shenandoah Homeowners Association: Served on Board of Directors for four years, including one year as president.” The letter was filed within the intervention period established by the Commission.

8. Durango West Metropolitan District No. 2 filed a Petition to Intervene. The petition was filed within the intervention period established by the Commission and meets the requirements of Rule 4 CCR 723-1-64(b). The petition, which was served on November 15, 2004, and filed on November 18, 2004, is unopposed. Granting the petition will not prejudice any party. The petition will be granted, and Durango West Metropolitan District No. 2 will be an intervenor in this proceeding.

9. The Board of County Commissioners of La Plata County, Colorado filed a Petition to Intervene. The petition was filed within the intervention period established by the Commission and meets the requirements of Rule 4 CCR 723-1-64(b). The petition, which was served on November 17, 2004, and filed on November 19, 2004, is unopposed. Granting the petition will not prejudice any party. The petition will be granted, and the Board of County Commissioners of La Plata County, Colorado will be an intervenor in this proceeding.

10. Mr. Barton K. Cross, “[a]s a representative of the Independent Users of Lake Durango Water Company ..., request[s] to intervene as a party in” this proceeding. Letter dated

November 5, 2004, addressed to Bruce N. Smith, Director of the Commission. It appears that Mr. Cross sent the letter within the intervention period, but the letter was received on November 22, 2004, after the close of the intervention period established by the Commission. *See* letter dated November 18, 2004, explaining that the letter originally sent in early November apparently was not received by the Commission. As the request to intervene was received on the next business day following the expiration of the intervention period, as it appears that Mr. Cross made a good faith effort to meet the intervention deadline, and as Mr. Cross made the filing *pro se*, the Administrative Law Judge (ALJ) will permit the late-filing of this request to intervene.

11. Mr. Thomas D. Brossia, Vice President and Board Member of La Plata West Water CO, “request[s] permission to intervene in” this case. Filing dated November 17, 2004 addressed to Bruce N. Smith, Director of the Commission. This appears to be the same Mr. Brossia who submitted the November 9, 2004, letter on behalf of the Shenandoah Highlands Home Owners Association Board. The letter sometimes refers to “we” (presumably the La Plata West Water CO) and sometimes to “I” (presumably Mr. Brossia). It appears that Mr. Brossia sent the letter within the intervention period, but the letter was received on November 29, 2004, after the close of the intervention period established by the Commission. *See* letter dated November 29, 2004, explaining that request to intervene originally sent November 17, 2004, was returned to Mr. Brossia as undeliverable and, therefore, was not received by the Commission. As it appears that Mr. Brossia made a good faith effort to meet the intervention deadline, as Mr. Brossia served a copy of the request for intervention within the intervention period so that Applicant has had knowledge of the request since approximately November 17, 2004, and as Mr. Brossia made the filing *pro se*, the ALJ will permit the late-filing of this request to intervene.

12. The Commission deemed the Application complete as of December 1, 2004. In addition, the Commission referred this matter to an ALJ for expedited consideration.

13. On December 6, 2004, Staff of the Commission filed its intervention of right and request for hearing. This intervention was timely.

14. 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 **December 22, 2004**. This prehearing conference will be held in conjunction with the prehearing conference in Docket No. 04A-525W. The provisions of Rules 4 CCR 723-1-79(b)(3) and 4 CCR 723-1-79(b)(4) will govern this prehearing conference.

15. The first issue to be discussed at the prehearing conference will be the requests to intervene filed by Messrs. Bradley; Griffith; Brossia, as Water Committee Chairman, Shenandoah Highlands Home Owners Association; Brown and Woods; Cross; and Brossia, as Vice President and Board Member of La Plata West Water CO. *Each of these proposed intervenors must be prepared to explain his request for intervention and to discuss the following with respect to his request for intervention:*

(a) is the intervention requested on behalf of an individual or a group?

(b) if the intervention is requested on behalf of an individual, what is that individual's specific interest in this proceeding (for example, is the individual a customer of Applicant, and how will the individual be affected if the Application is granted)? are the individual's interests represented by one of the institutional intervenors (that is, by Durango West Metropolitan District No. 1, by Durango West Metropolitan District No. 2, or by the Board of County Commissioners of La Plata County, Colorado) so that the individual does not need to intervene because his interests will be protected and the issues of concern to him will be raised?

if the individual does not believe that his interests are represented by one of the institutional intervenors, what are the specific areas of concern or issues that are not represented or protected by one of the institutional intervenors?

(c) if the intervention is requested on behalf of a group, what is the name of the group? is the group a legal entity (for example, an association, a corporation, a company, a partnership, a limited liability company)? what is the group's specific interest in this proceeding (for example, is the group or are its members customers of Applicant, and how will the group or its members be affected if the Application is granted)? is the person who requested intervention authorized by the group to make the request to intervene on behalf of the group and, if so, what document establishes that authorization (for example, written authorization, minutes of a meeting, or resolution of the board of directors)? are the group's interests represented by one of the institutional intervenors (that is, by Durango West Metropolitan District No. 1, by Durango West Metropolitan District No. 2, or by the Board of County Commissioners of La Plata County, Colorado) so that the group does not need to intervene because its interests will be protected and the issues of concern to the group will be raised? if the group does not believe that its interests are represented by one of the institutional intervenors, what are the specific areas of concern or issues that are not represented or protected by one of the institutional intervenors?

16. The second issue to be discussed at the prehearing conference is the question of whether this proceeding should be consolidated with Docket No. 04A-525W, the application of Lake Durango Water Company for authority to access funds in the Capital Improvement Escrow Account to pay for an engineering study for development of the Lightner Creek Project. Pursuant to Rule 4 CCR 723-1-79(a), consolidation is appropriate "where the issues are substantially similar and the rights of the parties will not be prejudiced." The parties must be

prepared to discuss consolidation, particularly in light of the apparent inter-relatedness of these dockets and the Commission directive to treat these two dockets on an expedited basis.

17. If the two proceedings are not consolidated, which matter should proceed first and why?

18. The third issue to be discussed at the prehearing conference is the need for expedited treatment because of the contingencies in ¶ 5 of the Construction Advance and Option to Purchase. *Applicant must be prepared to discuss the sequencing of those contingencies.* For example, is a Commission decision in this docket a necessary prerequisite to work on any other contingency, or can work on the other contingencies go forward without a Commission decision in this docket? If it is Applicant's position that one or more of the contingencies hinges on a Commission decision in this proceeding, Applicant must be prepared to explain its position, to identify which contingency or contingencies are dependent on a Commission decision, and to explain why the dependency exists.

19. The fourth issue to be discussed at the prehearing conference is the procedural schedule and hearing date. The hearing will be held in Durango, as requested by Applicant.

20. The parties must be prepared to discuss the following at the prehearing conference: (a) date by which Applicant will file its direct testimony and exhibits;¹ (b) date by which each intervenor will file its answer testimony and exhibits; (c) date by which Applicant will file its rebuttal testimony and exhibits;² (d) date by which each intervenor will file its cross-

¹ This includes consideration of whether each witness's testimony should be filed in question and answer format or should be filed in detailed summary format.

² This includes consideration of whether, to expedite this matter, Applicant's rebuttal testimony should be given orally at the hearing or prefiled.

answer testimony and exhibits;³ (e) date by which each party will file its corrected testimony and exhibits; (f) date by which each party will file its prehearing motions;⁴ (g) whether a final prehearing conference is necessary and, if it is, the date for that prehearing conference; (h) date by which parties will file any stipulation reached;⁵ (i) hearing dates; and (j) date for each party to file its post-hearing statement of position (assuming the parties wish to file such statements of position) and whether response should be permitted. In addition, the parties should be prepared to discuss 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.

21. In considering proposed dates, parties should keep in mind that the Commission deemed the Application complete as of December 1, 2004. Absent Applicant's waiver of the statutory time frame or a finding of extraordinary circumstances, a Commission decision in this proceeding should issue within 210 days of that date (*i.e.*, on or before June 28, 2005). *See* §§ 40-6-109.5(2) and 40-6-109.5(4), C.R.S. Any procedural schedule must take into consideration, and must allow time for, preparation of a recommended decision, preparation of exceptions to the recommended decision and response to exceptions, and preparation of a Commission decision on exceptions,⁶ all of which should occur by June 28, 2005. In this

³ Cross-answer testimony may respond *only* to answer testimony filed by another intervenor. This includes consideration of whether, to expedite this matter, cross-answer testimony should be given orally at the hearing or prefiled.

⁴ This date should be at least five calendar days before the final prehearing conference or, if there is no final prehearing conference, seven calendar days before the hearing.

⁵ This date should be at least three calendar days before the first day of hearing.

⁶ As a general rule, and not including the time necessary for preparation of a transcript if one is ordered, these activities consume 10 to 12 weeks from the end of the hearing, the filing of statements of position, or the filing of responses to statements of position, whichever occurs last.

proceeding, of course, the time frame is much tighter in view of the Commission's direction that this matter receive expedited treatment and in view of the contingencies in ¶ 5 of the Construction Advance and Option to Purchase which must be fulfilled no later than December 31, 2005.

22. The ALJ expects the parties to come to the prehearing conference with proposed dates for all deadlines. In addition, the ALJ expects parties to 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 dates which are satisfactory to the parties.

23. A party or potential party who would like to participate in the prehearing conference by telephone must contact Mr. Lloyd Petersen at the Commission (main telephone number: 1.800.888.0170) on or before **noon on December 17, 2004**. If possible, requests to participate by telephone will be granted; but it may be that not all those who wish to participate by telephone will be able to do so.

24. Parties are reminded that they are responsible for compiling a service list for this proceeding; that the service list must contain the name of all parties (both the Applicant and all intervenors); and that all filings are to be served on all parties. Service can be made by hand-delivery or by mail, first-class and postage paid. Service is to be made on or before the date a filing is made.

25. The final issue to be addressed in this Order is the issue of Applicant's legal representation. Based on the information available from the Commission file in this matter, Applicant appears to be a corporation. As a corporation, Applicant is a "person" as defined in § 40-1-102(5), C.R.S. Applicant is also a party in this matter.

26. Rule 4 CCR 723-1-21(a) *requires* a party in a proceeding before the Commission to be represented by counsel *unless* one of the following exceptions applies: (a) the person is “an *individual* who is a party to [the] proceeding and who wishes to appear *pro se* [to represent] *only* his *individual* interest” (Rule 4 CCR 723-1-21(b)(1) (emphasis supplied)); or (b) the person appears “on behalf of a closely held corporation, [but] *only* as provided in § 13-1-127, C.R.S.” (Rule 4 CCR 723-1-21(b)(2) (emphasis supplied)).

27. The Commission recently had occasion to emphasize the mandatory nature of this Rule requirement and to determine that pleadings filed by, and appearances made by, non-attorneys are void and of no legal effect if the Rule requirements are not met. *See, e.g.*, Decisions No. C04-1119 and No. C04-0884. Thus, by Rule and by Commission decision, a party cannot appear without counsel unless it is an individual or is a closely-held entity which meets the other statutory requirements.

28. Applicant is not an individual and, therefore, that portion of the Rule does not apply here.

29. Applicant cannot meet the requirements of § 13-1-127(2), C.R.S. That section provides that an officer may represent a closely held entity before an administrative agency *provided two conditions are met*: (a) the amount in controversy does not exceed \$10,000; *and* (b) the officer provides the agency with evidence, satisfactory to the agency, of the authority of the officer to represent the closely held entity. In this case, the amount in controversy unquestionably exceeds \$10,000. Therefore, whether or not Applicant is a close held entity, Applicant must appear through counsel.

30. Applicant will be ordered to be represented in this matter by an attorney at law currently in good standing before the Supreme Court of the State of Colorado. On or before

December 15, 2004, counsel for Applicant must enter an appearance in this matter. Counsel for Applicant must be prepared to proceed with the prehearing conference on the scheduled date.

31. **Applicant is advised that its failure to obtain counsel as required by this Order will mean that motions and other filings made by Applicant in this proceeding will be void. It will be as if those filings, including the Application, were never made.**

32. **Applicant is further advised that it may not participate in the prehearing conference without an attorney.**

II. ORDER

A. It Is Ordered That:

1. The procedural schedule established in the Notice of Application Filed, dated October 20, 2004, is vacated.

2. The Petition to Intervene filed by Durango West Metropolitan District No. 1 is granted. Durango West Metropolitan District No. 1 is an intervenor in this proceeding.

3. The Petition to Intervene filed by Durango West Metropolitan District No. 2 is granted. Durango West Metropolitan District No. 2 is an intervenor in this proceeding.

4. The Petition to Intervene filed by the Board of County Commissioners of La Plata County, Colorado is granted. The Board of County Commissioners of La Plata County, Colorado is an intervenor in this proceeding.

5. The request to intervene by Barton K. Cross, submitted after the close of the intervention period, is accepted for filing.

6. The request to intervene by Thomas D. Brossia, Vice President and Board Member of La Plata West Water CO, submitted after the close of the intervention period, is accepted for filing.

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

DATE: December 22, 2004
TIME: 10:00 a.m.
PLACE: Commission Hearing Room
1580 Logan Street, OL2
Denver, Colorado

8. The parties shall be prepared to discuss the matters set forth above.

9. On or before December 15, 2004, counsel for Applicant Lake Durango Water Company shall enter an appearance in this proceeding. Counsel for Applicant Lake Durango Water Company shall be prepared to proceed with the prehearing conference as scheduled.

10. The parties shall follow the procedures set forth above.

11. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge