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

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| Jurupa Community Services District,<br>Complainant<br>vs.<br>Empire Water Company, LLP,<br>Defendant | **Case (C.) 09-03-024**<br>(Filed March 23, 2009) |

# COMPLAINANT'S OPENING BRIEF



| COMPLAINANT | ATTORNEY FOR COMPLAINANT |
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| Jurupa Community Services District<br>Attn: Eldon Horst, General Manager<br>11201 Harrel Street<br>Mira Loma, CA 91752<br>Telephone (951) 685-7434 | Julie Hayward Biggs (SBN 81608)<br>Email: jbiggs@bwslaw.com<br>Gregory M. Murphy (SBN 222039)<br>Email: gmurphy@bwslaw.com<br>Burke, Williams & Sorensen, LLP<br>2280 Market Street, Suite 300<br>Riverside, CA 92501<br>Telephone (951) 788-0100 |



Complainant Jurupa Community Services District ("JCSD") hereby submits its Opening Brief ("Brief") as directed by the Commissioner's Scoping Memo of July 10, 2009.

## I. INTRODUCTION

In the Scoping Memo, the Commissioner frames the issue before the Public Utilities Commission thusly:

> "Do the present water deliveries by Empire Water Company come within the regulatory jurisdiction of the Commission, making the company a public utility?"

JCSD contends that the answer to this question is "yes". In the Complaint filed with the

Public Utilities Commission on March 23, 2009 ("Complaint"), JCSD contended that Defendant Empire Water Corporation ("Empire") is operating as a provider of water services within the JCSD service area in violation of Section 2701 of the Public Utilities Code and ***should be*** regulated by the Public Utilities Commission ("PUC") .[1] In this brief, JCSD must further contend, based on the information provided in response to the Administrative Law Judge's ("ALJ"'s) request for additional information on September 8, 2009, that Empire is ***currently*** subject to regulation by the PUC and any lack of compliance with PUC regulation is also illegal.

Empire is a private corporation selling water on a for-profit basis directly to end users. Section 2701 states that such activity is subject to regulation by the PUC. As such, the JCSD contends that Empire should be regulated by the PUC. In addition, Empire's predecessor-in-interest, Western Riverside Canal Company ("WRCC") was subject to PUC regulation and neither WRCC nor Empire has ever successfully petitioned the PUC to release them from PUC regulation. With Empire acceding to WRCC's interests, Empire also acceded to being regulated by the PUC – and at no time have WRCC or Empire successfully petitioned to be released from PUC oversight and regulation.

## II. STATEMENT OF RELEVANT FACTS

Rather than reiterating all of the facts set forth in JCSD's Complaint, JCSD incorporates them here by reference and highlights the following key facts relevant to the current dispute.

### A. Empire's Predecessors-in-Interest and the Supply of Water

WRCC was formed in 1886 to supply water for agriculture in the general west Riverside County area, and WRCC's first set of Rates, Rules, and Regulations filed with the PUC was submitted in 1948.[2] In those Rates, Rules and Regulations, WRCC made clear that the users of WRCC water had to pay PUC-established rates for the water.[3] Further, at the time and based on the Rates, Rules and Regulations, WRCC users were those having flowage or capacity rights in the canal operated by WRCC and whose properties abutted the canal.[4]

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[1] All statutory references herein are to the Public Utilities Code unless otherwise noted.
[2] See Exhibit A to JCSD's Complaint.
[3] Exhibit A to JCSD's Complaint, Rule and Regulation No. 2.
[4] Exhibit B to JCSD's Complaint, Rule and Regulation Nos. 1 and 5.

In 1983, WRCC filed with the PUC a revised set of Rules and Regulations, showing that it was now delivering water to third parties and not just to members of the company, but that any contract for delivery of water was subject to authorization and modification by the PUC.[5]

Since at least 2000, WRCC was supplying non-potable water to the Indian Hills Golf Course ("Golf Course"), one aspect of a development owned by Henry C. Cox, II ("Cox"), as well as to the Jurupa Unified School District.[6] The Jurupa Unified School District uses the WRCC water to irrigate Patriot High School ("High School").

On March 16, 2006, WRCC sent a letter to the PUC to have its Certificate of Public Convenience and Necessity withdrawn, claiming that it no longer operated as a public utility (Exhibit C). Apparently, the PUC disagreed with WRCC, as the PUC continues to list WRCC as a PUC-Regulated Water Utility.[7]

In May of 2007, Basin Water Resources, Inc. ("BWRI"), a wholly owned subsidiary of Basin Water, Inc., entered into an agreement to purchase from Cox and John West ("West") all assets of WRCC and 350 Inch Water Company ("350IWC"), a mutual water company.[8] As a result of that purchase, BWRI was to acquire WRCC's 18 mile canal system historically used to transport water for agricultural and other non-potable water applications and certain historic water rights in the Riverside Basin of approximately 960 million gallons per year with two wells and a pipeline distribution system.

### B. <u>Empire Water Corporation and the Supply of Water</u>

Empire Water Corporation was incorporated as a business consulting firm in Nevada in 2005 and was formerly known as Cascade Coaching Corp.[9] In 2007, the company changed its name to Empire Water Corporation and entered into an agreement with BWRI, Henry C. Cox II and John West to purchase the same WRCC and 350IWC assets that BWRI had purchased in May of that year.[10] The purchase agreement included an issue of 6,000,000 shares of Empire

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[5] Exhibit B to JCSD's Complaint, Rule No. 5.
[6] *See* Exhibit E to JCSD's Complaint.
[7] This information was taken from the most recent PUC listing of California Public Utilities Commission Regulated Water and Sewer Utilities, pulled from PUC website on 1/22/09.
[8] Exhibit H to JCSD's Complaint, Item 2.01.
[9] Exhibit H to JCSD's Complaint, Item 2.01.
[10] Exhibit H to JCSD's Complaint, Item 2.01, Exhibit I to JCSD's Complaint, Exhibit J to JCSD's Complaint.

stock and a matching number of warrants.[11]

In purchasing the assets of WRCC and 350IWC, Empire purchased WRCC's contracts with the Golf Course and High School. The JCSD contends that Empire also "purchased" WRCC's certificate of convenience, rate structure, and obligation to provide water in compliance with PUC regulations.

Empire now supplies non-potable water to the Golf Course and the High School for irrigation purposes, and to an individual named John West.[12] Empire is to supply the Golf Course at cost.[13] But the supply to the High School is not so limited, instead pegged at a rate of $250.00 per acre foot, subject to escalation if the JCSD increases the cost of the potable water it provides to the High School.[14] And no contract showing the terms of provision to John West has been made available to JCSD.

In response to the ALJ's request, Empire provided proof that neither Empire nor WRCC ever successfully petitioned for release from PUC oversight and regulation of their provision of water to end users.[15]

## III. ARGUMENT

The JCSD brought the Compliant in this matter because it thought Empire should be regulated by the PUC. Little did the JCSD know that it would turn out that, by WRCC not successfully withdrawing from PUC regulation, Empire ***is currently subject to PUC regulation*** and has been operating illegally in not complying with PUC regulation. JCSD contends that Empire should remain subject to PUC regulation.

First, Empire may not rely on a failed attempt by WRCC to withdraw from PUC regulation to avoid its current duties to the PUC – the ALJ found in his Ruling on Motion to Strike that "speculative allegations about future events and conditions [] are not ripe for

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[11] Exhibit I to JCSD's Complaint.

[12] See Empire's Responses to First Set of Discovery Requests, and specifically response to special interrogatory No. 1, attached hereto as Exhibit "1".

[13] Exhibit I to JCSD's Complaint, p. 23.

[14] Exhibit F to JCSD's Complaint.

[15] See Empire's Response to Administrative Law Judge's Request for Information Concerning Transfer of Utility Assets, attached hereto as Exhibit "2".

consideration."[16] In light of the ALJ's ruling, the PUC must look at what Empire currently *is* and not what Empire *plans to be* or how Empire *may* provide service in the future.

Empire admits that it acquired right, title, and interest in the shares or assets of WRCC and that it now provides water to the Golf Course and High School.[17] These are current activities by Empire, undertaken pursuant to the contractual obligations Empire purchased when it purchased WRCC's assets.

However, Empire's Stock and Asset Purchase Agreement states: "Parties believe in good faith that neither WRCC nor 350IWC are regulated by the [PUC], though certain official records appear to indicate differently." Sched. 2.1(g). From this statement, it appears that Empire, BWRI and 350IWC were somewhat uncertain as to the regulatory posture of the companies and their assets when the transfer of WRCC and 350IWC assets occurred. But because WRCC never removed itself from PUC regulation, Empire is subject to regulation by the PUC and must still have a franchise or other authority granted by the PUC in order to provide water to customers. A franchise to provide water services is a special privilege that may be granted by ordinance. *See People v. Willert* (1939) 37 Cal. App. 2d Supp. 729, 741. "[E]very water franchise so granted confers upon the grantee the right to use, or to lay and use, pipes, ditches, flumes, conduits, and appurtenances for the purpose of transmitting and distributing water." Pub. Util. C. § 6265.

### A. PUC Jurisdiction Over Water Providers

The California Constitution declares all water appropriated for "sale, rental, or distribution… to be a public use."[18] The Public Utilities Commission has jurisdiction over water providers pursuant to § 2701 of the Public Utilities Code, which says:

> "Any person, firm, or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system within this State, who sells, leases, rents, or delivers water to any person, firm, corporation, municipality, or any other political subdivision of the State, whether

[16] Ruling on Motion to Strike, p.1.
[17] See Exhibit "2" pages 8 and 9.
[18] Cal. Const. Art X, § 5.

under contract or otherwise, is a public utility, and is subject to the provisions of Part 1 of Division 1 and to the jurisdiction, control, and regulation of the commission, except as otherwise provided in this chapter."

As a further clarification of the scope of the Commission's jurisdiction, §2702 and §2703 provide as follows:

"2702. Any corporation or association which is organized for the purpose of delivering water solely to its stockholders or members at cost, and which delivers water to others than its stockholders or members, or to the state or any department or agency thereof or any school district, or to any other mutual water company, for compensation, is a public utility and is subject to Part 1 (commencing with Section 201) and to the jurisdiction, control, and regulation of the commission."

"2703. Any corporation or association which is organized both for the purpose of delivering water to its stockholders or members at cost, and to persons, firms, corporations, municipalities, or other political subdivisions of the state, is a public utility and is subject to Part 1 (commencing with Section 201) and to the jurisdiction, control, and regulation of the commission."

To put it simply, the PUC has jurisdiction over any entity that is compensated for delivering water to any private person or any public entity. Empire is an entity that, based on its own current regulation by the PUC, its contracts for the provision of water, and its SEC filings, is providing water for compensation. Despite its role as a provider of water, Empire continues to assert that it is not a business subject to PUC regulation.

**B. <u>Empire's Provision of Water to the Golf Course</u>**

Per its agreement with the Golf Course, Empire is to provide water at its cost. This agreement was acceded to by Empire when it took over WRCC's assets and contracts. While the

legality of the agreement between WRCC and the Golf Course is in doubt (because WRCC never stopped being regulated by the PUC and the "at cost" provision of water does not comply with WRCC's rate schedule), it is clear that Empire's "at cost" provision of water violates the law regarding pricing of water. Specifically, Section 727.5 requires that water rates be high enough that they shall "maintain the reliability of water service, shall minimize the long-term cost to ratepayers, shall provide equity between present and future ratepayers, and shall afford the utility an opportunity to earn a reasonable return on its used and useful investment, to attract capital for investment on reasonable terms and to ensure the financial integrity of the utility."

An "at cost" agreement with one of its only two current customers (West apparently receives water through the Golf Course t no charge to him) fails to meet the rationale behind this statutory mandate. Further, it does not meet the rate schedule approved by the PUC – even the very old rate schedule set up by WRCC. Clearly, Empire is ***not currently complying*** with PUC regulation. The PUC should take notice, keep Empire regulated, and enforce against Empire all of the PUC's requirements and regulations.

### C. Empire's Provision of Water to the High School

There are of course some exemptions to PUC regulation that are found in the Public Utilities Code. And Empire may attempt to convince the PUC that one or more should apply to its provision of water to its customers – as it did in its Answer. The exemption therein, that the provision of water to the High School is done on a wholesale basis, is inapplicable here. An entity with water that is not being used to supply water to a public water system that delivers the water *at wholesale* to any public agency or private entity providing water utility service.[19]

Empire is not delivering water at "*wholesale*" to the School District. The Public Utilities Code does not define "wholesale" for purposes of the exemption, and no judicial decisions have defined the term. Black's Law Dictionary provides the following definition: "*The sale of goods or commodities usu. for resale by retailers, as opposed to a sale to the ultimate consumer.*" Thus, direct provision of water to an ultimate consumer would not be "wholesale" provision under a reasonable interpretation of the Code. Because Empire provides water directly to the High

[19] Pub. Util. Code § 2706(b).

School, it cannot be said to be a wholesale supplier. Thus, Empire's agreement to supply water to the High School other than at rates set by the PUC violates the law.

## IV. CONCLUSION AND RELIEF REQUESTED

Given that Empire continues to act as an unregulated water provider when clearly regulation is proper, JCSD requests that the PUC take action to regulate Empire's pumping and delivery of water. JCSD seeks the following:

First, a statement from the PUC that Empire remains a public utility subject to regulation.

Second, regulation by the PUC of Empire's provision of water to end users, so as to protect the health, safety, and welfare of Empire's customers.

Third, that the PUC, having taken on regulation of Empire, initiate ratesetting for the delivery of water by Empire to its customers to ensure that the rates paid by the customers reflect all of the applicable PUC policies.

Dated: October 23, 2009

Burke, Williams & Sorensen, LLP

By: _____
Julie Hayward Biggs
Gregory M. Murphy
Attorneys for Complainant

# PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is Burke, Williams & Sorensen, LLP, 444 South Flower Street, Suite 2400, Los Angeles, California 90071-2953.

On October 23, 2009, I served the following document(s) described as **Complainant's Opening Brief** on the interested party(ies) in this action as follows:

by placing true copies thereof enclosed in a sealed envelope addressed stated on the attached service list.

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope was placed for collection and mailing with postage thereon fully prepaid at Los Angeles, California, on that same day following ordinary business practices.

☐ **BY FACSIMILE:** At approximately _____, I caused said document(s) to be transmitted by facsimile. The telephone number of the sending facsimile machine was (213) 236-2700. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The document was transmitted by facsimile transmission, and the sending facsimile machine properly issued a transmission report confirming that the transmission was complete and without error.

**BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or other facility regularly maintained by the overnight service carrier, or delivered such document(s) to a courier or driver authorized by to receive documents, in an envelope or package designated by the overnight service carrier with delivery fees paid or provided for, addressed to the person(s) served hereunder.

☒ **BY ELECTRONIC SERVICE** of the document(s) through the Court's transmission facilities.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the above is true and correct. I declare that I ☒ am employed in the office of a member of the bar of this court at whose direction the service was made; ☐ served the above document(s) at the direction of a member of the bar of this court.

Executed on October 23, 2009, at Los Angeles, California.

Alexandra Sainz

## SERVICE LIST

***Jurupa Community Services District v. Empire Water Company, LLP.***
**PUC Case No: C.09-03-024**

Gary Weatherford, Esq.
California Public Utilities Commission
505 Van Ness Avenue, Room 5020
San Francisco, CA 94102-3214
Tel: (415) 703-2782
Email: gw2@cpuc.ca.gov

Peter Jensen, C.E.O.
Empire Water Company, LLP.
25 Orchard
Lake Forest, CA 92630

Eldon Horst
General Manager
Jurupa Community Services District
11201 Harrel Street
Mira Loma, CA 91752

Edward J. Casey
Tammy L. Jones
333 S. Hope Street, 16th Floor
Los Angeles, CA 90071
Email: ed.casey@alston.com
Tammy.jones@alston.com