Decision **PROPOSED DECISION OF ALJ COLBERT** (Mailed 6/4/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Wendy Wood and Robert F. Spohr, Complainants, vs. Tahoe Park Water Company, (U96W), Defendant.	Case 11-03-020 (Filed March 30, 2011)

DECISION DISMISSING THE COMPLAINT OF WENDY WOOD AND ROBERT F. SPOHR

Summary

This Decision dismisses the complaint filed by Wendy Wood and Robert F. Spohr against the Tahoe Park Water Company. The water quality issue has been resolved by the Department of Public Health. The property rights issue is properly before the Superior Court, where the matter is being litigated. The complaint thus raises no legal issue or questions of material fact for the Commission to resolve.

This proceeding is closed.

Background

Ms. Wendy Wood and Mr. Robert F. Spohr (Wood & Spohr or Complainants) are husband and wife and customers of record for the water service at 3015 West Lake Boulevard, Homewood, California.

Tahoe Park Water Company (Tahoe Park or Defendant) (U96W) is a Class C water utility (over 500 but less than 2,000 connections). Its 2009 annual report shows 519 connections. Tahoe Park's address is listed as 5000 Windplay Drive, Suite #4, El Dorado Hills, California 95762. The president of Tahoe Park is Richard Dewante.

On March 30, 2011, Wood and Spohr filed the above-captioned complaint against Tahoe Park. In 2005 the Complainants purchased a parcel on Westlake Boulevard in Homewood, California. The parcel was divided in two and a luxury home was built on each parcel. One of the parcels has been sold. The other parcel is still owned by the Complainants. This parcel has a well on it operated by the Defendant. The well serves over 100 customers. Wood and Spohr claim that they had no knowledge of the well when they purchased the property.[1] Their complaint alleges that Tahoe Park distributes "corrosive water" that is contaminated with lead.[2] The complaint asserts that Tahoe Park's well is located on the Complainant's property without legal authorization. Complainants demand that Tahoe Park purchase the land on which the well is located and reimburse their legal fees. The Complainants have sued Tahoe Park in Placer County Superior Court for trespass. In their brief, filed November 4, 2011, the Complainants request that their claim for compensation for their property be "struck"[3] and that the Defendant be required to abandon its "trespassing, corrosive well."[4]

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[1] PHC T 11:16-23, 12:1-9.

[2] *Id.* 14:7-19.

[3] Complainants' Opening Brief at 7.

[4] *Id.*

Tahoe Park asserts that the Complainants gave it an easement for the well on the Complainants' property and referred to the well in public documents.[5] The Defendant denies the Complainants' allegations concerning the quality of the water it distributes to customers. It asserts that the California Department of Public Health (DPH) has tested the water and determined that it is within acceptable guidelines for consumption.[6] Finally, the Defendant asserts that the Commission is not the proper forum and has no jurisdiction over the issues raised by the Complainants[7] and has requested that the complaint be dismissed.[8] Tahoe Park has filed a counter-suit against Complainants in Placer County Superior Court for breach of contract and failure to convey an easement.[9]

Scope of Proceeding

The Assigned Commissioner's Scoping Memo and Ruling (Scoping Memo), in the instant proceeding, was issued on October 13, 2011. The Scoping Memo determined that the threshold question in this proceeding is does the

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[5] PHC T 20:9-13.

[6] PHC T 20:17-28.

[7] *Id.* 22:23-28, 23:1-22.

[8] Defendant's Brief at 8.

[9] In addition to the litigation between the parties, the Complainants are engaged in litigation with the Skyland Homeowner's Association (SKA), which receives water produced from the well on Complainants' property. It is alleged that the Complainants, in letters to SKA, threatened to shut off the water supply from the Tahoe Park well. SKA went to court in order to prevent any disruption in water supply to SKA and has been granted a Temporary Restraining Order, Preliminary and Permanent Injunction preventing Complainants from shutting off the water. This proceeding has been consolidated with the other proceedings between the Complainants and Defendant in Placer County Superior Court.

complaint set forth any issue(s) that are under the jurisdiction of the California Public Utilities Commission (Commission or CPUC)?

Included in this question were the following sub-issues:

1. What, if any, is the Commission's role in determining the water quality for a well?
2. Does the Commission have the authority to order the sale of land and or granting of an easement in a property dispute?
3. Does the Commission have the authority to order a party be reimbursed for legal fees?
4. If the answer to questions 2 and/or 3 is yes should the Commission exercise its authority prior to the culmination of the pending civil action between the parties?

Both parties were instructed to brief the issues raised in the Scoping Memo. Issue briefs were filed on November 14, 2011.

Standard for Ruling on a Motion to Dismiss

As noted earlier (see footnote 8 and accompanying text), Defendant requests that the Commission dismiss the complaint. In effect, the request is a Motion to Dismiss.

A Motion to Dismiss requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice.[10] A motion for summary adjudication is appropriate where the evidence presented indicates there are no triable issues as

[10] Scoping Memo and Ruling of Assigned Commission on Motion to Dismiss and Preliminary Matters, page 3, in *Raw Bandwidth Communications, Inc. v. SBC California, Inc. and SBC Advanced Solutions, Inc.*, 03-05-023 (September 11, 2003), citing to *Westcom Long Distance, Inc. v. Pacific Bell et al.*, D.94-04-082, 54 CPUC2d 244, 249.

to any material fact and that the moving party is entitled to judgment as a matter of law.[11] The interpretation of a statute or regulation is generally seen to be a pure legal issue.[12]

While there is no Commission rule expressly for summary judgment motions, the Commission's Rules of Practice and Procedure (Rules) does have Rule[13] 11.2, which governs motions to dismiss. This procedure is analogous in several respects to a motion for summary judgment in civil practice.[14] The Commission has explained that the purpose of both types of motions is to permit determination before hearing whether there are any triable issues as to any material fact.[15] The Commission looks to California Code of Civil Procedure § 437(c) for the standards on which to decide a motion for summary judgment. Section 437(c) provides:

> The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on

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[11] Code of Civil Procedure, § 437c; Weil & Brown, Civil Procedure Before Trial, 10:26-27.

[12] *See* Manriquez v. Gourley, 105 Cal. App. 4th 1227, 1234-35 (2003), quoting from Culligan Water Conditioning v. State Bd. of Equalization, 17 Cal.3d 86, 93 (1976).

[13] All references to Rules are to the Commission's Rules of Practice and Procedure, which are available on the Commission's website.

[14] Westcom Long Distance v. Pacific Bell, D.94-04-082, 54 CPUC2d 244, [249] (1994).

[15] *Id.*

> inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

C.C.P. §§ 437c(f)(1) and (2) provide for summary adjudication by an analogous procedure:

> A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty….
>
> A motion for summary adjudication shall proceed … in all procedural respects as a motion for summary judgment.

A further purpose of such a motion is that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials.[16] As such, where appropriate, the Commission regularly grants motions for summary judgment or summary adjudication.[17] Initially, the moving party bears the burden of establishing evidentiary facts sufficient to prove or disprove the elements of a particular claim, and then the burden shifts to the opposing party to show a material issue of fact or an affirmative defense.[18] As the Commission stated in D.06-08-006:

> Under the summary judgment procedure, the moving party has the burden of showing that there are no disputed facts by means

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[16] Westcom Long Distance, supra, 54 CPUC2d at 249.

[17] *See* D.07-07-040 (granting Chevron judgment against Equilon "as a matter of law"); D.07-01-004 (granting Cox Telecom judgment against Global NAPs of California); D.02-04-051 (granting summary adjudication of a claim by County Sanitation District against SoCal Edison).

[18] C.C.P. §§ 437c(c), (f), (p).

> of "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." The opposition to the motion must state which facts are still in dispute. The motion shall be granted if all the papers show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. If the parties' filings disclose the existence of a disputed issue of material fact, the motion must be denied.[19]

In Application (A.) 99-04-010, we reviewed our standards for dismissing complaints and applications:

> On a motion to dismiss a complaint, the legal standard against which the sufficiency of the 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]

In evaluating the sufficiency of a complainant's allegations, we are guided by the standards set forth in Public Utilities Code Section 1702 which provides that the complainant must (a) allege that a regulated utility has engaged in an act or failed to perform an act; and (b) in violation of any law or commission order or rule:

> Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or anybody politic or municipal corporation, by written petition or complaint, setting forth any act or thing done

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[19] *Westcom Long Distance, supra*, 54 CPUC2d at 249, quoted in D.06-08-006 *Qwest Communications v. Pacific Bell.*

[20] E.g., MCI Telecommunications Corp. v. Pacific Bell, D.95-05-020, 59 Cal.P.U.C.2d 665, 1995 Cal.P.U.C. LEXIS 458, at p. *29-*30, citing Burke v. Yellow Cab Co. (1973) 76 Cal.P.U.C. 166.

> 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.

The Commission will dismiss a complaint that fails to meet this two-pronged standard.[21] In addition, Commission Rule 4.2(a) requires that complaints be drafted with specificity so that the defendant and the Commission know precisely the nature of the wrong that defendant has allegedly committed, the injury, and the relief requested:

> The specific act complained of shall be set forth in ordinary and concise language. The complaint shall be so drawn as to completely advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired.

With these standards in mind, we now examine the parties' responses to the scoping memo in order to determine if the Complainants have raised a legal question or any issue of material fact within the Commission's jurisdiction. If not, then the Defendant is entitled to a judgment, dismissing the complaint, as a matter of law.

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[21] *See* Monkarsh v. Southern California Gas Company, D.09-11-017, at 3 (November 24, 2009); Pacific Continental Textiles, Inc. vs. Southern California Edison Company, D.06-06-011, at 4 (June 15, 2006); Watkins v. MCI_Metro Access Transmission Services, D.05-03-007, at 4 (March 17, 2005); Rodriquez v. Pacific Gas and Electric Company, D.04-03-010, at 3-4 (March 16, 2004); AC Farms Sheerwood. v. So. Cal Edison, D.02-11-003 (November 7, 2002); and Crain v. Southern California Gas Company, D.00-07-045 (July 20, 2000).

Discussion

We will first address the parties' responses to the sub-issues raised in the Scoping Memo.

1. What, if any, is the Commission's role here in determining the water quality for the well?

This issue was not directly briefed by either party. The Commission has constitutional and statutory authority and responsibilities to ensure that regulated water utilities provide service (e.g., water) that protects the public health and safety. The clearest statement of the Commission's statutory authority is found at Pub. Util. Code § 739.8(a) which states: "Access to an adequate supply of healthful water is a basic necessity of human life, and shall be made available to all residents of California at an affordable cost." Further, Pub. Util. Code § 770 addresses water quality regulation and provides in pertinent part: "The commission may after hearing: [¶] . . . [¶] (b) Ascertain and fix adequate and serviceable standards for the measurement of . . . quality . . . or other condition pertaining to the supply of the product, commodity, or service furnished or rendered by any such public utility. No standard of the commission applicable to any water corporation shall be inconsistent with the regulations and standards of the State Department of [Public] Health pursuant to Chapter 4 (commencing with Section 116275) of Part 12 of Division 104 of the Health and Safety Code."

The California Supreme Court has found that:

> While the water quality standards may be the product of [DPH] study and expertise, they are the [Commission] standards as well. The Legislature, by mandating that the [Commission] standards cannot be 'inconsistent' with [DPH] water quality standards, has established that the [DPH] safety standards are the minimum standards for the [Commission] to use in

> performing its regulatory function of ensuring compliance with safety standards. (Hartwell v. Superior Court of Ventura County (2002) 27 Cal 4th 256, 271).

In its brief, the Defendant asserts that DPH has been monitoring quality of the water from the well on the Complainant's property[22] and states that the water quality issue is being addressed by DPH.[23] We find no reason not to rely on DPH's oversight in this instance. Complainants' brief does not address this issue.

There is no triable issue of material fact regarding water quality.

2. Does the Commission have the authority to order the sale of land and or grant of an easement in a property dispute?

This issue was not directly briefed by the Complainants. In their brief Complainants allude to the fact that the Commission has "concurrent jurisdiction with the Superior Court[24] but they do not address the issue raised in question #2 of the Scoping Memo. The Complainants' only response to this question was a cite to Pratt v. Coast Trucking[25] arguing against the proposition that they cannot maintain an action in Superior Court and before the Commission on the same underlying facts.[26] The issue raised in the scoping memo is not whether the Commission and the Superior Court can have concurrent jurisdiction over an

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[22] Defendant's Brief, § 4.1.

[23] *Id.* at § 4.4.

[24] Complainant's Opening Brief at 7 citing Pratt v. Coast Trucking.

[25] 228 Cal. App. 2d. 139.

[26] Complainant's Opening Brief at 7.

issue (a position supported by Pratt) but does the Commission have jurisdiction over the sale of land and the granting of an easement.

In its brief Defendant acknowledges that the Commission has broad authority, which is quasi-judicial in nature, but asserts that the Commission does not have the authority to order the sale of land or grant easements in real property disputes.[27] Citing several cases, Defendant argues that the Commission does not have the authority to settle property disputes between parties.[28] Defendant contends that disputes between parties concerning property rights should be handled by the courts. Defendant asserts that the Commission is authorized to prevent the owner of a public utility from disposing of that utility's property where such disposition would be against the public interest. If the owner of a public utility does not desire to sell its property, even if there is an agreement to do so, the Commission cannot compel the sale.[29]

We conclude that the resolution of the property rights dispute in this matter is properly before the Superior Court.

3. Does the Commission have the authority to order a party be reimbursed for legal fees?

In light of our conclusions concerning the parties' responses to questions 1 and 2 the instant question is moot.

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[27] Defendant's Brief at § 4.2.

[28] *Id.* citing Kopenen v. Pacific Gas and Electric Co. (2008) 165 Cal. App4th 345.

[29] *Id.* citing Hanlon v. Eshleman (1915) 169 Cal. 200, 146 P. 656.

4. If the answer to questions 2 and/or 3 is yes should the Commission exercise its authority prior to the culmination of the pending civil action between the parties?

In light of our conclusions concerning the parties' responses to questions 1 and 2 the instant question is moot.

Conclusion

The Complainants feel that the well in question is illegally located on their property and that the water from said well is unsafe. The facts and the law, however, do not support Complainants' contention that the Commission is the proper forum in which to adjudicate these issues. The issue of the legality of the well's location is currently being adjudicated in Placer County Superior Court. DPH has jurisdiction over the well's water quality and has determined that the water from the well is safe for human consumption.

The instant complaint should be dismissed.[30]

Categorization and Need for Hearing

The Instruction to Answer filed on April 19, 2011 categorized this Complaint as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings. Because there is no disputed or triable issue of material fact before and/or under the Commission's jurisdiction in this proceeding this complaint must be dismissed. The evidentiary determination is charged to state that no evidentiary hearings are necessary.

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[30] On May 22, 2012, Complainants filed a "Motion to add additional recently obtained documentation to original brief" the Motion was not properly served or filed with the Commission, never the less, we have reviewed its substance. The contents of the Motion, if accepted, would not change the disposition of this proceeding.

Comment on Proposed Decision

The proposed decision of Administrative Law Judge (ALJ) Colbert 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. No comments were received.

Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and W. Anthony Colbert is the assigned ALJ in this proceeding.

Findings of Fact

1. Complainants are husband and wife and customers of record for the water service at 3015 West Lake Boulevard, Homewood, California.
2. Defendant is a Class C water utility (over 500 but les than 2,000 connections).
3. In 2005 the Complainants purchased a parcel on Westlake Boulevard in Homewood, California, the parcel was divided in two and a luxury home was built on each parcel.
4. One of the Complainants' parcels has been sold, the other parcel is still owned by the Complainants.
5. Defendant operates a well located on the parcel owned by Complainants.
6. The well serves over 100 customers.
7. Complainants assert that the well is located on their property without legal authorization.
8. Complainants allege that Defendant well contains corrosive water that is contaminated with lead.
9. Complainants demand that the Defendant be required to abandon its well.

10. Complainants have sued Defendant in Placer County Superior Court over the property rights issue related to the well.

11. Defendant has filed a counter-suit against Complainants in Placer County Superior Court over the property rights issue related to the well.

12. The California DPH has tested the water and determined that it is within acceptable guidelines for human consumption.

13. The Assigned Commissioner's Scoping Memo and Ruling, in the instant proceeding, was issued on October 13, 2011.

14. The threshold question in this proceeding is whether the Complaint sets forth any issue(s) that are under the jurisdiction of the California Public Utilities Commission.

15. There were four sub-issues/questions in the Scoping Memo.

16. The Complainants' brief did not directly address the main question and sub-issues contained in the Scoping Memo.

17. Defendant has requested that the Complaint be dismissed.

18. There is no disputed or triable issue of material fact within the Commission's jurisdiction in this proceeding.

Conclusions of Law

1. The property rights issues concerning the legality of the wells location is currently and properly under the jurisdiction of the Placer County Superior Court.

2. The issue of the water quality of the well is under the jurisdiction of the California DPH, which has tested the water and determined that it is within acceptable guidelines for human consumption.

3. There is no disputed or triable issue of material fact before and/or under the Commission's jurisdiction in this proceeding.

4. Hearings are not necessary.

5. Defendant's request to dismiss the Complaint will be treated as a Motion to Dismiss.

6. The Complaint against the Defendant should be dismissed, effective immediately.

O R D E R

IT IS ORDERED that:

1. The Complaint against Tahoe Park Water Company is dismissed.
2. The hearing determination is changed to no hearings necessary.
3. All Motions not previously ruled on are denied.
4. Case 11-03-020 is closed.

This order is effective today.

Dated _____, at San Francisco, California.