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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

City of Ojai,

Complainant,

vs.

Golden State Water Company (U133W),

Defendant.

Case No. (C.) 16-06-008

(Filed June 14, 2016)

**GOLDEN STATE WATER COMPANY'S (U133W)
MOTION TO DISMISS COMPLAINT**

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July 25, 2016

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Pursuant to Rules 11.1 and 11.2 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rule"), Golden State Water Company ("Golden State") hereby moves to dismiss the complaint of the City of Ojai ("Complainant").

I. INTRODUCTION

This complaint relates to a main break that occurred in the City of Ojai in July of 2014. Flooding from the main break damaged a nearby building located at 145 East Ojai Avenue ("Playhouse") and affected several businesses. Golden State and its primary insurer have diligently pursued the repair of the Playhouse and have worked closely with the owners of the Playhouse and their contractor in performing the restoration work. As with many construction projects, the Playhouse restoration project has encountered unforeseen circumstances and there have been disputes among the interested parties that have resulted in delay of the project's completion. These disputes are currently being

resolved pursuant to litigation initiated by the owners of the Playhouse against Golden State in the Ventura County Superior Court, and that lawsuit is set for trial on December 12, 2016.

Notwithstanding the efforts of the stakeholders to resolve the issues surrounding the repair of the Playhouse, certain vocal members of the Ojai community are frustrated at the pace of the repair work and have successfully lobbied Complainant to bring this complaint in an effort to get the Commission to step in and dictate the speed and manner in which the damage to the Playhouse will be addressed. This effort should be rejected as there is no legal basis for the Commission to get involved with the Playhouse repairs, and if it did the issues will only become more complicated and will likely engender even more delay.

Fundamentally, the complaint fails to state a claim against Golden State because even assuming all of the allegations are true, Golden State is entitled to prevail as a matter of law. First, Complainant does not have standing to assert claims against Golden State for the repair of the Playhouse because Complainant does not own the Playhouse. The Playhouse is privately owned, and the owners have chosen to pursue their remedies against Golden State in the Ventura County Superior Court. Complainant is not the real party in interest and its claims therefore fail as a matter of law.

Second, Complainant has failed to identify any law, order or rule that Golden State has violated in connection with the damage to the Playhouse. Contrary to Complainant's false claims, Golden State has diligently and responsibly responded to the damage caused by the main break, and is in full compliance with Ojai City Ordinance Number 382,

Section 10(f) (Golden State's Franchise Agreement with the City of Ojai) that merely grants Golden State the right to place its facilities in the City's public right of ways. Indeed, the complaint itself establishes that the privately owned Playhouse is not a street or public improvement and therefore this structure is not within the purview of the Franchise Agreement. Moreover, the insurance issues raised by Complainant do not give rise to a cognizable cause of action—Golden State's insurance policies are standard and have been procured in full compliance with all laws, rules and orders. Complainant does not allege otherwise. And Complainant's request that the Commission initiate an investigation into the circumstances surrounding Golden State's response to the damages to the Playhouse does not give rise to a cause of action that can be adjudicated by the Commission in a complaint proceeding.

Third, Complainant's claim that Golden State's valve maintenance program is in violation of General Order (“GO”) 103-A fails as a matter of law. This claim is procedurally improper because it is the exact claim that has been raised in Golden State's current 2014 general rate case (“2014 GRC”), the issues have been extensively litigated before the Commission (including evidentiary hearings and briefing), and a Commission decision on this issue is expected shortly. In any event, Complainant's GO 103-A claim regarding valve maintenance and repair is a red herring as it is completely irrelevant to the issues surrounding the repair of the Playhouse.

Alternatively, even if the complaint was not facially deficient as a matter of law (it is), the Commission should nonetheless dismiss this action to permit the Ventura County Superior Court to determine the parties' rights and obligations with respect to the damage

to the Playhouse. Complainant's attempt to insert itself into this private dispute and bypass the ongoing court process on these issues is misplaced and should be rejected. Indeed, the real parties in interest—the owners of the Playhouse—have chosen to pursue their claims regarding repair of the Playhouse in Ventura County Superior Court, not before the Commission. There is no need for the Commission to interfere with this ongoing legal process and issue orders that may end up in conflict with the adjudication of these issues by the Ventura County Superior Court.

II. BACKGROUND

The water main break at issue occurred in the downtown area of the City of Ojai on July 20, 2014.¹ Golden State personnel were able to quickly repair the damaged water main and restore water service to its Ojai customers within approximately 12 hours. As a result of the flooding from the main break, the Playhouse was damaged and several businesses suffered business interruption losses.² The Playhouse is privately owned by Khaled A. Al-Awar and Walid A. Al-Awar (“Owners”).³ Golden State acknowledged responsibility for the main break and immediately following the accident initiated remediation efforts to mitigate the damage caused by the main break, including the damage suffered by the Playhouse.⁴ Golden State also immediately placed its commercial liability carrier, James River Insurance Company (“James River”), on notice

¹ Complaint at 2.

² *See id.*

³ *See* Declaration of Matthew K. Narensky in Support of Golden State Water Company's Motion to Dismiss Complaint (“Narensky Decl.”), Ex. A (Owners' Complaint) at 1. Concurrently with this Motion to Dismiss, Golden State is filing a motion requesting that the Commission take official notice of the documents that are attached to the Narensky Decl.

⁴ Complaint at 3.

of the property damage suffered by the Playhouse and the claims of the affected businesses.⁵ The James River policy provides a \$1,000,000 limit of liability for each occurrence or loss, subject to a \$200,000 self-insured retention.⁶

Golden State and James River have diligently addressed the claims of all parties that sustained damages from the main break flooding, including the Owners' claims related to damage to the Playhouse. According to the complaint, the initial phase of the repairs to the Playhouse began shortly after the main break occurred and such repairs were conducted in a reasonable manner.⁷ Several months into the restoration of the Playhouse, it became apparent that the cost to repair the Playhouse would exceed James River's policy limits.⁸ Accordingly, James River and Golden State placed Golden State's excess insurer, Starr Indemnity & Liability Company ("Starr"), on notice of the extent of the loss.⁹ The Starr excess policy provides Golden State with an additional \$10,000,000 in limits for each occurrence in excess of the limits provided by the James River Policy.¹⁰

By January 2015, Golden State had satisfied its \$200,000 self-insured retention and it was clear that James River's limits would also soon be exhausted by the claims related to the damaged Playhouse and the affected businesses.¹¹ Specifically, in addition to the significant repair work performed at the Playhouse, by the end of 2014, Golden

⁵ Narensky Decl., Ex. B (James River Complaint) at 3:26-28.

⁶ *See id.* at 3:28-4:2.

⁷ Complaint at 3.

⁸ Narensky Decl., Ex. B (James River Complaint) at 4:3-17.

⁹ *See id.*, Ex. C (Starr Complaint) at 4:3-9.

¹⁰ *See id.*, Ex. B (James River Complaint) at 3:6-12.

¹¹ *See id.* at 4:3-17. James River exhausted its policy limits in or about May of 2015. *See id.*

State and James River had also settled several additional claims, including claims made by The Village Jester, the Ojai Film Society, the Ojai Film Festival, AT&T, Marche Gourmet Delicatessen, and the Oaks at Ojai.¹² Notwithstanding the fact that the James River policy limits were nearing exhaustion, Starr refused to acknowledge that its policy would be triggered, arguing (among other things) that James River's interim payments to the Owners for the repair of the Playhouse did not exhaust the primary policy because such payments had not been made pursuant to a judgment or settlement agreement.¹³ As a result of this coverage dispute between James River and Starr, and the fact that the Owners had chosen not to make a claim under the Playhouse's property insurance policy, the repair of the Playhouse came to a halt.

Following several unsuccessful attempts to resolve the disputed issues informally, litigation was initiated among the Owners, Golden State, James River and Starr related to the parties' rights and obligations regarding the repair of the Playhouse. Specifically, on November 13, 2015 the Owners filed a lawsuit against Golden State in the Ventura County Superior Court asserting causes of action for inverse condemnation, nuisance, trespass, and negligence related to the damage of the Playhouse.¹⁴ In addition, both James River and Starr have each filed declaratory relief claims against one another in the Ventura County Superior Court seeking declaratory judgments regarding their rights and obligations under their respective insurance policies related to the repair of the

¹² *See id.*, Ex. D (James River Notice of Related Case) at 2:12-17.

¹³ *See id.*, Ex. C (Starr Complaint) at 4:10-15.

¹⁴ *See id.*, Ex. A (Owners' Complaint).

Playhouse.¹⁵ On June 17, 2016, the Ventura County Superior Court consolidated these actions and assigned both cases to the same trial court judge.¹⁶ A trial date has been set for December 12, 2016 in the underlying action against Golden State filed by the Owners of the Playhouse.¹⁷

Even though Complainant does not own the Playhouse, and notwithstanding the pendency of litigation that will resolve the respective rights and obligations of the Owners, Golden State, Starr and James River related to the damage to and repair of the Playhouse, Complainant filed this complaint on June 16, 2016 seeking to have the Commission issue an order requiring Golden State to step in and conduct the repairs to the Playhouse.¹⁸ The complaint also requests that the Commission render a decision as to the adequacy of the insurance policies at issue and open an investigation into the main break and Golden State's response to the damage to the Playhouse.¹⁹

Pursuant to Rule 4.4, Golden State is simultaneously filing a verified answer to the complaint. Golden State denies the many misstatements of facts and false accusations regarding Golden State's conduct in this matter.

III. DISCUSSION

On a motion to dismiss a complaint, the legal standard against which the

¹⁵ See *id.*, Ex. B (James River Complaint); Ex. C (Starr Complaint).

¹⁶ See *id.*, Ex. E (Superior Court Minute Order of June 28, 2016). James River has brought a motion to have the cases deemed “related,” rather than “consolidated”; this motion is currently pending. *Id.*

¹⁷ See *id.*, Ex. F (Superior Court Minute Order of April 11, 2016) (15 day jury trial is scheduled for 12/12/2106).

¹⁸ Complaint at 13.

¹⁹ See *id.*

sufficiency of a complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law.²⁰ The Commission may properly take official notice of, and consider, the files and records of court and Commission proceedings.²¹ All of the claims brought by Complainant fail as a matter of law and the complaint should be dismissed by the Commission with prejudice.

A. Complainant Lacks Standing to Bring a Complaint Related to the Damage to the Playhouse

Standing is a threshold element that is required for a party to state a cause of action against another party. “To have standing to sue, a person, or those whom he properly represents, must have a real interest in the ultimate adjudication. ... A real party in interest is one who has an actual and substantial interest in the subject matter of the action and who would be benefited or injured by the judgment in the action[.]”²² The Commission has consistently determined that a person must be the owner of a property interest in order to have standing to pursue a complaint against a utility related to such property.²³

For example, in Decision 14-03-013 an individual sought compensation from a water utility because the utility had installed a service line through the property the individual lived on; in particular, the individual requested that the utility pay for an

²⁰ D.01-05-086 at 14.

²¹ *See id.*

²² *Martin v. Bridgeport Cmty. Ass'n, Inc.*, 173 Cal. App. 4th 1024, 1031, 93 Cal. Rptr. 3d 405, 412 (2009) (internal quotations and citations omitted).

²³ *See, e.g.*, D.15-07-009 at 8-9.

easement across the property.²⁴ At the time the complaint was filed, the complainant did not hold title to the property at issue.²⁵ The Commission ruled that because the complainant did not hold title to the property, he had no standing to seek compensation for the easement.²⁶ Likewise, in Decision 12-09-010, the Commission held that an individual did not have standing to file a complaint against a utility related to an interest in real property because the individual was not the owner of the private property at issue.²⁷

Here also, Complainant lacks standing to file a complaint against Golden State related to the damage to the Playhouse because complainant is admittedly not the owner of the Playhouse.²⁸ The Owners of the Playhouse are the real parties in interest and the only parties that have standing to seek an order requiring Golden State to repair the Playhouse. Indeed, as discussed in detail below in Section II.D, the Owners are actively pursuing their claims against Golden State related to the damage to the Playhouse in litigation initiated in Ventura County Superior Court.

Complainant attempts to avoid the obvious fact that it does not own the Playhouse, and therefore does not have standing to bring this action, by asserting that the harm caused by the failure to repair the building is “public in nature.”²⁹ To this end,

²⁴ D.14-03-013 at 5.

²⁵ *See id.*

²⁶ *See id.*

²⁷ D.12-09-010 at 2.

²⁸ Complaint at 4.

²⁹ *See id.* at 4.

Complainant attaches several letters from interested members of the public expressing frustration that the Playhouse has not yet been repaired.³⁰ Complainant is wrong. Just because certain members of the public in Ojai desire a faster restoration of the Playhouse does not somehow magically transform the damage to private property into a public harm, and thereby give anyone the right to file a complaint seeking injunctive relief.

Indeed, the standing doctrine is in place precisely to prevent this kind of unchecked litigation:

The purpose of the real party in interest requirement is to assure that any judgment rendered will bar the owner of the claim sued upon against relitigating. It is to save a defendant, against whom a judgment may be obtained, against further harassment or vexation at the hands of some other claimant to the same demand.³¹

Golden State has already been sued in Ventura County Superior Court related to the damage to the Playhouse by the real parties in interest—the Owners of the Playhouse.³²

Neither Complainant, nor any other person that believes the Playhouse should be repaired on a faster timeline, has standing to bring an additional claim against Golden State on the same grounds.

The Commission should dismiss the complaint because Complainant does not own the Playhouse and therefore lacks standing to file the claims asserted in the complaint.

³⁰ Notably, the Owners of the Playhouse have not submitted such a letter. Complainant attempts to explain away this glaring omission by asserting that the Owners were “unable to provide [a letter] due to pending litigation[.]” Complaint at 4. There is no indication or explanation for why this is true. The mere fact that there is pending litigation does not restrict a litigant from making public statements or otherwise pursuing legitimate remedies he may have in different forum.

³¹ *George v. Gandolfo Excavating, Inc.*, No. A141249, 2015 WL 4035245, at *4 (Cal. Ct. App. June 30, 2015)

³² Narensky Decl., Ex. A (Owners' Complaint) at 6:22-9:1.

B. The Complaint Fails to State a Claim Upon Which Relief may be Granted

Pursuant to Section 1702 of the Public Utilities Code, a complaint must set forth “any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.”³³ Thus, a complaint that fails to allege that a public utility has violated a specific law, order, or rule must be dismissed for failure to state a claim.³⁴ Golden State is entitled to prevail as a matter of law as to each of the following claims.

1. Complainant's Claim That Golden State Violated City Ordinance No. 382 Fails as a Matter of Law

Complainant's primary claim is that Golden State is in violation of City Ordinance No. 382 Section 11(f)—the Franchise Agreement Golden State entered into with the City of Ojai which grants Golden State the right to place its facilities in the City's public right of ways (referred to herein as the “Franchise Agreement”)—for failing to promptly repair the Playhouse.³⁵ The Franchise Agreement explicitly obligates Golden State to “promptly repair, at the sole cost to the Grantee and to the complete satisfaction of the City, any damage to *any street or public improvement* caused directly or indirectly by the Grantee in exercising . . . this franchise.”³⁶ According to the allegations of the

³³ Cal. Pub. Util. Code § 1702.

³⁴ See, e.g., *AC Farms Sherwood v. So. Cal. Edison Co.*, Decision No. 02-11-003 (Nov. 7, 2002); *City of Santa Cruz v. MHC Acquisition One LLC, et al.*, Decision 01-07-024 (July 12, 2001); *Crain v. So. Cal. Gas Co., et al.*, Decision No. 00-07-045 (Jul. 20, 2000);

³⁵ Complaint at 4-6.

³⁶ Narensky Decl., Ex. G (Franchise Agreement) at § 10(f) (emphasis added).

complaint, the Playhouse is not a street or public improvement.³⁷ Complainant's claim that Golden State is in violation of the Franchise Agreement therefore fails as a matter of law and should be dismissed.

Indeed, Complainant acknowledges that the Playhouse is “not owned by a public entity” but rather is privately owned by local businessmen.³⁸ Complainant does not even attempt to argue that the Franchise Agreement applies to such a privately owned building, and instead argues that the Playhouse “should be” afforded the same protection as a street or public improvement under the Franchise Agreement.³⁹ Complainant's opinion as to what should have been included in the Franchise Agreement is irrelevant—the undisputed fact is that privately owned businesses and buildings are not public improvements and therefore are not subject to the Franchise Agreement.

Complainant attempts to avoid the plain language of the Franchise Agreement by arguing that the damage to the privately owned Playhouse is public in nature because it is a movie theater enjoyed by members of the public and its operation is beneficial to the local economy.⁴⁰ Complainant is wrong. Just because members of the public use a facility does not make it a public improvement. If this were true, every privately owned place of business in the entire City of Ojai would fall within the ambit of the Franchise Agreement. Complainant's position would radically expand the Franchise Agreement and improperly create rights and obligations that were not agreed to by the parties to the

³⁷ Complaint at 4.

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See id.*

Franchise Agreement, nor adopted into law by the proper authorities. The Commission cannot rewrite the law and alter negotiated agreements in this fashion to fit a particular litigant's desired outcome.

In summary, even assuming all of the allegations in the complaint are true, Complainant has not identified any violation of the Franchise Agreement. Complainant's claim for violation of the Franchise Agreement therefore fails as a matter of law.

2. Complainant's Claim That Golden State's Insurance Coverage is Inadequate Fails as a Matter of Law

Complainant challenges the adequacy of Golden State insurance coverage, alleging that Golden State's current insurance policy should be changed to allow for the reimbursement of voluntary payments where Golden State is liable for the loss at issue.⁴¹ This challenge fails as a matter of law. As discussed above, it is fundamental that a complaint must allege a violation of a state law or Commission regulation, order or rule to survive a motion to dismiss. Complainant has not identified any provision of law, order or rule of the Commission that requires Golden State to procure insurance coverage that contains the voluntary payment reimbursement term described by Complainant. That is because no such authority exists. Accordingly, even assuming that Complainant's position on this insurance issue is correct (it is not), this claim fails as a matter of law because Complainant has not alleged that Golden State's current insurance coverage violates any law, order or rule.

⁴¹ Complaint at 11.

In fact, Golden State's lines of insurance coverage are periodically reviewed and approved by the Commission in the context of Golden State's GRC proceedings. Golden State's insurance coverage is currently under review by the Commission in the 2014 GRC. As explained by Golden State witness Jan Allnut, Golden State has a robust and comprehensive insurance program that ensures Golden State procures reasonable and appropriate insurance coverage:

The Company assigned Broker of Record in 2008 (via a request for Proposal) to one of the top insurance brokers in the US who maintains relationships with numerous qualified insurers that are knowledgeable and familiar with utilities and regulated industries. AON is our current Broker of Record and they monitor the market for each line of insurance coverage. They have a complete understanding of the market environment and our operations so they assist us in obtaining the appropriate insurance at a reasonable price.⁴²

Even though Complainant is a party to the 2014 GRC, Complainant did not raise any issue in that proceeding with Golden State's insurance coverage. Contrary to Complainant's suggestion in this complaint proceeding, Golden State's insurance program is just and reasonable and results in appropriate insurance at a reasonable price.

In any event, Complainant's position as to what constitutes reasonable liability insurance coverage is misplaced. A policy term in a commercial liability policy requiring reimbursement of voluntary payments made by an insured without the insurer's consent would be abnormal—"No Voluntary Payment" clauses are standard in commercial liability policies and enforceable under California law.⁴³ Indeed, such clauses are:

⁴² Narensky Decl., Ex. H (Exhibit GS-11 - Prepared Testimony of Jan Allnut) at 2:2-9.

⁴³ Croskey *et al.*, Cal. Practice Guide: Insurance Litigation (The Rutter Group 2015), ¶7:439.5 *et seq.*

[D]esigned to ensure that responsible insurers that promptly accept a defense tendered by their insureds thereby gain control over the defense and settlement of the claim. That means insureds cannot unilaterally settle a claim before the establishment of the claim against them and the insurer's refusal to defend in a lawsuit to establish liability.... [T]he decision to pay any remediation costs outside the civil action context raises a 'judgment call left solely to the insurer....' In short, the provision protects against coverage by fait accompli.⁴⁴

Complainant's position misconstrues basic insurance coverage principles and its argument that the Commission should prohibit a No Voluntary Payment policy term applicable just to Golden State's insurance coverage for its operations in the City of Ojai should be rejected.

3. Complainant's Request that the Commission Open an Investigation Fails to State a Claim

Complainant requests that the Commission initiate an investigation into the 2014 water main break pursuant to Section 315 of the Public Utilities Code.⁴⁵ This statute provides that the Commission shall investigate the cause of accidents occurring on the property of a public utility that in the Commission's judgment require such investigation.⁴⁶ The City's inclusion of this requested relief does not give rise to a cause of action that the Commission can adjudicate by way of a complaint proceeding. That is, even if the Commission determines that an investigation pursuant to Section 315 of the Public Utilities Code should be opened, the Commission could issue any appropriate order or recommendation in that investigation proceeding; this complaint proceeding should still be dismissed.

⁴⁴ *Jamestown Builders, Inc. v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341, 346.

⁴⁵ Complaint at 13.

⁴⁶ Public Utilities Code § 315.

Moreover, a Commission investigation pursuant to Section 315 of the Public Utilities Code is not supported by Complainant's allegations. According to the complaint itself, the cause of the main break accident is not a material issue that requires further investigation by the Commission. Instead, Complainant requests that the Commission open an investigation into whether Golden State is purposely causing the delay in the Playhouse repairs.⁴⁷ Complainant cites to the opinions and feelings of various individuals in the Ojai community that the delay in the Playhouse repairs appears to be retribution for the fact that the Ojai community is supporting efforts to condemn Golden State's Ojai water system, and asserts that a full investigation by the Commission is required to determine whether Golden State's ulterior motives are to blame for the delay in the Playhouse repair.⁴⁸ Complainant's request should be rejected as this is not an appropriate subject matter for a Commission investigation pursuant to Section 315 of the Public Utilities Code—the purpose of this statute is to ensure that the Commission investigates accidents on public utility property in order to promote and safeguard the health and safety of utility employees, utility customers and the public.⁴⁹ Complainant has not alleged facts that indicate there is anything for the Commission to investigate regarding the cause of the underlying accident, or raised any safety or health concern whatsoever.

⁴⁷ Complaint at 5.

⁴⁸ *See id.* (Citing to the Ojai Valley Chamber of Commerce letter which states that “One cannot ignore the feeling that Golden State Water Company is taking revenge on our community;” and stating that this sentiment of retribution is also felt by Steve Bennett, Ventura County Supervisor).

⁴⁹ *See Atchison, T. & S. F. Ry. Co, v. Division of Industrial Safety*, 64 Cal. App.3d 188 (1976).

In any event, irrespective of the subject matter, a Commission investigation is not warranted based upon the facts alleged in the complaint. Indeed, the complaint fails to allege even a single fact that supports the beliefs expressed by the various individuals that Golden State is purposefully delaying the Playhouse repair. To the contrary, the complaint specifically alleges that Golden State addressed the damage to the Playhouse (along with the businesses affected by the main break) in a reasonable manner shortly after the main break occurred.⁵⁰ Complainant also acknowledges in the complaint that the subsequent delay in the repair work is not due to any action taken by Golden State; rather, this delay is directly attributable to the fact that the Owners along with Golden State's insurers decided to initiate litigation regarding the repair work.⁵¹ This litigation is not within Golden State's control. Golden State understands that certain members of the community are frustrated with the delay caused by this litigation; however, the Owners and the insurance companies that are paying for the damages are the real parties in interest, and they have the right to have their disputes adjudicated by a court of law, even if such legal process results in a delay to the repair work.

In summary, even assuming it is true that certain members of the Ojai community “feel” that Golden State is acting out of retribution for the ongoing efforts to condemn Golden State's Ojai water system, this allegation is insufficient to support any cause of action in the complaint and does not justify opening a Commission investigation.

⁵⁰ Complaint at 3.

⁵¹ *See id.*

C. Complainant's Claim That Golden State has Violated General Order 103-A Should be Dismissed as Procedurally Improper

Complainant asserts a general challenge to Golden State's valve maintenance program, alleging that Golden State has failed to adequately inspect and maintain its pipeline valves in the City of Ojai in violation of GO 103-A.⁵² This claim is duplicative of the precise issue that is currently pending before the Commission in Golden State's 2014 GRC. Accordingly, the Commission need not accept Complainant's factual allegations regarding GO 103-A as true because such allegations are not well-pleaded; Complainant's GO 103-A claim is procedurally improper and should be dismissed with prejudice.

In fact, the complaint on this issue consists almost exclusively of a lengthy excerpt from Ojai FLOW's opening brief in Golden State's 2014 GRC, wherein Ojai FLOW raised the very same claim for violation of GO 103-A related to Golden State's valve maintenance and inspection program in Ojai.⁵³ The allegations in the complaint that Golden State has violated GO 103-A are therefore based solely upon the same evidence that has already been examined and admitted into the record of Application 14-07-006. This evidence includes (among other things): the prepared testimony and evidentiary hearing testimony of Ojai FLOW witness Bill Reynolds; the prepared testimony and evidentiary hearing testimony of Golden State witness Robert Hanford; and, documentary evidence produced by Golden State in response to Ojai FLOW's data requests, including

⁵² *See id.* at 6-9.

⁵³ *See id.* Ojai FLOW is a citizen group formed for the purpose of promoting the condemnation of Golden State's Ojai water system. Both Complainant and Ojai FLOW are parties to the 2014 GRC.

Golden State's valve maintenance records for the Ojai Service Area Distribution System.⁵⁴ Accordingly, resolving Complainant's GO 103-A claim in this complaint proceeding would require litigation involving the same prepared witness testimony, discovery, evidentiary hearings and briefing that has already been presented to the Commission in the 2014 GRC. This duplicative litigation would be a significant waste of the Commission's resources, and an undue burden on all parties involved.

Incredibly, Complainant asserts that the facts in this case are uncontroverted and that evidentiary hearings are not necessary.⁵⁵ This is a bizarre assertion in light of the fact that Complainant's GO 103-A claims are based entirely upon an argumentative brief submitted by Ojai FLOW that is, in turn, based upon a contested evidentiary record that has been developed in Golden State's 2014 GRC.⁵⁶ It is as if Complainant believes that the arguments made by Ojai FLOW in its brief somehow establish undisputed fact. This is pure fantasy. As explained in Golden State's Reply Brief in the 2014 GRC, Ojai FLOW's claims regarding Golden State's valve maintenance program in the City of Ojai and its assertion that GO 103-A has not been complied with are wholly unsupported by the record.⁵⁷

In summary, Complainant's attempt to re-litigate in this proceeding the exact same issue, based on the exact same evidence, that is currently being litigated in a different Commission proceeding is procedurally improper and should be rejected. Complainant's

⁵⁴ *See id.* (citing transcripts and exhibits in A.14-07-006).

⁵⁵ *See id.* at 12.

⁵⁶ *See id.* at 6-9.

⁵⁷ Narensky Decl., Ex. I (Excerpt from Golden State's Reply Brief in A.14-07-006) at 213-218.

claim that Golden State's valve maintenance program in Ojai violates GO 103-A should be dismissed.

D. The Complaint Should Be Dismissed Pending the Resolution of Two Superior Court Cases that Concern Overlapping Issues and Requests for Relief

Even assuming that the Commission determines Complainant has stated a cognizable claim for relief, the Commission should nonetheless exercise its discretion and dismiss this action pending the resolution of the two related actions in Ventura County Superior Court that are currently examining the same issues related to the damage to and repair of the Playhouse that Complainant has raised in this proceeding.

Complainant's request that the Commission step into the ongoing dispute among the Owners of the Playhouse, Golden State and the insurance companies is misplaced and will only serve to further complicate the issues, and likely lead to even further delays. In order to promote judicial economy and uniformity of decisions, the Commission should refrain from deciding issues related to the repair of the Playhouse until the Ventura County Superior Court renders its decision on this subject.

Specifically, the Owners of the Playhouse have filed a complaint in Ventura County Superior Court against Golden State (*Al Awar v. Golden State Water*, Case No. 56-2015-00474589-CU-PO-VTA) in which they (1) indicate they intend to repair and continue to operate the Playhouse, (2) allege several property-related torts against Golden State under state law, and (3) seek damages to fund the repair of the Playhouse.⁵⁸ In addition, two related complaints have been filed by James River and Starr, disputing,

⁵⁸ See *id.*, Ex. A (Owners' Complaint) at 3-8.

among other issues, whether the damages to the Playhouse should properly be measured by the cost to rebuild or should be determined by the diminution in value of the theater due to the damage caused by the flooding.⁵⁹ Thus, these state court actions will resolve the question of whether Golden State and its insurers are obligated to fund the repair of the Playhouse, or alternatively, whether the measure of damages will be the diminution in value of the Playhouse.⁶⁰

Complainant seeks to bypass this state court litigation by having the Commission issue an order requiring Golden State to repair the Playhouse. Whether Golden State is obligated to perform such repairs to the Playhouse is the precise question before the Ventura County Superior Court. This is a complicated legal question that involves the application of the “personal reason” exception to the general rule requiring diminution in value, rather than the cost to rebuild, measure of damages.⁶¹ The state court litigation on this issue is well developed, with a trial date in the primary action brought by the Owners of the Playhouse set for December of this year.⁶² It would be a waste of both Commission and judicial resources for the Commission to also pursue this complaint proceeding on the very same question. In addition, there is a risk of further complicating

⁵⁹ *See id.*, Ex. B (James River Complaint) at 5-7; Ex. C (Starr Complaint) at 6, and Ex. D (James River Notice of Related Cases) at 6:5-21.

⁶⁰ These three complaints are presently consolidated for review by the Ventura County Superior Court. *See id.*, Ex. E (Ventura County Superior Court Minute Order of June 28, 2016).

⁶¹ *See id.*, Ex. D (James River Notice of Related Case) at 6:13-21 (explaining that this legal issue depends on the Superior Court's determination of the applicability of the personal reason exception under *Heninger v. Dunn*, 101 Cal.App.3d 858, 862 (1980)).

⁶² *See id.*, Ex. E (Ventura County Superior Court Minute Order of June 28, 2016).

and confusing the parties' rights and obligations, as the state court's decisions could conflict with the Commission's orders as to the obligation to repair the Playhouse.

The Commission has previously dismissed complaints where a pending Superior Court action could resolve the same issues or obviate the need for the relief sought from the Commission. For example, in Decision 00-11-038 (“*Cox California*”), the complainant sought from the Commission a finding that condemnation of certain utility easements was in the public interest.⁶³ At the same time, two Superior Court actions were pending in which the complainant's right to use similar utility easements was at issue, along with several other property-related torts such as trespass and nuisance.⁶⁴ The Commission dismissed the complaint without prejudice, finding that the Superior Court cases would resolve the question of whether the complainant was entitled to access the easements in dispute.⁶⁵ In support of its conclusion, the Commission noted as follows:

Logic and efficiency support this result, because it makes sense to permit the Superior Court, a court of general jurisdiction, to address the property issues which are currently before it, rather than having multiple fora adjudicate the same issues concurrently. Finally, the primary jurisdiction doctrine supports this result because the easement issues, which concern contract and real property law, do not require the Commission's specialized public utility expertise, such as ratemaking, but rather legal issues that courts routinely resolve. The result we adopt promotes uniformity of decisions and judicial economy, policies that underlie primary jurisdiction doctrine.⁶⁶

⁶³ *Cox California Telecom, L.L.C. dba Cox Communications v. Crow Winthrop Development Limited Partnership*, D.00-11-038, 2000 WL 33114490 (Nov. 21, 2000).

⁶⁴ *See id.* at 7.

⁶⁵ *See id.* at 6.

⁶⁶ *Id.* at 6-7.

The Commission's rationale in *Cox California* is equally applicable in this case. Dismissal of the complaint would avoid “having multiple fora adjudicate the same issues concurrently,” and so would promote efficiency and conserve resources. As in *Cox California*, there is also a danger that the Commission's decision in this matter could conflict with the judgment of the Superior Court.

Further, as in *Cox California*, the primary jurisdiction doctrine supports the same result in this case because like the property and contract law issues in *Cox California*, the legal issues surrounding the appropriate measure of damages and insurance coverage related to the restoration of the Playhouse do not require the Commission's specialized public utility expertise, such as ratemaking, but rather involve legal issues that courts routinely resolve.⁶⁷ As the Commission noted in *Cox California*, the Superior Court is “a court of general jurisdiction” better equipped than the Commission “to address the property issues which are currently before it.”⁶⁸ This is also true with respect to the property damage and insurance coverage questions at issue in this case.

Accordingly, in the event the Commission does not dismiss the complaint with prejudice based on Complainant's lack of standing or for failing to allege a legally sufficient claim, the complaint should be dismissed without prejudice to allow the Ventura County Superior Court to resolve the proper measure of damages and insurance coverage issues related to the restoration of the Playhouse. Dismissal without prejudice would avoid the risk of conflicting opinions, promote efficiency, and be consistent with

⁶⁷ *See id.*

⁶⁸ *Id.*

the doctrine of primary jurisdiction.

IV. CONCLUSION

Golden State respectfully requests that the Commission dismiss the complaint in its entirety with prejudice. If the Commission is not inclined to dismiss the complaint in its entirety, Golden State respectfully requests that the Commission dismiss with prejudice those issues for which it deems dismissal is proper.

In the event that the Commission determines that the complaint is not legally deficient, the Commission should nonetheless dismiss the complaint without prejudice with instructions that Complainant may re-file this action once the claims pending against Golden State in Ventura County Superior Court in the litigation captioned *Al-Awar, et al. v. Golden State*, Case No. 56-2015-00474589-CU-PO-VTA have been fully adjudicated.

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Respectfully submitted,

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