

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



**FILED**

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Application of James L. and Marianne S. Orvis to sell, and Aspen Forest Investment Co., LLC, To Buy, Five Thousand (5,000) Shares of the Common Stock of the water system known as Lake Alpine Water Company, Inc. (U148WTD) Located in Alpine County, California.

A.11-04-013

Motion to Reconsider Disqualification of Mr. MacBride's Dual Representation of Lake Alpine Water Company and Aspen Forest Investment Partners

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Shareholder and Board  
Member of LAWC

February 14, 2012

I respectfully request the commission to reconsider the decision to allow Mr. MacBride to continue to represent both Lake Alpine Water Company (LAWC) and TBH/Aspen Forest Investment Partners (TBH/Aspen) in Aspen's application for retroactive approval of its purchase of 50% of LAWC shares from Jim And Marianne Orvis. I am asking for reconsideration because the decision of ALJ Wilson did not address the fundamental issue of the ethical conflict of interest created by Mr. MacBride representing both the applicant and LAWC in the same proceeding without having obtained the written consent of shareholders in this closely held corporation. Instead, ALJ Wilson decided that Mr. MacBride could continue his dual representation based on her (incorrect) understanding that the board of directors of LAWC approved such dual representation. This misunderstanding may be due to the way I described the board vote in my motion. I said in my motion that a majority of the board approved Mr. MacBride's dual representation. But it is more accurate to say that a majority of the board approved Mr. MacBride's representation, but with conditions.

As I said in my motion to disqualify Mr. MacBride, the board approved only Mr. MacBride's handling of the complaint filed by Gloria Dralla against both LAWC and Aspen. Mr. Toeniskoetter (without board approval) initially hired Mr. MacBride on Aspen's behalf to begin handling the application and protest. Only after Mr. MacBride had been hired to represent Aspen, the board had an opportunity to consider this dual representation. The two Orvis family board members voted against it, and Mr. Toeniskoetter voted in favor. Mr. Hallgrimson (a business partner in Aspen) voted for Mr. MacBride to continue, but only if there was not a

conflict. The fifth “independent” board member, Mr. Ritchie, acknowledged that there was a “minority conflict” with Mr. MacBride’s dual representation. Therefore, at best, the board’s approval of Mr. MacBride’s dual representation was conditioned on ALJ Wilson finding that there is no ethical conflict. ALJ Wilson, however, did not reach this issue. She incorrectly understood that the board had approved Mr. MacBride’s dual representation regardless of a conflict. Even if the board had approved Mr. MacBride’s representation without conditions, there is a real question whether the Aspen board members properly hold their seats since the TBH/Aspen stock purchase is in question.

As explained in this motion, I am requesting a review of my motion to disqualify Mr. MacBride to directly address whether there is an ethical conflict for him to represent Aspen and LAWC. I understand that my motion to disqualify may seem like a technical legal issue, but it has a very important effect on LAWC, its shareholders and its ratepayers. I hope the Commission will take another look and try to find a way to make sure that the best decision possible is made about the future of LAWC.

Mr. MacBride’s dual representation of both Aspen and LAWC assumes that the interests of LAWC and Aspen in this proceeding are identical. If they are not, a very real conflict exists. Even before the board vote on June 14, 2011 regarding Mr. MacBride’s dual representation, his bills show that he began immediately to defend Aspen’s purchase of 50% of LAWC before the board ever had a chance to vote on whether Aspen’s purchase of LAWC was proper. Mr. MacBride never considered and provided the independent analysis of what was in LAWC or the public’s best interest. Instead, Mr. Toeniskoetter used his control of LAWC to make the

decision himself and to tell Mr. MacBride how to handle the matter. LAWC deserves independent counsel to represent its interests which are not identical in this proceeding to those of Aspen.

Technically, until the CPUC approves Aspen's application, Mr. Toeniskoetter should not be in charge of anything at LAWC. LAWC deserves independent counsel dedicated and loyal to the best interests of LAWC in its mission to provide safe, economical and reliable drinking water to its ratepayers. Any reasonable person can see Mr. MacBride cannot fulfill his fiduciary duty to both clients Aspen and LAWC simultaneously and therefore has an inherent conflict that cannot be waived. Neither client should have any suspicion that they are being given utmost loyalty. As set forth in the American Bar Association on conflicts Rule 1.7 (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal and (4) each affected client gives informed consent, confirmed in writing.

As both a 40% shareholder and minority members of the board of directors in filing a protest to the Aspen application, we considered:

1. The lack of the independence of our fifth board member, Dave Ritchie whose conduct has clearly violated our LAWC shareholder voting agreement requiring "the fifth director shall not be affiliated by business with the TBH shares (or its individual partners) ...". We recently learned he has been employed since 2006 by Bear Valley Alpine Ski Co., which is co-owned by Mr. Toeniskoetter, Dundee Corporation and a third partner. We learned Mr. Ritchie intentionally mislead Alpine County in providing undocumented and

unauthorized data regarding sewer capacity of the BVWD on district stationary as its president in support of Aspen's development needs resulting in his resignation as president of BVWD. In addition, Mr. Ritchie said in his deposition that he has never voted against Mr. Toeniskoetter.

2. The harm being done to the public ratepayers by expanding LAWC's system to support Aspen's future development plans at the expense of existing ratepayers.
3. The motivation of Aspen in controlling LAWC and therefore the company as a whole to serve its private interest.

Rather than trying to minimize expenses for LAWC by asking that LAWC not be included as a party, Mr. MacBride has recommended that a memorandum account be set up for his legal fees and he seems utterly unconcerned about the impact of having LAWC now formally involved in this application process. An independent lawyer would be looking out for the best interests of LAWC, all of its board members and its shareholders and not using his role to support part of the shareholders and board members who favor his other client, Aspen, in its application.

Finally, the conflict of interest inherent in Mr. MacBride's dual representation is clear from the following three examples:

1. Mr. MacBride served discovery on me as a protester requesting data that is already available to him as LAWC's attorney of record. This seems like an effort to help Aspen by trying to harass me into giving up on my protest in order to benefit the shareholders and board members affiliated with the Aspen, the entity he represents.

2. More significantly, as board members and shareholders, in this closely held corporation, we are entitled to confer and meet with Mr. MacBride to understand how Aspen's application affects LAWC financially, the legal issues it raises, and the strategy he intends to employ on behalf of the company. He is in the awkward position of revealing his case to the opposition or excluding an entire group of shareholders and directors from information about their company. He recently stated "you and your husband are adverse parties to Aspen/LAWC in this matter notwithstanding your status as shareholders and directors".
3. In Mr. MacBride's own bills he reveals that his clients were/are Mr. Toeniskettoer, Mr. Hallgrimsom and Mr. Ritchie; for engaging in e-mails, phone calls and various activities defending the application against the protest, and in response to other community boards like Bear Valley Residents Inc, all taking place before the LAWC board voted to hire him on June 14, 2011; This clearly confirms he really never intended to represent the entire board or the separate interests of LAWC.

Mr. MacBride in representing both LAWC and TBH/Aspen Partners also has a fiduciary duty to the ratepayers of LAWC as well as the entire board, not just the controlling members. If the sale of LAWC to TBH/Aspen partners is found to be void by the commission and a fine is to be assessed to one party, then how does Mr. MacBride decide or make recommendations to the commission between the two LAWC and TBH/Aspen Partners?

I also object to Mr. MacBride only representing LAWC through the application process and disregarding that the protest is a legitimate effort by half of the shareholders to protect the

company. I objected to his representation since June 2011 following a board meeting and this motion to have him dismissed is the result of his refusal to remove himself. (Not being a lawyer myself, I do not know about all of the options I have to do this). I consider this inconsistency for trying to represent both parties, or choosing to serve only half of the company as a non-waivable conflict of interest. Mr. MacBride cannot properly address through his dual representation the concerns of both parties of the application and of the protest, as required by law. ABA Rule 1.7 (b): Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.) Mr. MacBride has to ignore one or the other parties (or 50% of LAWC) in order to represent both LAWC and Aspen at the same time. Mr. MacBride has clearly stated that he is not my or my husband's lawyer, but that he does represent the LAWC board and that he may use any information obtained through discovery to assist LAWC and Aspen. Then Mr. MacBride should have to take into consideration the position that the protest might defeat the application, and that a penalty might also be given to only one of the parties involved that would affect a financial stance of the company.

The PUC code clearly states it is the responsibility of the one acquiring the shares and control to prove that they are capable of managing the company properly in the public interest. After 9 years of control, it will be proven at the hearing that Aspen Partners ownership and control of LAWC has been to further its private interest in furthering of their development plans under the guise of improving the infrastructure of LAWC and clashes with its obligations to act in the public interest and serve its existing ratepayers. The Orvis shareholders do not have to

prove their worthiness in operating the company; they have been successfully operating LAWC since its inception in the public's interest. If Aspen's attorney is allowed to continue to represent LAWC in this application under the existing shareholders agreement, the applicant will continue controlling LAWC and LAWC will be deprived of fair and impartial representation that will also result in continuing harm to its ratepayers and the public interest. Certainly, if the situation was reversed and the Orvis family had an attorney representing us in this protest, Aspen would not want our attorney representing LAWC because they would correctly perceive a corporate conflict of interest.

In conclusion, Mr. MacBride's dual representation breaches his fiduciary duty to both his clients whose interests are not identical and may be competing. He must choose between representing the applicant (Aspen) or LAWC. If Mr. MacBride represents the application of Aspen Forest Investment partners LLC only, LAWC would be free to retain its own attorney to represent its interests now that it has been joined in the proceeding. Should it decide to do so, LAWC's participation in this application process is purely passive: LAWC did not sell or transfer stock in 2003---and in fact was not told of the secret sale between two private entities until it was in escrow. LAWC does not need to defend itself. Mr. MacBride also has a fiduciary responsibility also to LAWC's ratepayers. He needs to consider the outcome of this case, specifically with respect to any financial burden this litigation may impose on the ratepayers for: Aspen's failure to comply with the CPUC's rules and regulations in 2003 when it secretly purchased 50% of the stock in a private sale from Jim and Marianne Orvis. **This must never result in litigation costs to either LAWC or the ratepayers.** No doubt, as Aspen's attorney, Mr. MacBride wants these costs passed onto the ratepayers as Mr. Toeniskoetter has already

told some LAWC ratepayers they will be paying the costs of the litigation if the protests continue apparently to put pressure on the protesters to withdraw the protest. Lastly, I would like to include by reference the Ratepayers of LAWC's argument on December 30, 2011 (attached) in support of disqualifying Mr. MacBride because the ratepayers should not have to pay Aspen's attorneys fees. If Aspen had filed its application asking for permission to purchase half of LAWC in 2003, neither LAWC nor its ratepayers would have had to pay for Aspen's attorneys fees or expenses. Aspen should not be rewarded for its failure to follow the Commission's rules by forcing LAWC or its ratepayers to pay for attorneys to defend what Aspen did wrong. The legal cost of the acquisition should be the responsibility of Aspen, the applicant, in seeking retroactive approval of its acquisition of LAWC.

Sincerely,  
/s/Paula Orvis

Shareholder and Board Member of LAWC