

[Service Date April 22, 2003]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

DAVID and JANIS STEVENS, PAUL)	
CARRICK, ALAN and JIM)	DOCKET NO. UW-011320
WIEMEYER, CHRIS and CECILY)	
FLAVELL, STAN and KAY MILLER,)	
MICHAEL and COLLEEN STOVER,)	SEVENTH SUPPLEMENTAL
RICHARD and PAULA RUSSELL,)	ORDER; ORDER APPROVING
BEN G. MARCIN, RONALD and)	SETTLEMENT AGREEMENT
VICTORIA MONTGOMERY,)	WITH CONDITIONS
CHARLES and MICHELLE CLARK,)	
PAUL SCHULTE, SUE PERRAULT,)	
and JORG REINHOLT,)	
)	
Complainants,)	
)	
v.)	
)	
ROSARIO UTILITIES, LLC.)	
)	
Respondent.)	
.....)	

Synopsis: *The Commission approves and adopts the Settlement Agreement, with conditions, as a reasonable resolution of the complaint.*

1 **PROCEEDINGS:** This is a formal complaint brought by the owners or representatives of owners of thirteen properties that are within the service area of Rosario Utilities, LLC (Utility). Complainants allege that Rosario Utilities, owned by Oly Rose, LLC, has given preferential rights to available water connections to Rosario Resort, also owned by Oly Rose.

2 **PARTIES:** Michael and Patrick M. Hanis, attorneys, Renton, WA, represent Complainants. Thomas M. Pors, attorney, Seattle, WA, represents Rosario Utilities LLC. Richard A. Finnigan and Seth Bailey, attorneys, Olympia, WA, represent Oly Rose, LLC.

3 **SETTLEMENT AGREEMENT:** On February 12, 2003, Complainants, Rosario
Utilities, and Oly Rose filed a Settlement and Agreed Final Order that would
resolve all the issues raised in this complaint.

I. BACKGROUND

A. Procedural history

4 On September 24, 2001, Complainants¹ filed a complaint with the Commission
alleging that a sale of water certificates by Rosario Utilities failed to comply with
statutory requirements and gave preferential rights to available water
connections to Rosario Resort.

5 The Commission convened a prehearing conference on January 23, 2002, before
Administrative Law Judges Karen M. Caillé and Theodora Mace. Among other
things, the Commission granted Oly Rose's petition to intervene, established a
procedural schedule, invoked the discovery rule and entered a protective order.

6 On July 25 and 26, 2002, the Commission held an evidentiary hearing before
Administrative Law Judge Karen M. Caillé (ALJ) in Seattle, Washington. The
Commission received into evidence testimony and exhibits previously filed in
this docket by the parties and previously marked for identification, and heard
the testimony of fifteen witnesses.

7 On November 8, 2002, the ALJ entered an Initial Order proposing that the
Commission deny the complaint because Complainants failed to sustain their
burden of proof as to the allegations in their complaint, namely that Rosario
Utilities improperly conducted the June 15, 2002, sale of water certificates, and

¹ Complainants are individuals or representatives of individuals who own land on Orcas Island. Rosario Utilities is a water service company owned by Oly Rose and regulated by the Commission. Rosario Resort is an unincorporated entity wholly-owned by Oly Rose that operates a resort on Orcas Island. Rosario Resort is an existing customer of Rosario Utilities. In addition to its ownership of Rosario Utilities and Rosario Resort, Oly Rose owns certain undeveloped lands within the area served by Rosario Utilities. Oly Rose petitioned to intervene and was granted intervention to protect its interests as a land owner and customer of Rosario Utilities. Rosario Homeowners Association, Orcas Highlands Homeowners Association, and Rosario Water System are licensed public water systems that distribute water bought from Rosario Utilities.

granted Rosario Resort preferential treatment in obtaining water certificates. *Sixth Supplemental Order; Initial Order Denying Complaint (Initial Order)*.

8 Complainants filed a Petition for Administrative Review on December 2, 2002. The Commission granted several requests by Rosario Utilities for extensions of time for filing an answer to the petition for administrative review, based on the Company's representations that the parties were attempting to settle the case.

9 On February 12, 2003, the parties filed a proposed Settlement Agreement. Thereafter, on March 18, 2003, the Commission convened a hearing before Administrative Law Judge Karen Caillé to consider whether the result of the proposed Settlement Agreement is in the public interest.

B. Factual History

10 This complaint relates to a June 15, 2001, first-come, first-served sale² (June 15th sale) of a limited number of water service connections by Rosario Utilities. The June 15th sale followed a five-year moratorium imposed by the Department of Health that barred the Utility from adding new customers until it made certain improvements to the facilities.

11 In May 2001, the Department of Health lifted the moratorium and approved 127 new service connections. However, only 38 of those service connections were available for the June 15th sale. The remainder of the service connections went to those property owners on a priority list that included residents who had prepaid for service connections prior to the moratorium.³ Rosario Resort was included on the priority list for 34 connections to service a 71-room expansion of the resort pursuant to a 1996 conditional use permit. The conditional use permit was issued with a condition that the water system be upgraded to capacity. Oly Rose financed the \$1 million to construct the new water treatment plant in compliance with the condition on this permit.⁴

² Water certificates were available for purchase upon submission of the appropriate fee and documentation.

³ *Gaskill et al. v. Rosario Utilities, LLC, Docket No. UW-990071, Commission Order Accepting Settlement Agreement; Dismissing Complaint, July 28, 1999 (Gaskill)*, provided as Ex. 67. See also: Exs. 68 and 132.

⁴ Ex. T-65, pp.4-5.

- 12 By letter dated May 23, 2001, Rosario Utilities notified all property owners in the Vusario Homeowners Association, Orcas Highlands Homeowners Association and Rosario Water System that the moratorium had been lifted, that those customers who were on the priority list approved by the Commission in *Gaskill*⁵ would be the first to receive water certificates, and that a limited number of new water certificates would be available beginning June 15th, 2001, on a first-come, first-served basis.
- 13 Complainants are the thirteen property owners next in line who did not receive water certificates at the June 15, 2001, first-come, first-served sale.⁶ Complainants brought this formal complaint to the Commission alleging that their failed attempts to acquire water certificates occurred after they had made efforts to understand and comply with the ambiguous notice and rules of the sale, and the ambiguous statements of Rosario Utilities' manager. They allege that Rosario Resort had contact with Rosario Utilities leading up to the sale and was given information by Rosario Utilities not afforded to Complainants. Furthermore, Complainants assert that the sale did not comply with statutory requirements and must be voided.

C. Initial Order

- 14 The presiding administrative law judge entered an initial order on November 8, 2002, recommending that the Commission deny the complaint because Complainants had failed to sustain their burden of proof as to the allegations in their complaint. Specifically, the Initial Order concluded that Complainants had failed to show by substantial competent evidence that the notice and rules of the water certificate sale were not "just and reasonable" under RCW 80.28.010(3), had failed to show that the sale was unfair, unjust and unreasonable pursuant to Title 80.28 RCW, and had failed to show that Rosario Resort received "undue or unreasonable" preference in obtaining water certificates under RCW 80.28.090.

⁵ *Gaskill et al. v. Rosario Utilities, LLC, Docket No. UW-990071, Commission Order Accepting Settlement Agreement; Dismissing Complaint, July 28, 1999.*

⁶Ex. 46. The Resort representative was eighth or ninth in line and purchased 16 certificates. Ex. T-81, pp.5-6; 9-11.

II. SETTLEMENT AGREEMENT

A. Terms and Conditions

15 Following entry of the Initial Order, the Complainants, Rosario Utilities and Oly Rose negotiated a resolution of their dispute. The parties filed a settlement agreement that resolved the issues in the complaint by creating a priority list composed of the thirteen Complainants in this proceeding who established that they were the next thirteen customers in line for connections at the June 15th sale.⁷ The terms of the settlement agreement are memorialized in Paragraph 60 of a proposed agreed order entitled “Final Order Accepting Settlement and Denying Complaint.” *Proposed Agreed Order*. The Proposed Agreed Order is identical to the *Initial Order* with the exception of a new Paragraph 57 and a new Paragraph 60, and the omission of Paragraph 1. The settlement contemplates the Commission’s adoption of the Proposed Agreed Order.

16 Paragraph 60 of the Proposed Agreed Order sets forth the following facts, terms, and conditions:

- (1) The Department of Health limited the number of connections available for the June 15, 2001, sale until Rosario Utilities could demonstrate that it had capacity for additional connections based on water usage data.
- (2) Rosario Utilities has submitted data to the Department of Health in order to increase the number of available connections.
- (3) Complainants have established that they were the next 13 customers in line for connections at the June 15, 2001, sale.
- (4) The June 15, 2001, sale is considered open for the sole purpose of completing the sale of 13 connections, one to each of the 13 Complainants, upon Rosario Utilities’ receipt of authority from the Department of Health to make additional connections.

⁷ Ex. 46.

- (5) The 13 connections shall be made available only to the Complainants in the following order: Sue Perrault, David and Janis Stevens, Paul Carrick, Alan Wiemeyer, Jorg Reinholt, Chris and Cecily Flavell, Stan and Kay Miller, Michael and Colleen Stover, Richard and Paula Russell, Ben G. Marcin, Ronald and Victoria Montgomery, Charles and Michelle Clark, and Paul Schulte.
- (6) Rosario Utilities may impose a reasonable time limit for each of the Complainants to complete their purchase of a connection, and failure of any Complainant to comply with the utility's time limit will result in their forfeiture of their place in line and the availability of the connection to the next Complainant or for the next sale of connections to the public.
- (7) This Order does not affect the sale of any additional connections beyond the 13 allocated herein.
- (8) For all other purposes, the June 15, 2001, sale of water connections is concluded.

B. Hearing on Settlement

- 17 WAC 480-09-466 establishes the Commission's responsibility to verify that a proposed settlement is lawful and that the result is consistent with the public interest. Accordingly, pursuant to notice, the Commission requested that the parties appear and present facts from which the Commission may make findings about the propriety of the proposed settlement. The parties provide the following information in support of their proposed Settlement Agreement.
- 18 According to the parties, keeping the sale open to distribute additional water certificates released by the Department of Health based on actual customer usage is consistent with the terms of the May 23rd notice because the notice provided that new water certificates "will be available *beginning* June 15th on a first come, first serve basis." Moreover, Ms. Vierthaler, Manager of Rosario Utilities, confirmed that according to the preliminary plan from the Department of Health she expected to have an additional 17 connections for sale on June 15, 2001. However, after the May 23rd notice went out, the Department of Health informed her that it would need additional data on actual customer usage in order to

release those 17 connections. Accordingly, the parties assert that any additional connections made available at this time would be part of the existing capacity of the plant, and what was contemplated under the May 23rd notice, rather than a result of future plant expansion. As part of the terms of the settlement, Complainants agree to hire an engineer to submit the necessary information to the Department of Health so that the Department can approve the additional connections. Complainants will be financially responsible for the engineer's fee.

- 19 The parties acknowledge that based on the data submitted, the Department of Health might approve 10 additional connections, 20 additional connections, or no additional connections, depending on the amount of actual consumption. Ms. Vierthaler opined that if the Department of Health approved more than 13 connections, the utility would have to provide notice of a new sale to the public. If there are fewer than 13 certificates available, the parties agree that the certificates would go to Complainants in the order that they appear on the list in Exhibit 46, which is based on the time they arrived at the June 15th sale.
- 20 The parties assert that Exhibit 46, a list of Complainants according to their place in line at the June 15th sale, is the best evidence to show that those individuals are the only individuals who sought water connections and did not receive them. They add that no other property owners sought to join in the complaint, or contacted counsel for Complainants, and there have been no other formal or informal complaints received by the Commission in connection with the June 15th sale.
- 21 Ms. Vierthaler testified that the utility also had not received any complaints about the sale. She did recall that she received two connection fees by Federal Express later in the day on June 15, 2001. Complainants point out that according to the terms of the Notice, those people that mailed in their applications would be placed at the end of the list. Complainants agreed that the two applications sent by Federal Express should be included in the priority group as numbers 14 and 15 behind the Complainants.
- 22 The parties observe that the thirteen Complainants next in line at the June 15th sale may not even constitute a preference. However, assuming that the list of 13 Complainants does constitute a preference, they argue that it is not an unreasonable preference given that Complainants would have received the next 13 certificates had the water connections been available on June 15, 2001.

23 The parties note that the Commission approved the use of a priority list for the sale of water connections in *Gaskill et al. v. Rosario Utilities, LLC*.⁸ They explain that the priority list approved by the Commission in *Gaskill* relates to the instant case in that those individuals received the first available connections prior to the public as part of the June 15th sale of water certificates.

24 Finally, the parties argue that the Commission recently reviewed an analogous situation involving a fairly large transaction by Rainier Water Company to purchase additional capacity. There, those property owners who wanted water connections and made their financial commitments early got a significant price break, because in essence they were providing the funds that would allow the transaction to happen. Here, by participating in the cost of hiring an engineer, Complainants are providing the funds to determine whether the actual capacity will allow for additional water connections. Should additional water connections become available, they will receive a connection according to their place in line at the June 15th sale.

III. DISCUSSION AND DECISION

25 Based on the record developed in this proceeding, we find that the issues presented by this complaint are adequately addressed and resolved by the terms of the parties' settlement agreement, discussed in Paragraphs 18 through 24 above, with the addition of the following four conditions.

26 First, we find it inappropriate to adopt the Initial Order with the addition of Paragraph 60, which encompasses the terms of the settlement, as the settlement document for this proceeding. It is procedurally inappropriate because the settlement agreement supersedes the Initial Order. If the settlement is appropriate, the Initial Order is no longer effective, and it no longer resolves the validity of the sale. Moreover, the addition of the settlement terms to an Initial Order that denies the complaint creates a substantive inconsistency in the document. A consistent outcome would be to approve the settlement agreement and dismiss the complaint. Accordingly, we will consider the terms of the proposed settlement agreement to be those set forth in Paragraph 60 of the

⁸ *Docket No. UW-990071, Commission Order Accepting Settlement Agreement; Dismissing Complaint*, July 28, 1999, provided as Ex. 67.

Proposed Agreed Order and those referenced at the hearing on the settlement, as discussed in Paragraphs 18 through 24, above.

- 27 Second, the information presented at the hearing on the settlement reveals that Rosario Utilities received applications and payments from two additional property owners by Federal Express on June 15, 2001. These two property owners should be added to the list of thirteen Complainants as numbers 14 and 15, if they are willing to share in the expenses for hiring the engineer.
- 28 Third, since it is impossible to determine how many additional connections will be allowed by the Department of Health, Rosario Utilities should pay for the costs of the engineering study and later be reimbursed by equal payments from property owners as they receive water certificates. This way, those property owners who receive the benefit of the water certificate will contribute to the cost of the study necessary to release additional connections.
- 29 Fourth, if the Department of Health releases more than 15 additional water connections (assuming the two property owners who submitted their applications by Federal Express are willing to share in the cost of the necessary studies to obtain the additional water connections, if not then the threshold number becomes 13), then Rosario Utilities must issue notice of a process for the sale of these additional certificates.
- 30 With the addition of these conditions, we are satisfied that the settlement agreement is consistent with the public interest and that it should be approved and adopted as a full and final resolution of all issues pending in Docket UW-011320. We commend the parties for their diligent work to resolve the issues presented by the complaint.

IV. FINDINGS OF FACT

- 31 Having discussed in detail both the oral and documentary evidence concerning all material matters inquired into, and having previously stated findings and conclusions based thereon, the following summary of the facts is now made. The portions of the proceeding detailing findings and discussion pertaining to the ultimate facts are incorporated by this reference.

- 32 (1) The Washington Utilities and Transportation Commission (Commission) is an agency of the State of Washington vested by statute with the authority to regulate rates, rules, regulations, practices, accounts, securities and transfers of public service companies, including water companies.
- 33 (2) Rosario Utilities, LLC, is a public service company engaged in the business of furnishing potable water to the public within Washington State and, as such, is subject to the jurisdiction of the Commission.
- 34 (3) Complainants are the owners or representative of 13 properties whose owners or representative failed to obtain water certificates during the June 15, 2001, first-come, first-served sale of water connections by Rosario Utilities.
- 35 (4) On September 24, 2001, Complainants filed a formal complaint against Rosario Utilities, LLC, alleging improper distribution of water permits.
- 36 (5) On February 12, 2003, the parties filed a settlement agreement that would resolve all the issues in the complaint.

V. CONCLUSIONS OF LAW

37 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the following provides summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Order are incorporated by this reference.

- 38 (1) The Washington Utilities and Transportation Commission has jurisdiction over the parties to, and subject matter of, this proceeding. *RCW 80.01.040, Chapter 80.04, Chapter 80.28 RCW.*
- 39 (2) The settlement agreement with conditions fully and fairly resolves the issues pending in this complaint, is consistent with the public interest, and should be approved. *WAC 480-09-466.*
- 40 (3) The complaint should be dismissed.

- 41 (4) The Commission should retain jurisdiction over the subject matter of and the parties to this proceeding to effectuate the provisions of this Order.
Title 80 RCW.

VI. ORDER

- 42 (1) The settlement agreement with modifications and conditions as discussed in this Order is approved, adopted, and made part of this Order.
Specifically,
- a) The Commission's decision is expressed in this Order, which is not a modification of the Initial Order;
 - b) The two additional property owners who submitted applications and payments by Federal Express on June 15, 2001, must be added to the list of thirteen participating property owners as numbers 14 and 15 eligible for priority, if they agree in writing to share in the expenses of hiring the engineer.
 - c) Rosario Utilities must pay the costs of the engineering study and will later be reimbursed by equal payments from the participating property owners as they receive water certificates, when allowed by the Department of Health. All of the participating property owners who have committed to paying the engineering costs will remain obligated to fund their portion of the engineering fee no matter what the outcome.
 - d) If the Department of Health releases more additional water connections than there are participating parties, Rosario Utilities must issue notice of a process for awarding these additional certificates.
- 43 (2) The complaint is dismissed.
- 44 (3) The Commission retains jurisdiction over this matter to effectuate the provisions of this Order.

DATED AT Olympia, Washington, and effective this ____ day of April, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO THE PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).