



BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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RICHARD S. CALONE

C. 08-12-007

Complainant,

vs.

POINT ARENA WATER WORKS,
INC., a public utility
corporation,

Defendant.

**REPLY OF RICHARD S. CALONE TO OPPOSITION OF
POINT ARENA WATER WORKS TO MOTION FOR SUMMARY JUDGMENT**

CARTER & MOMSEN, LLP
Brian S. Momsen
Matisse M. Knight
444 N. State Street
Ukiah, California 95482
Telephone: (707)462-6694
Facsimile: (707)462-7839
Email: bmomsen@pacific.net

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Attorneys for Complainant
Richard S. Calone

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I. INTRODUCTION

Complainant Richard S. Calone ("**Calone**") filed a Motion for Summary Judgment ("**Motion**") which would summarily end this dispute, if granted, based upon a finding that the water system operated by Defendant Point Arena Water Works ("**PAWW**") at Whiskey Shoals could handle a fifth residential hookup. PAWW, in turn, filed an opposition to Calone's motion for summary judgment ("**Opposition**") essentially asserting that two very recent, unverified, ex parte and unattested "reports" of pump tests create a question of fact as to the Whiskey Shoal's well production. As discussed below, these reports can not - and do not - create such a question.

Based upon the evidence produce by Calone and uncontroverted by PAWW, the Whiskey Shoals water system can support another hookup for the Calone residence - bringing the total to five - and PAWW should

be ordered to provide such a hookup to Calone.

II. ARGUMENT

1. SUMMARY JUDGMENT IS APPROPRIATE

PAWW complains that if the Commission were to grant the Motion without conducting a full evidentiary hearing, PAWW would be denied due process.¹ To support its position PAWW cites to California Trucking Association v. Public Utilities Commission (1977) 19 Cal.3d 240, 244-5 ("CTA"). However,

"CTA does not...stand for the proposition that in all instances, 'the opportunity to be heard' means evidentiary hearings. CTA does not purport to interpret any hearing requirement other than that mandated by Section 1708. Moreover, Section 1708 mandates evidentiary hearings only when there is an alteration or rescission of a previous Commission decision or order."²

This proceeding does not involve Cal. Pub. Util. Code §1708 and thus CTA is inapplicable.

PAWW's position that due process is somehow cut short by a summary adjudication/judgment proceeding is so contrary to the law it requires little attention. Summary proceedings have long been recognized as a sufficient process to both guard the rights of the parties and ensure efficient execution of justice. "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve

¹ Opposition pg. 2.

²Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications, (1995) Decision No. 95-03-043, 59 CPUC2d 91.

their dispute.”³ Nonetheless - and while complaining of the potential costs of this proceeding - PAWW would drag the parties and the Commission through the entire formal complaint process even if there are no material disputes.

In fact, the Commission has recognized the summary judgment proceeding as a way to resolve adjudicatory disputes such as this. Cox California Telecom v. Global Naps (“Cox”)⁴ is such an example. In attempting to distinguish the instant case from Cox, PAWW completely misreads/misrepresents the procedural history stated therein. Contrary to PAWW’s representation, Cox did not turn “entirely on the jurisdictional status of traffic subject to an inter-connection agreement” and defendant Global Naps did not “rel[y] almost exclusively on a preemption-related defense...”⁵ In fact, the jurisdictional/preemption issues were not at issue in Cox’s motion for summary judgment - filed September 15, 2006 - because they had been decided by the Administrative Law Judge’s (“ALJ”) July 5, 2006 ruling on a motion to dismiss brought by Global Naps.⁶

Thus, after the ALJ determined the preemption issue, Cox filed a motion for summary judgment on the contract between the parties. In ruling on that motion, the Commission determined that the

³Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.

⁴ Decision 07-01-004, 2007 Cal. PUC LEXIS 8.

⁵ Opposition pgs 5-6.

⁶ Cox pg. 5.

relationship between the parties was contractual, there was no factual dispute that Global Naps was required to pay Cox, refused to do so and therefore, as a matter of law, was required to pay Cox for the outstanding charges. Based upon that determination in the summary judgment proceeding, the Commission determined that no further hearing was required for further adjudication and the case was closed.⁷

Incidentally, Global Naps, in a subsequent request for rehearing, raised a similar argument proffered by PAWW herein - that summary judgment in the administrative hearing context denies due process - and lost. In that ruling, the Commission stated:

"This argument has no merit. Not only did the Commission not pledge to follow CCP Section 437(c) strictly, but oral argument is not a right under the Commission's Rules of Practice and Procedure. The California Supreme Court states as follows: '[An administrative hearing] consists of any confrontation, oral or otherwise, between an affected individual and an agency decision-maker sufficient to allow [an] individual to present his [or her] case in a meaningful manner. [Citation omitted]' GNAPS has taken advantage of that opportunity with a hearing and a multitude of filings at the Commission."⁸

Therefore, contrary to PAWW's assertions, Cox is exactly the type of case PAWW says does not exist, where "the Commission would, or could, entertain summary judgment against the defendant..."⁹

⁷ Cox pg. 10.

⁸ Cox California Telcom, LLC v. Global NAPs California, Inc.,
Decision 07-08-031; 2007 Cal. PUC LEXIS 475

⁹ Opposition pg. 5 [emphasis original].

Of note, PAWW, in the Opposition, alleges that the Motion is inappropriately labeled as "summary judgment" because it does not address all of the issues in the Commission's Scoping Ruling.¹⁰ However, the Motion addresses two issues - the output of the well and whether that output is sufficient to support the Calone residence hookup - which if decided in favor of Calone would dispose of this case. While the Motion could easily be considered a motion for summary adjudication, because of its potential to dispose of the matter entirely, it is appropriate to consider it a motion for summary judgment.

2. PAWW HAS OFFERED NO EVIDENCE TO CREATE A DISPUTE AS TO A MATERIAL FACT

A. PAWW'S FAILURE TO INCLUDE A SEPARATE STATEMENT REQUIRES JUDGMENT IN FAVOR OF COMPLAINANT

In summary judgment proceedings, both the moving and opposing parties are required to file "Separate Statements" regarding undisputed facts. Cal. Code of Civ. Proc. ("**CCP**") 437c(b)(1)-(3). PAWW, however, did not file such a statement.

"The separate statement is not merely a technical requirement, it is an indispensable part of the summary judgment or adjudication process. 'Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for ... summary judgment to determine quickly and efficiently whether material facts are disputed.' [citation]." ¹¹

¹⁰Opposition pgs. 8-9.

¹¹Kojababian v. Genuine Home Loans. (2009)174 Cal.App.4th 408, 415-6.

If the moving party makes a prima facie showing - "one that is sufficient to support the position of the party in question" - in its motion for summary judgment, the burden shifts to the opposing party who, if no separate statement is filed, may have judgment entered against them for failure to meet its "'burden of production' showing a triable issue of fact."¹²

Calone, in the Motion, offered evidence that the well in question produces 1.25 - 4.0 gallons per minute, that this output is sufficient to support a hookup for Calone's residence and PAWW has produced no evidence in the form of a separate statement showing a triable issue on those facts. Therefore, the motion for summary judgment should be granted.

B. PAWW'S RECENT REPORTS DO NOT CONSTITUTE EVIDENCE.

In order to muddy the waters and attempt to offer contravening evidence, PAWW attaches to the Opposition, as Exhibit A, two faxes from Mendocino Coast Plumbing to Bill Hay with a few lines mentioning running the pump for the Whiskey Shoals well. PAWW apparently attempts to pass these faxes off as admissible evidence of "reports".¹³

The "reports" and the "tests" they allegedly reflect show only a completely unreliable and unqualified methodology of testing that produced convenient results in PAWW's favor. Despite an apparent

¹²Id.

¹³ Opposition pg. 7.

awareness of the California Waterworks Standards¹⁴ PAWW completely ignored those standards - both in form of reporting and actual conduct - for these tests.¹⁵ Additionally, the new "reports" are contrary to previous well yield reports submitted by PAWW¹⁶ and now conveniently reflect a lower well yield in an unreliable attempt to manufacture an issue - presumably because PAWW's previously submitted reports in fact support Calone's position.

However, summary judgment proceedings protect parties from becoming victims of manufactured disputes of facts. PAWW's "reports" are not in the form of "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken"¹⁷ as is required to make them admissible in this proceeding. Such facts must be in the form of a declaration and

¹⁴ The Opposition at pg. 7 cites to 22 C.C.R. §64554.

¹⁵ ¹⁵ See 22 C.C.R. §64554(g) giving very specific guidelines for the conduct of such tests and all ignored by PAWW's plumbing contractor. At a minimum, a 72 hour test was required with following steps taken - none of which were done:

1. For the purpose of obtaining an accurate static water level value, at least twelve hours before initiating step 2., pump the well at the pump discharge rate proposed in subsection (e) (2) for no more than two hours, then discontinu pumping;
2. Measure and record the static water level and then pump the well continuously for a minimum of 72 hours starting at the pump discharge rate proposed in (e) (2);
3. Measure and record water drawdown levels and pump discharge rate:
 - a. Every thirty minutes during the first four hours of pumping,
 - b. Every hour for the next four hours, and
 - c. Every four hours thereafter until the water drawdown level is constant for at least the last four remaining measurements, and;
4. Plot the drawdown and pump discharge rate data versus time data on semi-logarithmic graph paper, with the time intervals on the horizontal logarithmic axis and the drawdown and pump discharge rate data on the vertical axis.

¹⁶ See Pg. 5 of Exhibit A to Decl. of David Zensius in support of Motion for a summary of previously submitted well yield reports.

¹⁷ CCP §437c(b) (2)

clearly "show or state that if the affiants were sworn as witnesses they could competently testify as to any of the purported facts stated in their respective affidavits."¹⁸ Not only do the "tests" and "reports" not follow approved standards, but PAWW made no attempt to meet any evidentiary requirements to provide even a semblance of confidence in its controverting "evidence."

Therefore, PAWW has no evidence controverting Complainant's evidence such that a triable issue of fact is created and thus the motion for summary judgment should be granted.

2. THERE IS NO DISPUTED MATERIAL FACT AS TO WHETHER THE WHISKEY SHOALS SYSTEM CAN SUPPORT A HOOKUP FOR CALONE'S RESIDENCE

Instead of properly producing evidence to controvert Calone's evidence, PAWW chooses to attack the form of Calone's evidence. However, Calone submitted evidence in the form of declarations, pleadings and Commission records that meet the standards for production of evidence in a summary judgment proceeding. "A summary judgment will stand if the supporting affidavits state facts sufficient to sustain a judgment and the counteraffidavits do not proffer competent and sufficient evidence to present a triable issue of fact."¹⁹ Additionally, statements in pleadings constitute admissions which in turn are evidence upon which a court may rely in

¹⁸ Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 543.

¹⁹ Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 542.

a summary proceeding.²⁰ Finally, court records constitute evidence upon which a summary determination may be made. CCP §437c(b)(1).

Without completely rehashing the evidence presented by Calone in the Motion entirely, Calone has produced evidence in the form of a proper declaration from an engineering firm - Nolte Associates, Inc. ("**Nolte**") - stating that the well in question produces 1.25 - 4.0 gpm and that this is a sufficient quantity to support the additional hookup required for Calone's residence. Nolte also provided evidence that poor maintenance and servicing of the well contribute to its poor production rate²¹ - a fact never addressed in the Opposition. Additionally, Calone provided evidence that the Commission's own staff confirmed that the well's output reported by Nolte could sufficiently support the Calone residence hookup.

It should be noted that the Commission staff's preliminary analysis seems to be misinterpreted by PAWW in the Opposition. In the Opposition PAWW states that the staff found that "adding Mr. Calone to the system would produce a demand of 1700 gallons per day ("gpd") or 1.18 gpm." Opposition pg. 7. If PAWW is referring to total demand - five houses - that may be accurate, however it is not accurate to say that the Calone residence alone would require 1.18 gpm. What the staff actually provided in this preliminary analysis is that adding the Calone residence hookup would increase the maximum

²⁰ See Aim Ins. Co. v. Culcasi (1991) 229 Cal. App. 3d 209, 213.

²¹ Pg. 5 of Exhibit A to Decl. of David Zensius in support of Motion.

demand on the Whiskey Shoals system from 1,360 gpd (for the current four hookups) to 1,700 gpd (for five hookups). The actual increase for this proposed hookup is 340 gpd or 0.24 gpm. The staff went on to confirm that the max demand of .24 gpm the proposed hookup might cause could be absorbed by the current system.

PAWW's basic position in the Opposition is to acknowledge that 1.18 gpm is the required well production to serve the existing four residences plus the proposed Calone hookup²² and then attempt to refute the sworn testimony of Nolte that the well produces more than that with unsupported, unsworn conclusions.

Based upon the Nolte report: the well produces 1.25 - 4.0 gpm, this is enough to meet the 1.18 gpm maximum demand with the Calone residence hooked-up and therefore the current Whiskey Shoals system can handle an additional hookup for the Calone residence. This is confirmed in the Commission staff's preliminary analysis. PAWW offers nothing reliable to the contrary and therefore the motion for summary judgment should be granted.

III. CONCLUSION

PAWW, speaking out of both sides of its mouth, complains about the potential for a long and expensive dispute and then offers nothing credible as to why it should not be summarily ended. Therefore Calone respectfully requests that this motion for summary

²²Opposition pg. 7.

judgment be granted and PAWW be required to provide a 5th hookup on the Whiskey Shoals system to service Calone's residence.

Dated: December 14, 2009

Respectfully Submitted,

By: /s/ Matisse M. Knight
Matisse M. Knight
CARTER & MOMSEN, LLP
444 N. State Street
Ukiah, California 95482
Telephone: (707)462-6694
Facsimile: (707)462-7839
Email: bmomsen@pacific.net

Attorneys for Complainant
Richard S. Calone

CERTIFICATE OF SERVICE

I declare that: I am a resident of the County of Mendocino, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 444 North State Street, Ukiah, California.

On this date I caused the attached:

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WATER WORKS TO MOTION FOR SUMMARY JUDGMENT**

to be served on all known parties to C. 08-12-007 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. (See attached service list)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 14th day of December, 2009, at Ukiah, Mendocino County, California.

/s/ Adrienne J. Ramos
ADRIENNE J. RAMOS

Service List C. 08-12-007

Last Updated 12/3/09

THOMAS J. MACBRIDE, JR.

tmacbride@goodinmacbride.com

RICHARD S. CALONE

N/A

1800 GRAND CANAL BLVD., SUITE 6

STOCKTON, CA 95207-8110

WILLIAM G. HAY, JR.

POINT ARENA WATER WORKS, INC.

135 HAY PARKWAY (P.O. BOX 205)

POINT ARENA, CA 95468

BRIAN S. MOMSEN, ESQ.

bmomsen@pacific.net

Maribeth A. Bushey

mab@cpuc.ca.gov

PUC/X114748.v1