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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Patricia Heimer, doing business as Redwood Lodge Water Company for a Certificate of Public Convenience and Necessity to operate as a Water Public Utility within the meaning of Public Utilities Code Section 2701 et seq., in Santa Cruz County near Los Gatos; and to establish Water Rates.

Application 09-09-005
(Filed September 11, 2009)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION TO DISMISS APPLICATION
FOR CERTIFICATE OF CONVENIENCE AND NECESSITY**

1. Summary

By motion filed September 22, 2010, Patricia Heimer, doing business as Redwood Lodge Water Company, asks the Commission to dismiss the application for a Certificate of Public Convenience and Necessity to operate as a Water Public Utility within the meaning of Pub. Util. Code §§ 2701 et seq. The assigned Administrative Law Judge has referred the motion for ruling by a law and motion judge and I have reviewed the matter in that capacity. The motion is denied because the moving party failed to establish that Redwood Lodge Water Company is not subject to § 2701.

2. Background

Patricia Heimer (Heimer) is the owner of Redwood Lodge Water Company's (Water Company) water supply which was permitted and licensed in 1976 for domestic use. Heimer and her husband sold to their neighbors a portion of the water supply for \$35 per month for several decades. Upon her

husband's death in 2003, Heimer began operating the Water Company on her own.

As a result of a complaint¹ filed in 2008, Heimer was ordered by Administrative Law Judge Maribeth A. Bushey (ALJ Bushey) to file an application for a Certificate of Public Convenience and Necessity (CPCN) to authorize the provision of water service to at least 13 real property parcels in Santa Cruz County. With the assistance of Commission staff, Heimer filed such an application on September 11, 2009.

On September 22, 2010, Jay R. Call and Lisa Jane Call (Calls) filed a motion for an emergency hearing on their request for water service from the Water Company to their newly acquired parcel, which had previously received water service. The Calls claimed that the Santa Cruz County Fire Marshal required a reliable water source for fire protection and that no alternative automatic source of water was readily available to the parcel. The Water Company disputed the Commission's jurisdiction and objected to providing service to the parcel unless the Calls purchased a new connection as a condition to restoration of service. After an emergency hearing on October 1, 2010, ALJ Bushey ordered the Water Company to restore water service and the Calls to pay the Water Company's standard rates, pending the outcome of the application.

Also on September 22, 2010, the Water Company filed a motion to dismiss the application and to find that the Water Company was not "subject to the jurisdiction, control, and regulation of the Commission." Opposition to the motion was filed by several individual customers and the Redwood Lodge

¹ Complaint 08-06-026, now closed.

Mutual Water Company (RLMWC), a mutual benefit corporation formed by the Water Company's 12 customers in order to purchase the Water Company.² In addition to RLMWC, the individual customers who opposed the motion are the Calls, Scott Harris (Harris), Frank Roeth (Roeth), David M. Bates (Bates), and Paul K. Mlyniec, and Victoria R. Mlyniec (Mlyniecs) (collectively "Respondents").

3. Applicable Law

The Commission has had jurisdiction over investor-owned water systems since the Legislature enacted the Public Utilities Act of 1911. An investor-owned water company requires authorization or approval from the Commission regarding its rates for service, the quality of service, its service area, and other aspects of its business operations to protect the health and safety of the public. When it comes to water quality and contamination, the Commission has concurrent jurisdiction with state and local health departments.³

Public Utilities Code⁴ § 2701 provides that any person or entity "owning, controlling, operating, or managing any water system within this State, who sells, leases, rents, or delivers water to any person ... is a public utility, and is subject to ... the jurisdiction, control, and regulation of the commission, except as otherwise provided in this chapter." As applicable to this discussion, § 2704

² Redwood Lodge Mutual Water Company was granted party status by ALJ Bushey at the emergency hearing held October 1, 2010.

³ Decision (D.) 99-06-054 (as modified by D.99-09-073, corrected by D.99-07-04 and D.00-11-014), 1 CPUC3d 91, 99.

⁴ Unless otherwise indicated, all subsequent references to "section" refer to the Public Utilities Code.

excludes from Commission jurisdiction, control, and regulation, “[A]ny owner of a water supply not otherwise dedicated to public use and primarily used for domestic or industrial purposes by him or for irrigation of his lands, who ...

(c) sells or delivers a portion of such water supply as a matter of accommodation to neighbors to whom no other supply of water for domestic or irrigation purposes is equally available”

4. Parties’ Positions

Heimer contends that pursuant to § 2704, the Water Company is not a public utility, no CPCN is required and, therefore, Application (A.) 09-09-005 is inappropriate and should be dismissed. Instead, she argues that the Water Company is a “State small water system”⁵ and contends it is only regulated by the local county health department. Heimer asserts that she did not voluntarily submit the Water Company to the Commission’s jurisdiction by making the CPCN application, because ALJ Bushey ordered her to file it. She claims that recent water safety and distribution concerns have caused her significant expenses to upgrade the facilities used by her neighbors. Moreover, according to § 1001, a CPCN is required for new facility construction or expansion of projects, which the Water Company is not undertaking at this time according to Heimer.

Respondents primarily argue the Water Company has always operated publicly, the water service is essential to fire protection, and Commission

⁵ Health & Safety Code section 116275(n) defines a “State small water system” as a system for the provision of piped water to the public for human consumption that serves at least five, but not more than 14, service connections and does not regularly serve drinking water to more than an average of 25 individuals daily for more than 60 days out of the year. This provision is part of the California Safe Drinking Water Act enacted in 1995.

jurisdiction is necessary to prevent potential or actual diversion of water to wholesale use, excessive connection fees, unjustified rate increases, and incorrect and erratic billing. Specifically, RLMWC, which seeks to purchase the Water Company and convert it into a mutual water company, states that the Water Company has been in existence for over 50 years and has operated as a private company engaged in the business of selling water to customers for domestic use and has not been used in another manner. Furthermore, Respondents assert that the County Fire Marshall has allowed home construction permits to be issued where there is a tank of less than 10,000 gallons at the site if the parcel is connected to the Water Company for water service.

RLMWC urges Commission oversight and regulation in order to prevent possible irregularities and interruptions to their water service. In support of their claim, RLMWC alleges that Heimer and the Water Company have engaged in the following actions:

- Violated the County of Santa Cruz Environmental Health Department moratorium on new connections to the Company and gave itself two (2) connections at no charge;
- Disconnected parcel 097-071-15 in direct violation of Santa Cruz County Fire Marshall policy;
- Attempted to extract an excessive payment of \$15,000.00 from the owners of parcel 097-071-15 to turn their water back on;
- Engaged in disparate billing practices by charging different amounts to the customers, some customers were not charged at all;
- Submitted numerous incorrect bills to customers and failed to correct them in a timely manner;
- Attempted to engage in the sale of water at a wholesale level in violation of its permit;

- Failed to accurately reflect monies received and expected in the future in a document mailed to the customers for the purpose of justifying proposed future water rates.

Other Respondents echoed these concerns. The Calls, for example, moved onto their property on August 5, 2010. The previous owners discontinued service from the Water Company in 2008 and the valve was turned off. While the Calls were in escrow in July 2010, the Water Company filed a “reverse easement” and sought payment of purported charges from 2008 and a reconnection fee from the Calls prior to restoration of service. The Calls allege that the Water Company asked for a \$15,000 reconnection fee based on salary information garnered from the Internet. When the Calls objected, the Water Company suggested it might be willing to negotiate a smaller fee. The Water Company restored water service to the property as a result of the ruling by ALJ Bushey, but the reconnection fee has not been settled. The Calls argue that without Commission regulation, the Water Company will take further abusive actions against them and their neighbors.

The Mlyniecs have received water from the Water Company since 1986 and reported a large increase in rates along with a decrease in the quality of management and communication since Heimer took control. They contend the water meters are not read consistently at the end of each month, sometimes resulting in zero usage one month and unreasonably large bills the next. Harris alleges that Heimer’s “consultant,” Nick Massetti, plans to operate the Water Company independent of the Commission in order to sell the water to local water-hauling companies, disrupt service, and to charge excessive reconnection fees.

Both Bates and Roeth generally agree with the comments of other Respondents. Bates states that a dismissal of the CPCN is not in the best interests of his family or neighbors, the water system is clearly dedicated to public use, and chronic water shortages compel conservation of any extra water for fire protection. Roeth has received water since 1974 and was granted permission to rebuild from the County Fire Marshal after the Loma Prieta earthquake based on the Water Company connection. He is concerned that the Water Company's customers will have no remedy for arbitrary actions of the Water Company absent Commission regulation.

5. Discussion

Pursuant to § 2701, the Commission may regulate any person or entity owning, controlling, operating, or managing any water system within this State, who sells, leases, rents, or delivers water to any person. If the water system is not dedicated to public use and primarily used for domestic or industrial purposes, and it sells a portion of the water to neighbors who lack another water source simply as an "accommodation," then § 2704 provides an exception to Commission jurisdiction.

Thus, in determining whether the water Company is subject to Commission jurisdiction, we analyze its behavior. The Commission encountered this issue in D.88-03-066 where a small water supply company claimed it was providing water as an accommodation, as it had since 1949. The Commission determined that the water supply company was in fact subject to its jurisdiction after evaluating the company's recent business practices. The company had repeatedly increased water rates, made additional charges for repair expenses incurred by the owner of the water supply, offered hook-ups to the public, and local building permits were conditioned on continuous water service. Therefore,

the Commission found these practices indicated a business model where the water company dedicated the system to public use, rather than what would be expected when water is provided under § 2704.⁶

Similarly, Respondents have made largely undisputed claims that after decades of ongoing service, the Water Company has arbitrarily increased rates, charged for system repairs, and charged excessive connection fees, and that building permits were approved on the basis of the Water Company's continued water service. These actions indicate the Water Company is behaving in a manner consistent with a business that is supplying water on a permanent basis, not merely as an accommodation.

The Water Company has failed to establish it is entitled to the exclusion to Commission jurisdiction set forth in § 2704. To obtain the exclusion, the Water Company would have to establish that the water system is not otherwise dedicated to public use and primarily used for domestic or industrial purposes or for irrigation. It has not met that burden by its mere statements which are roundly disputed by its customers and the County Fire Marshall. Furthermore, § 2704 requires ongoing commitment to provide water as an accommodation, yet the Water Company has recently disrupted service and required new payments to re-start service, indications of a permanent water business.

The Water Company's unsupported argument that its operation under a State Small Water System license results in exclusive jurisdiction by the local health department also fails. The Commission has historically relied on state and local health departments which were primarily responsible for determining

⁶ D.88-03-066, 1988.

whether water was contaminated and how that affected public health. However, “at the same time ... the Commission consistently exercised its concurrent jurisdiction over the public health and safety of the services ... (emphasis added).”⁷

Finally, the Water Company argues that the CPCN application should be dismissed because § 1001 applies only to new facility construction or expansion projects. However, this argument also fails. The Water Company has been acting as a public utility by operating a water system that sells water to the public and it failed to establish the facts to qualify for an exclusion based on § 2704. Therefore, under § 1001, it is required to obtain a CPCN before it can begin construction of a line, plant, or system, or extension thereof. The Water Company should have obtained a CPCN before undertaking initial construction or expansion during any time it was acting as a public utility. A failure to comply with the CPCN requirement does not excuse it. Therefore, the Water Company failed to establish any legal basis for exclusion from the requirements of § 1001.

Based on the foregoing, the motion by Heimer and the Water Company to dismiss the Application for CPCN is denied.

⁷ D.99-06-054 (1999) 1 CPUC3d 91, 99.

IT IS RULED that the “Motion by Patricia Heimer to Dismiss CPCN Application 09-09-005 and Find Based on CPUC Code Section 2704(c) That She and Her Redwood Lodge Water Company Are Not Subject to the Jurisdiction, Control, and Regulation of the Commission” is hereby denied.

Dated January 31, 2011, at San Francisco, California.

/s/ MELANIE M. DARLING

Melanie M. Darling
Administrative Law Judge

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