

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**06-27-12
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June 27, 2012

Agenda ID #11438
Adjudicatory

TO PARTIES OF RECORD IN CASE 11-09-001

This is the proposed decision of Administrative Law Judge (ALJ) Angela K. Minkin. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Minkin at ang@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ MARYAM EBKE for
Karen V. Clopton, Chief
Administrative Law Judge

KVC:rs6

Attachment

Decision **PROPOSED DECISION OF ALJ MINKIN** (Mailed 6/27/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Eric Lafortune, Don Richardson, and David
Harvey,

Complainants,

vs.

Hart Creek Estates Mutual Water Company,

Defendant.

Case 11-09-001
(Filed September 2, 2011)

DECISION DISMISSING COMPLAINT

Summary

By this decision, we dismiss Case 11-09-001 without prejudice. We find that it is premature to consider Complainants' allegations that the conduct of defendant Hart Creek Estates Mutual Water Company is such that it should be deemed a public utility. The underlying threshold issue in this complaint is also being considered by the Superior Court of Kern County, i.e., the determination of whether or not Hart Creek Estates Mutual Water Company has exceeded its corporate powers in the manner by which it has issued shares of stock. Case 11-09-001 is therefore dismissed without prejudice, and the proceeding is closed.

Procedural History

Complainants Eric Lafortune, Don Richardson, and David Harvey (Complainants) filed Case (C.) 11-09-001 against defendant, Hart Creek Estates

Mutual Water Company (Hart Creek) on September 2, 2011 and amended the complaint on September 7, 2011. At the direction of the assigned Administrative Law Judge (ALJ), Complainants filed a second amended complaint on January 7, 2012. The ALJ required the Complainants to amend the complaint to provide the names and parcel numbers of individuals “other than its stockholders” who are receiving water, the dates and quantities of the water deliveries to those who are not stockholders, and facts to show that water is being delivered to non-stockholders.¹ Defendant filed and served its Answer on November 4, 2011 and an Answer to the Second Amended Complaint and a Motion to Dismiss on February 21, 2012. Complainant filed a response to the Motion to Dismiss on March 7, 2012. Defendant filed a prehearing conference (PHC) statement on May 21, 2012. The PHC in this matter was held on May 24, 2012. Based on the pleadings filed in this proceeding, the information obtained from the parties at the PHC, and publically-available information regarding the civil suit, we dismiss the Complaint prior to issuance of the assigned Commissioner’s Scoping Memo Ruling or convening evidentiary hearings in this matter.

Background

In the second amended complaint, Complainants allege that Hart Creek issued shares to individuals who are not eligible shareholders, as defined in Article II, Section I of its bylaws. According to those bylaws, “Persons owning land within Tract No. 5871 are eligible to be shareholders of the Company.”² Complainants contend that Defendant is “(a) providing water service to lots that

¹ ALJ Barnett’s Ruling dated November 21, 2011 at 2.

² Second Amended Complaint, dated January 20, 2012, Appendix 1 at 2.

are not included within the subdivision known as Hart Creek estates, (b) providing water service to persons who legally are not, and cannot be, shareholders or stockholders of the Mutual Water company, and (c) selling water for profit in excess of the cost thereof.”³ Complainants further allege that Defendant does not own title to the water supply, distribution and fire protections system used to provide water service to the owners of parcels with Tract 5871. In short, Complainants do not dispute that Hart Creek is providing water to shareholders, but contend that the issuance of shares to the five parcels that are contiguous to Tract 5871 violated various provisions of the Corporations Code. Further, Complaints allege that Defendant has provided water in a manner that is not subject to the exemptions listed in Pub. Util. Code § 2705.⁴ Complainants therefore contend that Hart Creek must be a public utility and should be regulated by the California Public Utilities Commission (Commission).

In response, Defendant states that it is a mutual water company and is not subject to the jurisdiction of the Commission, asserting that it has only delivered water at cost to its shareholders and that it had the right to issue shares to shareholders in parcels that are contiguous to Tract 5871. Moreover, Defendant states that these shares were issued in 2001 to parcels 67, 68, and 69, and that upon the sub-division of parcel 68 into three parts, shares were then issued to each of those shareholders in 2005. Complainants and Defendant have stipulated

³ Second Amended Complaint at 5.

⁴ All statutory references are to the California Public Utilities Code, unless otherwise noted.

that all parcels so requesting have received water, although Complainants contend that because of high water bills, water is not being provided at cost.

Issues and Discussion

In order to proceed with this Complaint, we must determine whether or not the Commission has the jurisdiction to determine whether a mutual water company wrongfully issued shares, or whether this determination should be left to the Superior Court to adjudicate, because it is an issue related to the Corporations Code. Alternatively, we must consider whether, by issuing such shares, Defendant has impliedly dedicated its water to the general public and therefore contravened Pub. Util. Code § 2705, and, if so, whether any exemptions apply.

Pub. Util. Code § 2725 defines a “mutual water company” in relevant part as “any private corporation or association organized for the purposes of delivering water to its stockholders and members at cost.” Hart Creek is a mutual water company, as its Articles clearly reflect. Under § 2705, a mutual water company “is not a public utility, and is not subject to the jurisdiction, control or regulation” of this Commission. Consequently, the Commission cannot order Hart Creek to cease water deliveries to specific customers, or even to serve new customers, unless we determine that Hart Creek is a public utility by operation of law.

Parties have stipulated to the fact that Defendant issued shares to parcel holders outside of Tract 5871. The question of whether such shares were issued appropriately is the subject of a lawsuit filed by Complainants in the Superior

Court of Kern County, as all parties agree.⁵ While there are other plaintiffs in the Superior Court action, and the matter is addressing other issues, the issue of whether Hart Creek violated the Corporations Code in issuing these shares is squarely before the Court.⁶ Complainants contend that they are seeking “damages and injunctive relief” in Superior court, but are “not seeking to have the court declare the mutual water company a public utility.”⁷ However, Complainants do acknowledge that whether or not the shares were issued appropriately is at issue before the Court. We decline to address this matter here, pending the Superior Court’s determination.⁸ As a practical matter, it serves little purpose for two venues to consider this threshold jurisdictional matter. Little, if any, discovery has taken place, and it appears that the question of whether water is being provided at cost (i.e., without profit) can be addressed through the discovery process. The assigned ALJ properly directed parties to meet-and-confer regarding Alternative Dispute Resolution (ADR) and resolving discovery issues, including whether water is being provided to shareholders at cost. We urge parties to continue this process.

For these reasons, we dismiss this matter without prejudice.

⁵ Case No. S-1500-CV-273779, filed May 27, 2011, amended June 29, 2011, amended October 26, 2011, amended February 14, 2012.

⁶ Proper ownership of the water system is also at issue in the Superior Court proceeding.

⁷ Reporter’s Transcript, Lines 4-7 at 10.

⁸ Reporter’s Transcript, at 36-37. See also, e.g., Paragraph 79 under Sixth Cause of Action in Second Amended Complaint filed in Superior Court and attached to Defendant’s Motion to Dismiss.

Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Angela K. Minkin is the assigned ALJ in this proceeding.

Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____ and reply comments were filed on _____ by _____.

Findings of Fact

1. Complainants are shareholders in Hart Creek Estates Mutual Water Company, located in Kern County.
2. The underlying threshold issue in this complaint is also being considered by the Superior Court of Kern County, i.e., the determination of whether or not Hart Creek Estates Mutual Water Company has exceeded its corporate powers in the manner by which it has issued shares in the mutual water company.
3. There is some question of fact as to whether water is being provided to shareholders at cost, but no discovery has taken place, despite the Complaint being filed in September 2011.
4. The assigned ALJ properly directed parties to meet-and-confer regarding settlement, the use of ADR, and the resolution of various factual issues.

Conclusions of Law

1. Pursuant to Pub. Util. Code § 2705, a mutual water company "is not a public utility, and is not subject to the jurisdiction, control or regulation" of this Commission. Consequently, the Commission cannot order Hart Creek to cease

water deliveries to specific customers, or even to serve new customers, unless we determine that Hart Creek is a public utility by operation of law.

2. The Superior Court of Kern County is considering Case S-1500-CV-273779, which includes consideration of whether or not Hart Creek issued shares in violation of the Corporations Code; therefore, it is premature to consider Complainants' allegations that Hart Creek is a public utility.

3. Evidentiary hearings are not required at this time and the preliminary determination that hearing shall be held should be modified.

4. C.11-09-001 should be dismissed without prejudice, pending the determination of the threshold jurisdictional matter by the Court.

5. The order in this matter should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. Case 11-09-001 is dismissed without prejudice.
2. No evidentiary hearings are required at this time.
3. Case 11-09-001 is closed.

This order is effective today.

Dated _____, at San Francisco, California.