Decision No. R05-0400

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04F-627W

JAMES AND LINDA LYSAGHT; STEVE AND CAROL PARKINSON; STEVE AND ELIZABETH KUTZLI; RICHARD AND PHYLLIS GLEINN; THOMAS AND PATRICIA REES; DENNIS MICHAUD; MARK AND BOBBIE JOHNSON; JAMES AND PATRICIA KERR; LARRY AND NANCY MEYERS; KAREN GOETTLER; AARON MCMANIGLE, AND DON STILTNER

COMPLAINANTS,

V.

DALLAS CREEK WATER COMPANY,

RESPONDENT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM J. FRITZEL DECLARING DALLAS CREEK WATER COMPANY TO BE A PUBLIC UTILITY

Mailed Date: April 5, 2005

Appearances:

Richard and Phyllis Gleinn and James Lysaght (*pro se*), Ridgeway, Colorado, Complainants; and

Scott C. Miller, Esq., Aspen, Colorado, for Dallas Creek Water Company.

I. STATEMENT OF THE CASE

1. On December 6, 2004, the above captioned Complainants, property owners located in subdivisions served by Dallas Creek Water Company (Dallas Creek or Respondent) filed complaints, naming Dallas Creek as Respondent.

2. On December 16, 2004, Don Stiltner, a property owner in one of the subdivisions served by Respondent also filed a complaint naming Dallas Creek as Respondent.

3. The Commission scheduled a hearing in this matter for January 24, 2005.

4. On December 29, 2004, Respondent filed its Answer. In its Answer, Respondent requested that the Commission dismiss the complaints, finding that Respondent is not a public utility. Alternatively, Respondent requested that the Commission enter a ruling limiting the hearing to the issue of whether the Commission has jurisdiction over Respondent. Respondent further requested that if the Commission finds that it has jurisdiction, that the hearing on the merits of the complaint be scheduled for a later time.

5. By Decision No. R05-0068-I, mailed on January 13, 2004, it was ordered that the hearing scheduled for January 24, 2005 proceed and that the jurisdictional issue as well as the merits of the complaints would be heard.

6. The hearing was held as scheduled. Testimony was received from witnesses and Complainants' exhibits C-1 through C-7, and Respondent's exhibits, R-1, R-20, R-22, R-23, R-24, R-26, R-29, R-30, R-31, R-33, R-34, R-39, and R-40 were marked for identification and admitted into evidence.

7. As a preliminary matter, Respondent moved to dismissed the complaints of the captioned Complainants who did not appear at the hearing. The motion was taken under advisement. The motion will be granted and the complaints of Steve and Carol Parkinson, Steve and Elizabeth Kutzli, Thomas and Patricia Rees, Dennis Michaud, Mark and Bobbie Johnson, James and Patricia Kerr, Larry and Nancy Myers, Karen Goettler, Aaron McManigle, and Don Stiltner will be dismissed for failure to appear at the hearing to prosecute their complaints.

8. At the conclusion of the hearing, the matter was taken under advisement. The parties were granted an opportunity to submit statements of position no later than February 18, 2005. On February 14, 2005, Complainant Richard J. Gleinn filed a Statement of Position. On February 18, 2005, Respondent filed its Statement of Position.

9. Pursuant to § 40-6-109, C.R.S., the record and exhibits of the hearing together with a written recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

10. On December 6, 2004, Complainants Richard and Phyllis Gleinn, James and Linda Lysaght, as well as all the other Complainants named in the caption of this Docket filed identical complaints against Respondent. Complainants allege that Respondent improperly assessed a $2,000 "service connection fee" on the Complainants for connection to Respondent's water system in order to provide domestic water to Complainants' homes located on Loghill Mesa, in the vicinity of Ridgeway, Colorado. Complainants request that this Commission assert jurisdiction over Respondent and initiate an investigation to determine the propriety and legality of the $2,000 water connection fee charged to homeowners in subdivisions on Loghill Mesa in addition to tap fees of $5,000 for each property.

11. Richard J. and Phyllis A. Gleinn own residential property in Loghill Village, located on Loghill Mesa. The Gleinns built their home starting in 2003. Their home was completed some time in May, 2004. A tap fee of $5,000 was paid by the developer prior to the time of the purchase by the Gleinns The $5,000 fee was reflected in the purchase price of the real estate and the Gleinns were assessed a $50 water tap transfer fee at the time of connection to the water system. (*See* Exhibit No. C-2.) On August 1, 2002, Respondent started to charge an additional $2,000 service connection fee for property owners who desired to connect to the water

system. The $2,000 was a charge in addition to the $5,000 tap fee. Either prior to or after the Gleinns moved into their new residence, Respondent assessed a $2,000 service connection fee. The Gleinns have refused to pay the $2,000 service connection fee. (See Exhibit No. C-4), which they maintain is illegal since Respondent did not provide proper notice to the Gleinns and other homeowners and that the Respondent has not justified the economic necessity for imposing the fee.

12. Complainants James and Linda Lysaght own property located at 810 Canyon Drive, Ridgeway, Colorado, located on Loghill Mesa. (Complaint of James and Linda Lysaght) The Lysaghts also contend that they were improperly assessed a $2,000 service connection fee prior to receiving water service from Respondent. The Lysaghts' complaint alleges the same matters as the Gleinn complaint.

13. Respondent is a water company, a corporation organized under the laws of the state of Colorado (Exhibit No. R-20) providing domestic water service to homeowners located in approximately 20 subdivisions located on Loghill Mesa. The subdivisions are Loghill Village; Fairway Pines Estate; Bennett; Keller; Ponderosa Crest; Sunridge; Calbeck; Marshall; Flying K; Meadow Estates; Deerfield Enclave at the Edge; Fisher Creek Estates; Fisher Canyon Estates; Gleason; Pinyon Peak; Stapleton, Limited.; Estate at Fairway Pines; Waterview; and Waterview Knolls. Respondent's predecessor, Loghill Village Water Company was formed to provide domestic water service to the subdivisions located on Loghill Mesa. Mr. James Willey is the owner/manager of Dallas Creek Water Company and he is also is a developer of Fairway Pines.

14. Respondent limits its water service to its service territory composed of the subdivisions located on Loghill Mesa. Respondent has sold 773 water taps. 312 water taps are currently in service. There are 461 water taps that are not connected to Respondent's water

system. The water taps are sold to individuals and to developers of properties. Respondent provides water to its customers pursuant to contracts executed by customers and Respondent. An example of this contract is found at Exhibit No. C-2.

15. Complainant Richard Gleinn testified that on or about March 1, 2003, an employee of Respondent started to install a water meter for service to his residence. Respondent's employee informed Dr. Gleinn that there would be a $2,000 service connection fee. Dr. Gleinn objected. Eventually the water meter was installed and service began to the Gleinn residence. Complainant receives a bimonthly bill, which includes the $2,000 fee plus interest and late charges. (Exhibit No. C-4).

16. The original developers of the subdivisions on Loghill Mesa started the predecessor of Dallas Creek to serve the subdivisions on the mesa. When the current owner of Dallas Creek Water Company, Mr. James A. Willey and his partner Eric Lederer purchased the water company in 1993, the new owners of the water company adopted all of the initial agreements of the previous owners to serve the subdivisions on Loghill Mesa. At a later time, Mr. Willey bought Mr. Lederer's interests in the water company. Respondent currently sells water only to individuals located in its service territory. Respondent does not provide water on a wholesale basis.

17. Mr. Willey testified that 773 water taps have been sold by Respondent. There are 312 current customers being served. Four-hundred and sixty-one water taps have been sold but are not currently in use nor connected to the water system. Approximately 80 to 90 acre-feet are delivered per year to Respondent's customers. The physical facilities of the water company include a treatment plant, a six-inch line that serves its customers, a main pump station, two lift stations, seven to eight pressure reducing valves, and two water storage tanks. Over a four year

period, 2001-2004, Respondent spent $1,273,700 in capital improvements. (Exhibit No. R-33). The improvements and upgrades include construction of a new water treatment facility, new water storage facility, new settlement pond, acquisitions of fixtures and pump system improvements.

18. In order to maintain a modern water plant, and to provide for growth, Respondent initiated a $2,000 service connection charge on August 1, 2002, assessed to all new customers after that date and to customers who have already paid the $5,000 tap fee who wanted to connect to the water system after August 1, 2002. All new connections to Respondent's water system made after August 1, 2002 were assessed the $2,000 service connection fee.

19. Respondent published notice of the $2,000 service connection fee in the local newspaper, the *Ridgeway Sun*. (Exhibit No. R-28) The notice stated that the service connection fee would become effective in August 1, 2002. There was no public meeting or customer input into the adoption of the service connection fee. Mr. Willey stated that the Board of Directors of Dallas Creek made the decision to charge the fee.

20. Respondent's service territory lies within the boundaries of the Tri-County Water Conservancy District (Tri-County) as shown in Exhibit No. R-39, page 2. Tri-County provides water on both a retail and wholesale basis to customers within the district. Tri-County presently does not serve any customers in the twenty subdivisions on Loghill Mesa. It does not have water lines within a reasonable distance of the subdivisions on Loghill Mesa, currently served by Dallas Creek. Although Tri-County does not currently serve any customers in the subdivisions, the Assistant Manager in an affidavit (Exhibit R-39) stated that Tri-County could provide water

service to customers in subdivisions on Loghill Mesa. The Assistant Manager for Tri-County states in an affidavit, Exhibit R-39, page 1, Item No. 3 that:

> Tri-County is not precluded from competing to be the water service provider to developments on Log Hill Mesa and does not have any arrangement with Dallas Creek Water Company whereby Dallas Creek Water Company has exclusive jurisdiction to be the sole provider in the Log Hill Mesa area. It is Tri-County Water Conservancy District's understanding that each entity, or another entity, can compete to be the provider in the area and that a developer is free to choose between Tri-County Water Conservancy District or Dallas Creek Water Company or any other entity, including a privately developed water system, as to the provision of water service to the development on Log Hill Mesa.

21. Some developers have contacted Tri-County for potential service to the developer's subdivision. However, to date, the subdivisions on Loghill Mesa are currently served by Respondent. At the time, Mr. Willey was considering whether to update the physical plant of Dallas Creek, he contacted Tri-County to determine whether it would be cost effective to obtain water on a wholesale basis from Tri-County to serve its customers. After receiving a quote for bulk water delivery, Respondent elected to invest approximately $1.2 million for capital construction of Dallas Creek's facilities.

22. Although Tri-County indicates that it could provide service to customers on Loghill Mesa, it has no facilities in the subdivisions located on Loghill Mesa. Mr. Willey upon questioning by Complainant Dr. Gleinn admitted that Complainants currently have no alternative source of water available to either Dr. Gleinn or other persons residing on Loghill Mesa. Nevertheless, a developer can choose Tri-County or Respondent.

23. Mr. Willey testified that he believes that it was necessary to initiate the $2,000 service connection fee to those tapping onto the system after August 1, 2002. The service connection fee was intended to cover increased costs sustained by Respondent. The fee covers a new customer's share of capital costs such as the building of new treatment and storage facilities,

cost of obtaining water, complying with environmental and fire regulations, upgrading the water system to serve future customers, connection of new customers to the water system and installation of meters.

24. Lysle G. Dirrim, an accountant who provides accounting services for Respondent testified that Respondent has been losing money and historically has rarely operated at a profit. Exhibit R-31 is Respondent's profit and loss statement for 2004. The profit and loss statement shows that the net income for Respondent in 2004 was negative $42,217.87.

25. Respondent has a positive cash flow, however, it does not have any capital reserves. Mr. Dirrim stated that Respondent has lost money every year with few exceptions since the inception of the water company. He stated that without the service connection fee, the loss would have been greater for 2004. Since Respondent does not earn enough money to cover the cost of its service and existing plant, Mr. Dirrin believes that Respondent should charge his customers more than it presently does.

III. DISCUSSION

26. Article XXV of the Colorado Constitution grants to the Colorado Public Utilities Commission the power to regulate public utilities.

27. Section 40-1-103 (1) (a), C.R.S., defines a public utility subject to the Commission's jurisdiction as:

> The term "public utility", when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas corporation, electric corporation, telephone corporation, telegraph corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and any corporation, or person declared by law to be affected with a public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title.

28. The Colorado Supreme Court has adopted the above statutory test in determining whether or not an entity is a public utility subject to the jurisdiction of the Commission. *Board of County Commissioners v. Denver Board of Water Commissioners*, 718 P.2d 235 (Colo. 1986).

29. Public utility status is a mixed question of law and fact. *Durango West Metropolitan District No. 1 v. Lake Durango Water Company, Inc.*, R96-631 (Colo. P.U.C. June 25, 1996).

30. The evidence of record establishes, and it is found, that Respondent is a public utility under the statutory test of § 40-1-103 (1) (a), C.R.S., as interpreted by the Colorado Supreme Court in the *Board of County Commissioners* case, *supra.* The facts produced at the hearing establishes that Respondent is a water corporation formed and operating for the purpose of supplying the public with water for domestic and public use within its service territory.

31. The evidence of record establishes that Respondent provides water directly to homeowners located in 20 subdivisions on Loghill Mesa near the Town of Ridgeway, Colorado. Respondent currently serves 312 water taps. Respondent has also sold an additional 461 water taps which are not yet connected, but which Respondent has an obligation to serve upon connection. Thus, Respondent is currently committed to serve a total of 773 water taps.

32. Respondent is the only domestic water supplier to the 20 subdivisions located on Loghill Mesa.

33. Respondent's service territory is located within the boundaries of Tri-County (Exhibit No. R-39, page 2). Tri-County does not have water mains and facilities in the 20 subdivisions, nor within a reasonable distance of the homeowners located in the subdivisions who are currently served by Respondent. There is no evidence that Tri-County ever actively sought to serve the public within the 20 subdivisions. Although some of the developers talked to

Tri-County about the possibility of providing water to some developments, Tri-County never became the supplier for the subdivisions. The homeowners located in the twenty subdivisions have no alternative for obtaining domestic water.

34. Respondent has never refused to provide water to those who request service within its service territory. The evidence establishes that Respondent offers to provide domestic water indiscriminately to the public within its service territory.

35. If an entity is declared to be a public utility by the Commission, all rates and charges shall be just and reasonable. Section 40-3-101(1), C.R.S., states:

> All charges made, demanded, or received by any public utility for any rate, fare, product, or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. …

36. Complainants contend that the $2,000 service connection fee assessed to homeowners who connect to Respondent's water system after August, 2002 is unjust and unreasonable and requests that the Commission remove the charge, and order refunds to the homeowners who have paid the fee.

37. Complainants have the burden of proof (4 *Code of Colorado Regulations* 723-1-82(a)(2)(A). Complainants must establish by a preponderance of evidence that the service connection fee is unjust and unreasonable or otherwise unlawful. The evidence of record establishes that Complainants have failed to establish by competent evidence and by the preponderance of the evidence that Respondent's service connection fee is unjust and unreasonable. Complainants produce no studies or analyses to establish that the fee does not reflect the cost of providing the service, or is not justified. There also is no showing that the service connection fee is discriminatory, since all customers who connect to the water system after August 1, 2002 are required to pay the fee.

38. On the other hand, Respondent presented evidence to establish that the service connection fee is reasonably related to the cost of providing service and that the charge is not discriminatory since all customers who connect to the system after August 2002 create additional costs to provide water service.

39. The fee cannot be found to be unreasonable in view of the financial condition of Respondent. Respondent's accountant, Mr. Derrim testified that Respondent has rarely been profitable during the period of its operation of the water system. In calendar year 2004, Respondent operated at a loss as shown in Exhibit R-31.

40. Without a financial study in the record, no finding can be made as to the justness and reasonableness of the service charge. However, since this decision finds that Respondent is a public utility, it will be required to file tariffs, rates, and charges with the Commission. Upon the filing, the Commission has the discretion to order an investigation and suspension of the tariffs, rates, and charges and can require that Respondent establish the justness and reasonableness of the tariffs, charges, and rates.

41. Finally, Complainants Respondent requests that Respondent be required to pay costs associated with bringing the complaint before the Commission. Complainants requests that the Commission award costs in the amount of $2,147.34, which includes legal advice, travel, and costs such as postage. Complainants document these costs in its Statement of Position. Since Respondent has not had an opportunity to respond to the requests for costs, Respondent will be given 20 days from the mailing date of this recommended decision to respond to Complainant's request if it chooses. After the expiration of the 20 days, a supplemental recommended decision will be issued addressing Complainant's request for costs.

42. Pursuant to § 40-6-109(2), C.R.S., it is recommended that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. Dallas Creek Water Company is declared to be a public utility subject to the jurisdiction of this Commission.

2. Dallas Creek Water Company shall come into full compliance with the provisions of § 40-3-103, C.R.S., and 4 *Code of Colorado Regulations* 723-5 within 60 days of the effective date of this Recommended Decision, and comply with all other statutes and Rules pertaining to water public utilities.

3. The complaints of Steve and Carol Parkinson; Steve and Elizabeth Kutzli; Thomas and Patricia Rees; Dennis Michaud; Mark and Bobbie Johnson; James and Patricia Kerr; Larry and Nancy Myers; Karen Goettler; Aaron McMingle; and Donald Stiltner are dismissed for their failure to appear at the hearing to prosecute their complaints.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

6. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

WILLIAM J. FRITZEL

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director

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