

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

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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,)	FIFTH SUPPLEMENTAL ORDER
RICHARD and PAULA RUSSELL,)	
BEN G. MARCIN, RONALD and)	
VICTORIA MONTGOMERY,)	PREHEARING CONFERENCE
CHARLES and MICHELLE CLARK,)	ORDER
PAUL SCHULTE, SUE PERRAULT,)	
and JORG REINHOLT,)	
)	
Complainants,)	
)	
v.)	
)	
ROSARIO UTILITIES, LLC.,)	
)	
Respondent.)	
)	
.....)	

1 **Proceeding.** Docket No. UW-011320 is a complaint brought by twenty-one property owners within the service area of Rosario Utilities, LLC who 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 **Conference.** The Commission convened a prehearing conference in this docket at Olympia, Washington on July 23, 2002, before Administrative Law Judge Karen M. Caillé for purposes of establishing the order of witnesses and of cross-examination, identifying all exhibits and cross-exhibits, hearing objections to evidence and argument on such objections, and hearing dispositive motions and response to such motions.

3 **Appearances.** Patrick M. Hanis, Hanis & Olson, attorneys, Renton, Washington, represents Complainants. Thomas M. Pors, attorney, Seattle, Washington, represents Respondent. Richard A. Finnigan, attorney, Olympia, Washington, represents Intervenor Oly Rose, LLC.

4 **Objections to Testimony of Complainants and Witnesses.** On July 19, 2002, Respondent and Intervenor filed objections to portions of the testimony of complainants Sue Perrault and Tom Corrigan and to the rebuttal testimony of witness Walt Torbet. During the prehearing conference on July 23, 2002, the parties agreed that only the second and third sentences of Question and Answer 8 of Ms. Perrault's testimony would be stricken. In addition, the parties clarified their agreement that Questions and Answers 3 and 4, and 6 through 15 of Mr. Corrigan's testimony would be stricken.

5 The remaining objection related to the rebuttal testimony of Mr. Walt Torbet. Respondent and Intervenor argued in their motion that the written rebuttal testimony of Mr. Torbet is irrelevant to any of the issues, adds nothing to the matter, and should therefore be excluded. Complainants responded that Mr. Torbet's testimony is relevant to show the inconsistencies in Ms. Vierthaler's statements regarding the sale process.

6 During the prehearing conference, the parties provided further argument consistent with their pleadings. Following their oral presentations, I overruled Respondent's and Intervenor's objection to Mr. Torbet's testimony. I concluded that Mr. Torbet's testimony is relevant to the process used by Respondent for the sale of water certificates. The central issue in the Complaint challenges the fairness of that process.

7 **Motion to Dismiss Ben G. Marcin and Ian Tull Flavell.** On July 19, 2002, Respondent and Intervenor filed a Motion to Dismiss Complainants Ben G. Marcin and Ian Tull Flavell. In support of their motion to dismiss Mr. Marcin, Respondent and Intervenor argued that no testimony had been filed on Mr. Marcin's behalf, therefore he has waived his opportunity to assert claims under the Complaint, and he should be dismissed for failure to prosecute his claims.

- 8 In support of their motion to dismiss Mr. Ian Tull Flavell as a Complainant, Respondent and Intervenor argued that Mr. Flavell is not the real party in interest in this matter. Respondent and Intervenor assert that the property that was eligible to obtain a water certificate via the June 15, 2001 sale is owned by Seaocean, Ltd. According to Respondent and Intervenor, Mr. Flavell's written testimony fails to establish that he has any ownership interest in Seaocean, Ltd. or the property.
- 9 Complainants responded that Mr. Marcin has "prosecuted his claims" through the testimony and evidence offered by all Complainants in this matter. Complainants argued that Mr. Marcin is named as a Complainant and has established that he is a party in interest because he is listed on Exhibit JR-3 and Exhibit CV-10, the list of property owners at the sale who did not receive water certificates. Complainants argued further that the issue brought by this Complaint is the fairness of the sale. According to Complainants, Mr. Marcin and each of the Complainants rely on the testimony of each other in establishing their claims as to the unfairness of the sale process.
- 10 With regard to the requested dismissal of Mr. Flavell, Complainants responded that Mr. Ian Tull Flavell is not a Complainant in this proceeding. Rather, he testified as an agent of a Complainant. Complainants argue that his testimony should be allowed in the same manner as that of Mr. March for Rosario Resort, Gwyneth Burrill for David and Janis Stevens, or Alan Weymeyer for the Weymeyer Family Trust. Complainants pointed out that Mr. Ian Flavell testified under the "Short Summary" of his written direct testimony that this is the "testimony of Ian Tull Flavell, *on behalf of* Seaocean, Ltd." Mr. Ian Flavell testified that his father is president, and his mother is secretary of Seaocean. Complainants asserted that his testimony establishes that he attended the sale and attempted to get a water certificate on behalf of Seaocean.
- 11 Following additional oral comments by the parties at the prehearing conference, I denied the motion to dismiss Mr. Marcin and Mr. Ian Flavell. Although Mr. Marcin did not file testimony, he is listed as one of the Complainants and Exhibit CV-10 places him in line at the water certificate sale on June 15, 2001. As an applicant for a water certificate, Mr. Marcin has standing as a Complainant. The key question in this Complaint is the fairness of the sale process. Counsel for Complainants has explained that Complainants rely on the testimony of one another to establish their position concerning the fairness of the process. Accordingly, Mr. Marcin remains a Complainant in this proceeding. With respect to Mr. Ian Flavell, his testimony

establishes that he is testifying on behalf of Seaocean, and that his parents Chris and Cecily Flavell, listed as Complainants, are the president and secretary of the corporation. Based on that evidence, Mr. Ian Flavell remains a witness in this proceeding.

12 **Testimony by telephone.** During the prehearing conference, counsel for Complainants expressed the need to hear testimony of four of the Complainants by telephone: Respondent and Intervenor objected to the testimony of these witnesses by telephone because of the difficulty to examine their credibility.

13 Following argument on the issue, I overruled Respondent's and Intervenor's objection to the testimony of the four Complainants by telephone. In changing the location of the hearing from Orcas Island to Seattle, I represented that we would attempt to accommodate witnesses who were unable to come to Seattle by allowing them to testify by telephone. The Commission does allow parties to appear by telephone and has also allowed witnesses to testify by telephone. Under the circumstances of this proceeding, including the change in hearing location, testimony by telephone is appropriate.

14 **Substitution of witness.** At the close of the prehearing conference, the parties informed me that they had agreed that Ronald Montgomery would be testifying at the hearing instead of his wife, Victoria Montgomery. In the Third Supplemental Order ruling on motions, the testimony of Ronald Montgomery was stricken as duplicative of the testimony of his wife, Victoria Montgomery. In order to accommodate this change, I modified my ruling on Mr. Montgomery's testimony, and ruled that Mrs. Montgomery's testimony should be stricken.

15 Dated at Olympia, Washington, and effective this ____th day of August, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

KAREN M. CAILLÉ
Administrative Law Judge