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

Jurupa Community Services District,

**Case (C.) 09-03-024**

Complainant

(Filed March 23, 2009)

vs.

Empire Water Company, LLP,

Defendant

**COMPLAINANT'S PREPARED OPENING TESTIMONY**

<b>COMPLAINANT</b>	<b>ATTORNEY FOR COMPLAINANT</b>
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Complainant Jurupa Community Services District ("JCSD") hereby submits its Prepared Opening Testimony ("Brief") as directed by the Commissioner's Scoping Memo of July 10, 2009, modified by the Administrative Law Judge's ("ALJ"'s) Ruling on Scheduling and Scope of Prepared Testimony of November 13, 2009.

**I. INTRODUCTION**

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

"Do the present water deliveries by Empire Water Company come within the regulatory jurisdiction of the Commission, making the

1 company a public utility?”

2 The ALJ added that this testimony should present evidence clearly, avoiding obfuscation  
3 and should give as clearly as possible an outline of “who is alleged to have acquired or done  
4 what.” Further, the ALJ stated that JCSD has the burden of proving that Empire does not come  
5 within an exemption to Public Utilities Commission (“PUC”) regulation if JCSD so asserts.

6 Keeping the issue and the ALJ’s directions in mind, JCSD asserts that the issues before  
7 the PUC are actually very simple. JCSD alleges, and will prove in this testimony and with the  
8 documentary evidence supporting this testimony, that Empire is operating as a public utility and  
9 should remain under PUC regulation.

10 JCSD will rely on documentary evidence,<sup>1</sup> as well as Empire’s admissions and responses  
11 to interrogatories, served by Empire in response to JCSD’s discovery requests as support for  
12 JCSD’s argument that Empire should remain regulated by the PUC. JCSD’s testimony will focus  
13 on the following six (6) issues:

14 First, JCSD will show, in this testimony and with the documentary evidence  
15 supporting this testimony, that Empire purchased all of the assets of both West Riverside  
16 350 Inch Water Company (“350 Inch”) and West Riverside Canal Company (“WRCC”).

17 Second, JCSD will show that at the time Empire purchased WRCC’s assets,  
18 WRCC was a public utility regulated by the PUC.

19 Third, JCSD will show, and Empire has already admitted in its pleadings in this  
20 matter, that WRCC never successfully extricated itself from PUC regulation, meaning  
21 Empire as successor-in-interest to WRCC is currently subject to PUC regulation.

22 Fourth, JCSD will show that Empire is currently supplying water to two entities,  
23 the Indian Hills Golf Course (“Golf Course”), one aspect of a development owned by  
24 Henry C. Cox, II (“Cox”), as well as to the Jurupa Unified School District, for use in  
25 irrigating Patriot High School (“High School”).

26 Fifth, JCSD will show that Empire is not supplying water to the High School at

27 <sup>1</sup> Empire Bates-stamped this documentary evidence. For ease of reference, all of the evidence supporting JCSD’s  
28 testimony herein has been referred to both by document name and by Bates stamp number and has been attached  
hereto in Bates stamp order as Exhibit “A.”

1 cost.

2 Sixth, JCSD will show that, by purchasing *all of the assets* of WRCC and 350  
3 Inch, JCSD cannot supply water *through* either of those entities and thus the exemptions  
4 that Empire claims apply to its situation cannot actually be applied

5 **II. TESTIMONY**

6 As a primary point, and as discussed more fully in Subsection C following, the Public  
7 Utilities Code *prohibits* the sale of WRCC's assets to Empire absent an order or resolution by the  
8 PUC.<sup>2</sup> Yet WRCC, without receipt of any document from the PUC stating that it had been  
9 relieved of PUC regulation, went forward with a plan to sell all of its water-related assets.  
10 Ultimately, Empire became the purchaser of those assets. But as the ALJ said in his Ruling on  
11 Motion to Strike and Request for Information Concerning Transfer of Utility Assets, "Sections  
12 851-854 of the Pub. Util. Code set out the requirements for Commission approval of transfers of  
13 utility property."<sup>3</sup> JCSD contends that because no PUC approval was ever given, the transfer of  
14 WRCC assets to Empire is of dubious legality. Notwithstanding this, even presuming that  
15 Empire legally acquired WRCC's water-related assets, in doing so Empire made itself subject to  
16 the jurisdiction of the PUC.

17 **A. Empire Purchased *All of the Assets of WRCC and 350 Inch***

18 In an undated Stock and Asset Purchase Agreement, a company known as Basin Water  
19 Resources, Inc. ("Basin"), agreed to purchase, *inter alia* all of the assets and shares of stock of  
20 WRCC and 350 Inch.<sup>4</sup> It appears this Stock and Asset Purchase Agreement was effective on or  
21 after May 8, 2007, as that is the day it was approved by Basin.<sup>5</sup> The Stock and Asset Purchase  
22 Agreement was later referred to as having been executed on May 10, 2007.<sup>6</sup> On December 21,  
23 2007, Empire, Basin, WRCC, 350 Inch, Cox, and John L. West ("West") entered into an  
24 Assignment and Amendment Agreement under which Empire acceded to Basin's right to  
25

26 <sup>2</sup> Public Utilities Code § 851.

27 <sup>3</sup> Ruling on Motion to Strike and Request for Information, p. 6.

28 <sup>4</sup> Stock and Asset Purchase Agreement, pp. EW00900 et seq.

<sup>5</sup> Action by Written Consent in Lieu of a Meeting, p. EW00861.

<sup>6</sup> See Assignment and Amendment Agreement, at p. EW01062.

1 purchase the assets of WRCC and 350 Inch.<sup>7</sup>

2 In the Assignment and Amendment Agreement, it should be noted, Empire agreed  
3 specifically that while it would purchase all of the assets of WRCC and 350 Inch, it would not  
4 purchase any of the shares of stock of either of those entities.<sup>8</sup> But Empire would and did  
5 purchase all of the assets of WRCC and 350 Inch.

6 Those assets include, as set forth in the original Stock and Asset Purchase Agreement<sup>9</sup>, the  
7 following:

8 From WRCC:

- 9 (1) All of WRCC's real property, as per the deeds attached to the Stock and Asset  
10 Purchase Agreement;
- 11 (2) WRCC's easements for pipeline purposes;
- 12 (3) WRCC's pipelines from Wells #5 and #7 within the canal right of way between  
13 the wells and High School and Indian Hills Booster Station; and
- 14 (4) A concrete siphon under the Santa Ana River terminating at Agua Mansa  
15 Road.

16 From 350 Inch:

- 17 (1) Wells #5 and #7 located in Colton, CA, and associated equipment;
- 18 (2) Wells #1 and #2 in Riverside County near Opal Street;
- 19 (3) 350 Inch's contract with Jurupa Unified School District for the delivery of  
20 water to the High School;
- 21 (4) 350 Inch's interest in a lease of an office building;
- 22 (5) 350 Inch's historical rights to pump water.

23 As set forth more clearly in the Stock and Asset Purchase Agreement, the foregoing  
24 constitute all of the land owned by WRCC and 350 Inch, all of the other rights, title, and interests  
25 in real property held by those entities, all personal property constituting the water appropriation

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27 <sup>7</sup> Assignment and Amendment Agreement, pp. EW01062 et seq.

28 <sup>8</sup> Assignment and Amendment Agreement, p. EW01062, Recital C(ii); *see also* p. EW01063, Section 1.4 (Asset Purchase Election)

<sup>9</sup> *See* Stock and Asset Purchase Agreement, Schedule 1.1, p. EW00940.

1 and distribution system belonging to those entities, all other equipment, machinery or other  
2 tangible property used in the delivery of water, all of the water appropriation and distribution  
3 rights belonging to either or both of WRCC and 350 Inch, and all of the rights and obligations of  
4 the entities with respect to the delivery of water.<sup>10</sup>

5 Thus, while WRCC and 350 Inch remain viable and independent entities – that is, Empire  
6 did not purchase the shares of their stock and thereby reduce them to simple subsidiaries of  
7 Empire – they are entities that have no assets other than the monetary compensation they received  
8 from Empire in exchange for their tangible and intangible assets purchased by Empire in  
9 December 2007.

10 **B. When Empire Purchased WRCC’s Assets, WRCC was Subject to PUC**  
11 **Regulation**

12 Empire stated in its Response to Administrative Law Judge’s Request for Information  
13 filed on October 7, 2009 that at the time of Empire’s purchase of WRCC, the latter was “no  
14 longer operating as a public utility.”<sup>11</sup> In support of this, Empire provided a letter sent by WRCC  
15 to the PUC requesting to withdraw WRCC’s Certificate of Public Convenience and Necessity  
16 (“CPCN”) because WRCC would comply with Public Utilities Code § 2705.<sup>12</sup> But a review of the  
17 PUC’s rulings and determinations finds no determination confirming that WRCC’s CPCN should  
18 be withdrawn and no action by the PUC to release WRCC from PUC jurisdiction and regulation.

19 Empire cannot contest that WRCC was at one time subject to PUC jurisdiction and  
20 regulation. Nor can Empire now allege that WRCC’s statements about compliance with § 2705  
21 should be applied to Empire -- § 2705 by its terms applies only to “Any corporation or association  
22 that is organized for the purposes of delivering water to its stockholders and members at cost.”  
23 Empire, according to its own SEC filings, is “engaged in the business of the ownership,  
24 development, and sale of water resources.”<sup>13</sup> While the PUC had the opportunity to determine  
25 that WRCC would meet the requirement of § 2705, it never made that determination and based

26 <sup>10</sup> Stock and Asset Purchase Agreement, Section 1.1 (Purchase and Sale), pp. EW00900 through EW00902.

27 <sup>11</sup> See Response to Administrative Law Judge’s Request for Information at 1:7-8.

28 <sup>12</sup> Id., attachment 2.

<sup>13</sup> See Empire Water Corporation SEC Form 10-Q for the quarterly period ending December 31, 2008, pp. EW00047 et seq., at p. EW00054.

1 on Empire's own statements about its organization and operation, cannot do so now.

2 At the very least, Empire purchased the assets – tangible and intangible – of an entity that  
3 was subject to PUC regulation at the time of purchase.

4 **C. Because WRCC was Subject to PUC Regulation at the Time of Purchase,**  
5 **Empire is Presumptively Subject to PUC Regulation**

6 While the Public Utilities Code *prohibits* the sale of WRCC's assets to Empire absent an  
7 order or resolution by the PUC,<sup>14</sup> presuming the PUC would have assented to Empire's purchase  
8 and operation of WRCC's assets, Empire would be subject to PUC regulation until it successfully  
9 petitioned to have its CPCN withdrawn.

10 Empire has not done so, not even in the context of this proceeding where it could have  
11 done so. While Empire has gone through contortions to explain how it will structure its water  
12 deliveries in the future so as to avoid PUC regulation, it appears to rely on WRCC's now-stale  
13 March 2006 letter requesting to withdraw its CPCN as the sole foundation for not being regulated  
14 by the PUC. But that letter does not state fact sufficient to allow the PUC to determine that  
15 *Empire's* activities should not be subject to PUC regulation – it merely provides conclusory and  
16 self-serving statements that WRCC provides water only to school districts and golf courses and  
17 that WRCC is no longer operating as a public utility.

18 Unless the PUC finds it necessary to undo the Empire-WRCC purchase agreement  
19 because of WRCC's failure to comply with Public Utilities Code requirements for the sale of its  
20 assets, Empire must be found to have stepped into the shoes of WRCC and to be regulated unless  
21 and until it successfully petitions for withdrawal of its CPCN.

22 **D. Empire Currently Supplies Water to the Golf Course and the High School**

23 In response to JCSD's request for discovery,<sup>15</sup> Empire admitted that it currently supplies  
24 water to three entities: (1) the Golf Course, (2) Jurupa Unified School District, and (3) West.<sup>16</sup>  
25 Empire admitted that its delivery of water to West is provided through the Golf Course and at no

26 \_\_\_\_\_  
27 <sup>14</sup> Public Utilities Code § 851.

28 <sup>15</sup> A copy of the Responses to First Set of Discovery Requests (Second Amendment) ("Responses") is attached hereto  
as Exhibit "B."

<sup>16</sup> Responses, 8:12.

1 additional cost to West.<sup>17</sup> Deliveries to the Golf Course, on the other hand, are provided pursuant  
2 to the Stock and Asset Purchase Agreement.<sup>18</sup>

3 The Stock and Asset Purchase Agreement states that the price paid by the Golf Course for  
4 Empire's water is an amount equal to the actual energy and maintenance costs incurred by Empire  
5 in appropriating, storing, pumping and distributing the water to the Golf Course, plus "an agreed  
6 upon amount necessary to maintain the wells and pipelines..., which shall be determined on a  
7 monthly basis."<sup>19</sup> This is, basically, the provision of water "at cost."<sup>20</sup>

8 **E. Empire Provision to the High School is not "At Cost"**

9 As Empire agreed in its discovery response, the price at which it supplies water to the  
10 High School is set by a Water Supply, Sale and Purchase Agreement.<sup>21</sup> While a copy of that  
11 Water Supply, Sale and Purchase Agreement was attached to JCSD's Complaint, another copy is  
12 attached to this Opening Testimony.

13 Pursuant to that agreement, Empire agreed to sell water to the High School<sup>22</sup> at a price of  
14 \$250.00 per acre foot.<sup>23</sup> That amount could be increased on an annual basis by a percentage equal  
15 to any the percentage over base price of any increase in the price of JCSD's provision of domestic  
16 water for irrigation purposes.<sup>24</sup> There is no mention of or reference to Empire's "cost" of  
17 providing water in the Water Supply, Sale and Purchase Agreement and absent any such  
18 reference it must be presumed that Empire is *not* providing water at "cost" to the High School.

19 **F. Empire Cannot Utilize WRCC or 350 Inch to Deliver Water to Third Parties**

20 As set forth more fully in Section II(A) of this Testimony, after Empire's purchase of the  
21 assets of WRCC and 350 Inch, those latter entities were left without any tangible assets related to  
22 the provision of water. Unquestionably, they were left without any assets that could be used to  
23 transfer water from any water owner to the Golf Course or the High School. Specifically, WRCC

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25 <sup>17</sup> Responses, 9:4-5.

<sup>18</sup> Responses, 8:24-27.

<sup>19</sup> Stock and Asset Purchase Agreement, p. EW00922.

<sup>20</sup> Section 2705 defines the term "at cost" to mean "without profit."

<sup>21</sup> Responses, 9:1-3.

<sup>22</sup> Actually, to the Jurupa Unified School District for use at the High School.

<sup>23</sup> Water Supply, Sale and Purchase Agreement, Section 6(a), a copy of which is attached hereto as Exhibit "C."

<sup>24</sup> Water Supply, Sale and Purchase Agreement, Section 6(b).

1 had sold to Empire its pipelines from Wells #5 and #7 within the canal right of way between the  
2 wells and High School and Indian Hills Booster Station. Further, 350 Inch had sold to Empire its  
3 wells, its historical rights to pump water, and its contract with Jurupa Unified School District for  
4 the delivery of water to the High School.

5 It is difficult, and indeed almost impossible, to see how Empire can claim that it is  
6 redrafting contracts such that 350 Inch, as a mutual water company, will be the party actually  
7 delivering water to the High School. 350 Inch lacks water rights and wells. 350 Inch never  
8 owned the pipelines to the High School – those were property of WRCC, and even those were  
9 sold to Empire. Empire bought, lock, stock, and barrel, all of 350 Inch and WRCC’s water-  
10 related assets: the right to pump water, the wells for pumping, the pipes, the real property,  
11 easements, and other tangible assets to deliver water, and every other asset of 350 Inch and  
12 WRCC’s water delivery businesses.

13 While it is possible that one of those entities could use the money it received from Empire  
14 to purchase new water-delivery assets, Empire’s use of those companies’ existing assets – which  
15 are now Empire’s assets – to deliver water, even if under some obfuscatory contractual set-up,  
16 still amounts to Empire delivering water to third parties – and to at least one third party for profit.

### 17 **III. CONCLUSION**

18 The ALJ noted that charts or other diagrams could be used to show “who is alleged to  
19 have acquired or done what.” JCSD contends that no such charts are necessary. Indeed, as this  
20 proceeding moves forward, it becomes more clear that oral testimony is probably unnecessary.  
21 The issue before the PUC is astoundingly clear.

22 Empire purchased all of the water-delivery assets of WRCC and 350 Inch. Those entities  
23 have no proven way to deliver Empire’s water. Empire is not a mutual water company or other  
24 entity organized for the delivery of water to its shareholders – it is organized for the purpose of  
25 selling water. Empire, upon purchasing WRCC’s water-delivery assets, became subject to PUC  
26 regulation. Nothing that Empire has done since that time has served to relieve it from that  
27 regulation. And Empire, having purchased all of the assets of both WRCC and 350 Inch, cannot  
28 now use either entity to “deliver” water to the High School so as to become subject to any

1 exemption from PUC regulation.

2 While JCSD reserves the right to provide charts or oral testimony in connection with its  
3 Reply Testimony to be filed later this month or at the hearing in January, it restates its contention  
4 that this matter is simple. As WRCC was subject to PUC regulation, so should Empire remain  
5 subject to regulation, and Empire should not be able to escape regulation through attempts to use  
6 350 Inch or WRCC – entities without any tangible assets – as the putative delivery vehicles for its  
7 water.

8  
9 Dated: December 4, 2009

Burke, Williams & Sorensen, LLP

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

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

7 On December 4, 2009, I served the following document(s) described as  
8 **Complainant's Prepared Opening Testimony** on the interested party(ies) in this  
9 action as follows:

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

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

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

25 **BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or  
26 other facility regularly maintained by the overnight service carrier, or  
27 delivered such document(s) to a courier or driver authorized by to receive  
28 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 December 4, 2009, at Los Angeles, California.

  
Alexandra Sainz

1 **SERVICE LIST**

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

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