

Decision No. R04-1580-I

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.

DOCKET NO. 04A-525W

IN THE MATTER OF THE APPLICATION OF LAKE DURANGO WATER COMPANY FOR AN ORDER AUTHORIZING LAKE DURANGO WATER COMPANY TO ACCESS FUNDS IN THE CAPITAL IMPROVEMENT ESCROW ACCOUNT TO PAY FOR ENGINEERING COSTS RELATING TO THE DEVELOPMENT OF THE LIGHTNER CREEK PROJECT.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING AND DENYING INTERVENTIONS;
NOTICING WAIVER OF § 40-6-109.5, C.R.S.;
CONSOLIDATING DOCKETS; REQUIRING
INTERVENORS TO OBTAIN COUNSEL;
AND REQUIRING FILINGS**

Mailed Date: December 30, 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 (Project Application). Applicant did not file its direct testimony and exhibits with

the Project Application. Applicant supplemented the Project Application by a filing made on November 1, 2004. The Project Application commenced Docket No. 04A-424W.

2. The Commission gave public notice of the Project Application and established an intervention period. *See* Notice of Application Filed, dated October 20, 2004.

3. Also on October 15, 2004, Applicant filed an Application in which it seeks authorization to access funds in its Capital Improvement Escrow Account to pay for an engineering study for development of the Lightner Creek Project (Engineering Application). Applicant did not file its direct testimony and exhibits with the Engineering Application. Applicant supplemented the Engineering Application by a filing made on November 1, 2004. The Engineering Application commenced Docket No. 04A-525W.

4. The Commission gave public notice of the Engineering Application and established an intervention period. *See* Notice of Application Filed, dated October 20, 2004.

5. Durango West Metropolitan District No. 1, Durango West Metropolitan District No. 2, the Board of County Commissioners of La Plata County, Colorado, and Staff of the Commission intervened in both dockets. *See* Decisions No. R04-1453-I and No. R04-1454-I.

6. Pursuant to Decisions No. R04-1453-I and No. R04-1454-I, the undersigned Administrative Law Judge (ALJ) held a prehearing conference in this docket on December 22, 2004. All parties and persons who sought to intervene, except Messrs. Brown and Woods, were present¹ and participated.

7. The first issue taken up at the prehearing conference was the interventions filed by various individuals. Each asked to intervene in both dockets.

¹ Some of the parties participated by telephone.

8. 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,” sought to intervene in this proceeding. Letter dated November 5, 2004, addressed to Bruce N. Smith, Director of the Commission. At the prehearing conference Mr. Bradley clarified that the intervention was filed on behalf of the Shenandoah Homeowners Association; that that Association is a Colorado non-profit corporation whose members receive their water service from Applicant; and that he was authorized to intervene on behalf of the Association. The intervention was granted, subject to the condition (discussed below) that the Shenandoah Homeowners Association obtain counsel. This Order memorializes that ruling.

9. 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,” sought to intervene in this proceeding. Letter dated November 8, 2004, addressed to Bruce N. Smith, Director of the Commission. At the prehearing conference Mr. Griffith clarified that the intervention was filed on behalf of the Rafter J Association; that that Association is a Colorado non-profit corporation whose members receive their water service from Applicant; and that he was authorized to intervene on behalf of the Association. The intervention was granted, subject to the condition (discussed below) that the Rafter J Association obtain counsel. This Order memorializes that ruling.

10. Mr. Thomas D. Brossia, Water Committee Chairman, Shenandoah Highlands Home Owners Association, stated: “The [Shenandoah Highlands Home Owners Association] Board is hereby formally intervening[.]” Letter dated November 9, 2004, addressed to Bruce N. Smith, Director of the Commission. As relevant here, the letter states: The Shenandoah Highlands Home Owners Association “represent[s] 43 owners serviced by [Applicant]. We were

an original intervenor & rely on this company for our water service.” At the prehearing conference Mr. Brossia stated that the Shenandoah Highlands Home Owners Association is a Colorado non-profit corporation whose members receive their water service from Applicant; that it is a separate entity from the Shenandoah Homeowners Association; and that he was authorized to intervene on behalf of the Association. The intervention was granted, subject to the condition (discussed below) that the Shenandoah Highlands Home Owners Association obtain counsel. This Order memorializes that ruling.

11. Messrs. Roger Brown and Lawrence Woods did not appear at the prehearing conference. As a result, their request to intervene was denied. This Order memorializes that ruling.

12. Mr. Barton K. Cross, “[a]s a representative of the Independent Users of Lake Durango Water Company” sought to intervene. Letter dated November 5, 2004, addressed to Bruce N. Smith, Director of the Commission. At the prehearing conference Mr. Cross clarified that the Independent Users of Lake Durango Water Company is an informal group of persons who receive their water service from Applicant and whose interests are not represented by any of the Associations which have intervened. Because the Independent Users of Law Durango Water Company is not a legal entity, Mr. Cross was permitted to intervene as an individual to represent his individual interests. As Mr. Cross will represent only his personal interest, he need not obtain counsel in this matter. This Order memorializes that ruling.

13. Mr. Thomas D. Brossia,² Vice President and Board Member of La Plata West Water Company, sought to intervene. Filing dated November 17, 2004 addressed to Bruce N. Smith, Director of the Commission. At the prehearing conference Mr. Brossia clarified that the

intervention was filed on behalf of La Plata West Water Company; that that Company is a Colorado corporation which provides water service to another area of the county served by Applicant; and that he was authorized to file the intervention on behalf of the Company. Mr. Brossia stated that, at present, there is no business relationship between the Company and Applicant. He further stated that the Company sought to intervene because it may seek to purchase Applicant in the future, although the plans are not definite and no offer has been made. The Company's intervention was denied because its interests in this proceeding are speculative at best and, thus, do not meet the requirement for intervention by permission. *See Rule 4 Code of Colorado Regulations* (CCR) 723-1-64(b)(1) (one seeking to intervene by permission must have "a substantial interest in the subject matter of a proceeding"); Decision No. C04-0722 at ¶ 10 (one seeking to intervene by permission must "show a current non-speculative interest that will be affected"). This Order memorializes that ruling.

14. With respect to intervention it is necessary to consider whether the Shenandoah Homeowners Association, the Rafter J Association, and the Shenandoah Highlands Home Owners Association (Intervenor Associations) must have legal representation to participate in this case. The ALJ finds that they must have legal representation.

15. The Intervenor Associations are Colorado corporations. As a corporation, each is a "person" as defined in § 40-1-102(5), C.R.S. Each is also a party in this matter.

16. 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 party is "an individual ... who wishes to appear *pro se* [to represent] only his individual interest"

² This is the same Mr. Brossia who submitted the November 9, 2004, letter on behalf of the Shenandoah Highlands Home Owners Association Board.

(Rule 4 CCR 723-1-21(b)(1)); or (b) the party 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)).

17. The Commission recently had occasion to emphasize the mandatory nature of the requirement that a party be represented by counsel (unless one of the exceptions applies) and to find specifically that pleadings filed by, and appearances made by, a non-attorney are void and of no legal effect (unless one of the exceptions applies). *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 two statutory requirements.

18. The Intervenor Associations are not individuals and, therefore, that portion of Rule 4 CCR 723-1-21(a) does not apply to them.

19. There is nothing in the record on which to determine whether Intervenor Associations are closely held entities. However, that portion of Rule 4 CCR 723-1-21(a) does not apply to them because they cannot meet the requirements of § 13-1-127(2), C.R.S. Section 13-1-127(2), C.R.S., 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. The amount in controversy exceeds \$10,000 in the Project Application³ and in the Engineering Application.⁴ Therefore, each Intervenor Association must appear through counsel.⁵

³ The cost estimates for the proposed Lightner Creek Project exceed \$2 million.

⁴ The cost estimate for the Project-related engineering exceeds \$50,000.

⁵ The Intervenor Associations may each retain separate counsel or may all retain the same counsel, as their interests dictate.

20. The Intervenor Associations each 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 **January 14, 2005**, counsel for each Intervenor Association must enter an appearance in this matter.

21. **Each Intervenor Association is advised that its failure to obtain counsel as required by this Order will mean that motions and other filings made by an unrepresented Intervenor Association in this proceeding will be void. It will be as if those filings, potentially including the interventions, were never made. In addition, an unrepresented Intervenor Association may not participate in hearings, further prehearing conferences, and other proceedings held in this consolidated matter.**

22. In the alternative, on or before **January 14, 2004**, Messrs. Bradley, Griffith, and Brossia each may elect to proceed as an individual intervenor in this matter.⁶ To exercise this election, an individual must file and serve a written notification of his election. Upon that election, the Intervenor Association on whose behalf the electing individual filed an intervention⁷ will be deemed to have withdrawn its intervention in favor of the named individual.

23. 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. To accommodate the schedule envisioned by the parties and discussed below, Applicant waived the

⁶ Each has a substantial interest in the subject matter of this proceeding because each receives water service from Applicant.

⁷ *See* ¶¶ 8 through 10, above.

provisions of § 40-6-109.5, C.R.S., as to both the Project Application and the Engineering Application. As a result, that statute does not apply to this proceeding.

24. The second issue discussed at the prehearing conference was the question of consolidation of Dockets No. 04A-524W and No. 04A-525W. 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 Engineering Application pertains to funding the engineering work necessary to proceed with construction of the Lightner Creek Project (the subject of the Project Application). In addition, all parties are in both proceedings. In the exercise of her discretion, the ALJ found that the two dockets would be consolidated because they are intertwined factually, the issues are substantially similar, consolidation would allow greater control over the overall proceeding and the schedule, and no party would be prejudiced. This Order memorializes that oral ruling.

25. The third issue discussed at the prehearing conference was whether the contingencies contained in ¶ 5 of the Construction Advance and Option to Purchase Agreement (Agreement) necessitated expedited treatment of the case. *See* Decisions No. R04-1453-I and No. R04-1454-I (Commission directed ALJ to provide expedited treatment of Applications). There are five contingencies which must be satisfied by December 31, 2005, to assure a loan of \$800,000 toward the construction cost of the Lightner Creek Project. One contingency is Commission approval of the Agreement; this is the subject of the Project Application. Another contingency is Applicant’s providing adequate assurance of financing to pay for any Lightner Creek Project construction cost in excess of \$800,000; this will also be an issue in the Project Application. Applicant stated that a Commission decision is not necessary to commence work on the three other contingencies and that that work could and would begin in the absence of a

Commission decision. Based on Applicant's representations at the prehearing conference and on its waiver of § 40-6-109.5, C.R.S., the ALJ finds that the Applicant has indicated its willingness to forego expedited treatment in this proceeding so long as a Commission decision is issued no later than December 31, 2005.

26. At the prehearing conference the parties stated that they had reached an agreement in principle in the Engineering Application and provided a broad outline of the agreement. The parties represented that this agreement, if approved, would allow release of funds to pay for preliminary engineering work on the feasibility of the Lightner Creek Project. The parties represented that the preliminary engineering work is a necessary prerequisite to a determination of whether to proceed with the Lightner Creek Project and that the work would take approximately 60 days. As a result, the parties requested prompt review of the written agreement when it is submitted. The parties were clear, however, that the agreement in principle might not resolve all issues in the Engineering Application. The ALJ ordered the parties to submit a written stipulation and settlement agreement on or before **January 12, 2005**. This Order memorializes that oral ruling.

27. Finally, the parties briefly addressed hearing dates for this consolidated proceeding. Assuming that the preliminary engineering work indicates that the Lightner Creek Project should go forward, Applicant suggested that the hearing be held in late summer 2005. No party proposed a specific procedural schedule. The ALJ will order the parties to consult about a proposed procedural schedule and hearing dates⁸ and will order Applicant to file, on or before **February 11, 2005**, a proposed procedural schedule and hearing dates satisfactory to the

⁸ The ALJ requests Applicant to contact her (telephone: 303.894.2842) to discuss available hearing dates.

parties. The proposed procedural schedule must cover the filings/dates listed in Decision No. R04-1453-I at ¶ 20. The ALJ will adopt the proposed schedule if possible.

28. At present, Applicant does not have a Certificate of Public Convenience and Necessity (CPCN) to provide service; however, an application for a CPCN is pending before the Commission. If granted, the CPCN will describe Applicant's service territory in terms of a specific geographic area which Applicant can serve. During the prehearing conference, there was discussion of the impact which granting the Project Application would have on Applicant's geographic service territory, assuming both the CPCN application and the Project Application are granted. As the ALJ understands it, granting the Project Application may result in an increase in the geographic area of Applicant's service territory beyond that sought in the pending CPCN application. **The parties are advised that this issue of Applicant's service territory must be addressed in this consolidated proceeding. Of particular interest is the question of whether there was notice to the public that such an increase in the service territory was an issue in Docket No. 04A-524W (that is, whether such an increase in the service territory was stated or otherwise contained within the Project Application as filed and noticed).**

29. Parties are reminded that they are each responsible for compiling a service list for this proceeding; that the service list must contain the name and address of all parties; and that all filings must be served on all parties.

II. ORDER

A. It Is Ordered That:

1. The request to intervene filed by the Shenandoah Homeowners Association is granted, subject to the discussion above.

2. On or before January 14, 2005, counsel for Intervenor Shenandoah Homeowners Association shall enter an appearance in this proceeding unless Gene M. Bradley elects to intervene as an individual and makes that election as required by ¶ I.22, above.

3. The request to intervene filed by the Rafter J Association is granted, subject to the discussion above.

4. On or before January 14, 2005, counsel for Intervenor Rafter J Association shall enter an appearance in this proceeding unless Richard G. Griffith elects to intervene as an individual and makes that election as required by ¶ I.22, above.

5. The request to intervene filed by the Shenandoah Highlands Home Owners Association is granted, subject to the discussion above.

6. On or before January 14, 2005, counsel for Intervenor Shenandoah Highlands Home Owners Association shall enter an appearance in this proceeding unless T. D. Brossia elects to intervene as an individual and makes that election as required by ¶ I.22, above.

7. The request to intervene made by Mr. Barton K. Cross as an individual is granted.

8. The request to intervene filed by the Independent Users of Lake Durango Water Company is denied.

9. The request to intervene filed by Mr. Roger Brown is denied.

10. The request to intervene filed by Mr. Lawrence Woods is denied.

11. The request to intervene filed by La Plata West Water Company is denied.

12. Dockets No. 04A-524W and No. 04A-525W are consolidated for all purposes.

13. Section 40-6-109.5, C.R.S., is not applicable to Docket No. 04A-524W.

14. Section 40-6-109.5, C.R.S., is not applicable to Docket No. 04A-525W.

15. On or before January 12, 2005, the parties shall file a written stipulation and settlement agreement pertaining to preliminary engineering work for the Lightner Creek Project.

16. On or before February 11, 2005, Applicant will file a procedural schedule and proposed hearing dates as set out in ¶ I.27 above.

17. The parties shall follow the procedures and make the filings set forth above.

18. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge