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

Eric Lafortune, Don Richardson, and David
Harvey,

Complainants,

v.

Hart Creek Estates Mutual Water Company,

Defendant.

C.11-09-001
(Filed September 2, 2011;
Amended September 7, 2011
and January 7, 2012)

**COMPLAINANTS' COMMENTS ON
THE PROPOSED DECISION OF ALJ MINKIN**

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, Complainants Eric Lafortune, Don Richardson and David Harvey (collectively, "Complainants"), hereby file their comments on the Proposed Decision of ALJ Minkin ("Proposed Decision" or "PD") mailed June 27, 2012. The Proposed Decision proposes to dismiss this complaint without prejudice because the "underlying threshold issue in this complaint is also being considered by the Superior Court of Kern County" (PD, at 1) in a separate civil law suit filed by Complainants against the defendant in this proceeding and other parties. Complainants oppose the PD and the proposed dismissal of this case at this time, even if it is without prejudice to the re-filing of the complaint, and urge the Commission not to adopt the Proposed Decision and permit this complaint to move forward to final disposition.

I. SPECIFIC COMMENTS ON PROPOSED DECISION

The Proposed Decision errs in describing the issue of whether the defendant in this case has illegally issued shares to persons who are not purchasers of lots in Tract 5871 as “[t]he underlying threshold issue in this complaint . . .” PD, at 1; emphasis added. While this issue is a key issue in this complaint, it is not the only issue – nor the “underlying threshold issue” -- in this complaint. There are a number of other key issues in this complaint which the Commission is capable of determining at this time and which, if determined in Complainants’ favor, provide enough evidence for the Commission to find that the Hart Creek Estates Mutual Water Company (“HCEMWC”) is actually a public utility subject to the Commission’s regulatory jurisdiction. These issues include:

- Whether HCEMWC is providing water service to lots outside of Tract 5871. The law under which HCEMWC was organized – Corporations Code §14311 – does not authorize it to provide water service outside of Tract 5871 and defendant admits that it is doing so.
- Whether HCEMWC owns title to the water supply, distribution, and fire protection systems by which it provides service. Corporations Code §14312(a)(5) requires a mutual water company to own these facilities and Complainants are prepared to prove that HCEMWC does not have such title.
- Whether HCEMWC is providing water service at cost. Public Utilities Code §§ 2702 and 2705 require that mutual water companies provide

water service at cost. Complainants are prepared to prove that HCEMWC is providing water service both within and outside of Tract 5871 in excess of its costs of providing such service.

If the Commission finds that defendant is not complying with any one or more of these various requirements, the Commission is authorized to determine that HCEMWC is not a mutual water company but instead is a public utility water company subject to its jurisdiction. The Commission should not dismiss this complaint but rather should move forward to take evidence on the issues described above and determine the status of HCEMWC.

In addition to the foregoing issues, the Commission does not need to defer, and should not defer to the Kern County Superior Court on the issue of whether HCEMWC has illegally issued shares to persons who do not own lots within Tract 5871. First, the reason the issue – along with many other issues – is before the Superior Court is to determine whether the plaintiffs in the civil suit are entitled to damages and injunctive relief. Conversely, the reason the issue is before the Commission is to determine the status of defendant as a public utility subject to the Commission's jurisdiction. While the Superior Court and the Commission may reach different conclusions on this issue, such results will not conflict with one another because the consequences would be totally different: if the Superior Court finds against the plaintiffs, they would be denied damages and injunctive relief, but if the Commission finds for the complainants, defendant would become subject to the Commission's jurisdiction as a public utility. Those two consequences can exist without conflict.

Second, the issue of whether HCEMWC has illegally issued shares to persons not entitled to be shareholders is not a difficult one to resolve. Defendant admits that it has issued shares to persons who do not own lots within Tract 5871. However, Corporations Code §14132(a)(9) provides that a mutual water company may only issue shares to persons owning lots within the subdivision that the mutual water company was formed to serve. In addition, HCEMWC's own By-Laws clearly specify that only "[p]ersons owning land within Tract 5871 are eligible to be shareholders of the company." HCEMWC By-Laws, Article II., Section 1. While defendant rests on certain exceptions to the "only-shareholders-can-receive-water" requirement in Public Utilities Code §2705, the Commission is perfectly capable to take evidence on whether those exceptions apply in this situation. Complainants contend that they do not.

Finally, and most importantly, the Commission should not defer to the Kern County Superior Court of the issue of whether HCEMWC has illegally issued shares to persons outside of Tract 5871 in order to protect its jurisdiction over public utility water companies masquerading as mutual water companies. If the Commission were to defer in every instance involving the mutual water company provisions of the Corporations Code, then "pseudo" mutual water companies could easily evade Commission jurisdiction by providing water service to whomever they want by simply issuing shares to whomever they want and claiming that the Superior Courts of the State – not the Commission – must determine their status. The Commission has the authority to determine the status of companies that provide domestic water service and has done so throughout its history. And the Commission is not constrained from considering the

statutory provisions of any code, including the Corporations Code, in determining a water company's status. If the Commission defers in this instance, it is setting a dangerous precedent in surrendering its powers to the Superior Courts of the State.

II. CONCLUSION

For the reasons discussed herein, Complainants urge the Commission not to adopt the Proposed Decision and permit this complaint to move forward to final disposition.

Dated July 17, 2012.

Respectfully submitted,

By: /s/ Jose E. Guzman, Jr.

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