

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298**FILED**04-21-11  
02:40 PM

April 21, 2011

TO PARTIES OF RECORD IN CASE 10-04-001

This proceeding was filed on April 1, 2010, and is assigned to Commissioner Catherine J.K. Sandoval and Administrative Law Judge (ALJ) Victor D. Ryerson. This is the decision of the Presiding Officer, ALJ Victor D. Ryerson.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 14.4 of the Commission's Rules of Practice and Procedure at [www.cpuc.ca.gov](http://www.cpuc.ca.gov).)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ KAREN V. CLOPTONKaren V. Clopton, Chief  
Administrative Law Judge

KVC:gd2

Attachment

**PRESIDING OFFICER'S DECISION** (Mailed April 21, 2011)

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

Hal Miller,

Complainant,

vs.

Kingvale Property Owners and Water Users, Inc., a non profit corporation and Mutual Water Company,

Defendant.

Case 10-04-001  
(Filed April 1, 2010)

Hal Miller, Complainant, in Pro Per

Jerry Duncan, Attorney-at-Law, for Defendant,  
Kingvale Property Owners and Water Users, Inc.

**PRESIDING OFFICER'S DECISION DISMISSING COMPLAINT**

**Summary**

Complainant Hal Miller's (Miller) contention that the conduct of defendant Kingvale Property Owners and Water Users, Inc. (Kingvale) is such that it should be deemed a public utility has no merit. Even if Kingvale might have exceeded its corporate powers in the manner by which it has issued shares of stock (or memberships), its activities do not indicate that it has the status of a public utility. Accordingly, the Commission lacks jurisdiction to grant the relief Miller seeks, and we must dismiss his complaint.

Case 10-04-001 is dismissed with prejudice, and the proceeding is closed.

## **Procedural History**

Complainant Hal Miller (Miller) filed Case (C.) 10-04-001 against defendant, Kingvale Property Owners and Water Users, Inc. (Kingvale), on April 1, 2010. Miller seeks an order from the Commission that would limit Kingvale, which is a mutual water company, to delivering water to shareholders within Kingvale Subdivision and Kingvale Subdivision Unit 2 (the Kingvale Subdivisions), and terminate delivery to any other properties except under emergency rules as provided by statute. The predicate to issuing such an order is that we determine we have jurisdiction to regulate Kingvale as a public utility.

The complaint was originally filed under the Commission's Expedited Complaint Procedure. By ruling issued May 25, 2010, the assigned Administrative Law Judge (ALJ) terminated the Expedited Complaint Procedure case and recalendared it for hearing under the Commission's regular procedure, pursuant to Rule 4.5, subdivision (g), of the Commission's Rules of Practice and Procedure.

The ALJ held an evidentiary hearing in Sacramento on July 27, 2010, and the matter was submitted as of that date. Issuance of the decision was necessarily delayed by the absence of the ALJ on extended medical leave following the hearing. The Commission has extended the statutory deadline for resolution of the proceeding until April 1, 2012, to accommodate this delay.

## **Background**

Miller is the owner of 41 lots located in Kingvale Subdivision Unit 2 in Nevada County. He seeks to have Kingvale provide water service to his presently unserved lots, and objects to Kingvale's provision of water service to lots that are not within Kingvale Subdivision or Kingvale Subdivision Unit 2 (the Kingvale Subdivisions). The Kingvale Subdivisions were respectively created by

subdivision maps filed in 1931 and 1937 in Nevada County, and each consists of a number of lots that are gradually being developed for vacation home construction.

In 1960 Kingvale was organized as a non profit corporation for the purpose of furnishing water to its stockholders at cost. Under the terms of its Articles of Incorporation, Kingvale is not authorized to carry on the business of a public utility. The Articles provide that the intent and purpose of the corporation is to be “mutual and without profit to its stockholders.” The parties have stipulated that Kingvale is a mutual water company.<sup>1</sup>

Kingvale’s By-Laws provide that water service “shall only be sold, distributed, supplied and delivered to owners of [Kingvale’s] capital stock,” and that “such stock shall be appurtenant to *certain* lands when the same are described in the certificate issued therefor.” (Italics supplied.) Each share represented by a stock certificate is “attached and appurtenant to one building lot.” The board of directors is the “exclusive judge of what constitutes a building lot with respect to which a share may be issued.”<sup>2</sup> Kingvale’s current rules and regulations governing water service provide that the company’s service area “includes” the Kingvale Subdivisions, but they do not expressly limit the extent of the service area.<sup>3</sup>

---

<sup>1</sup> *Transcript*, July 27, 2010, at 13, lines 12 – 16.

<sup>2</sup> *By-Laws of the Kingvale Property Owners and Water Users, Inc., Revised Copy, July 2, 1977, Article V.*

<sup>3</sup> *Uniform Rules and Regulations for the Governance of Water Distribution Services of the Kingvale Property Owners and Water Users, Inc., a Mutual Water Company, July 5, 2007, paragraph 2.22; see also paragraph 2.16.*

Kingvale collects an annual assessment (sometimes called dues) and fees from its stockholders (or members) and delivers water to their lots in return. Apart from funding a reserve for depreciation and repairs, these fees and assessments do not generate any excess revenue. Kingvale pays no dividend to its stockholders.

Kingvale is governed by a volunteer board of directors who serve without compensation. Stockholders (members) are called upon to serve annually on work parties to perform maintenance and other work on Kingvale's water system.

### **Discussion**

Miller seeks an order from this Commission to prevent Kingvale from delivering water to lots that allegedly do not qualify for water service because they are outside the Kingvale Subdivisions, and to compel Kingvale to provide service to his own unserved lots. His underlying theory is that Kingvale serves certain customers that are outside its service territory, has exceeded its authority as a mutual water company by doing so, and has thereby generated income in excess of the cost of serving legitimate customers. He argues that by reason of these acts Kingvale is now a public utility, which requires that it be regulated by this Commission, and that it extend service to his lots pursuant to its public service obligation as a utility.

Our jurisdiction to consider the relief Miller seeks is narrowly circumscribed by law. Public Utilities Code Section 2725<sup>4</sup> defines a "mutual water company" in relevant part as "any private corporation or association

---

<sup>4</sup> All statutory references are to the California Public Utilities Code, unless otherwise noted.

organized for the purposes of delivering water to its stockholders and members at cost.” Kingvale is such an entity, as the parties have stipulated, and as its Articles clearly reflect. Under Section 2705, a mutual water company “is not a public utility, and is not subject to the jurisdiction, control or regulation” of this Commission. Consequently, the Commission cannot order Kingvale to cease water deliveries to specific customers, or to serve new customers, even if the company’s activities may be *ultra vires* under its articles or by-laws, unless we determine that Kingvale is a public utility by operation of law.

Section 2707 provides that the Commission has the power to “hold hearings and issue process and orders” for the “purpose of determining the status of any person, firm, or corporation...managing any water system are within this state.” This is the task we undertake here.<sup>5</sup>

We find nothing in the record to support Miller’s contention that Kingvale is serving customers in a manner exceeding its authority as a mutual water company. As a threshold matter, we find no restriction in Kingvale’s Articles or By-Laws that preclude it from serving owners of lots that are not within the Kingvale Subdivisions. Therefore, we do not have to make a finding on this issue.<sup>6</sup> Even if it is doing so, we cannot construe that action in itself as an indication that Kingvale is acting in the capacity of a public utility.

---

<sup>5</sup> The findings and conclusions of the Commission on questions of fact in such a proceeding are final and, with certain exceptions, are not subject to review. (*Id.*)

<sup>6</sup> It appears that Miller may be collaterally estopped from raising this issue in any event. See Statement of Decision, *Harold A. Miller et al. v. Kingvale Property Owners and Water Users et al.*, Case No. 73315, Superior Court of the State of California, County of Nevada (January 4, 2010), at 4, Finding 9.

Miller's position that Kingvale may only serve Kingvale Subdivision lot owners in order to preserve its mutual water company status is apparently based upon a flawed inference he has drawn from the company's Articles, By-Laws, and Rules and Regulations. He also relies upon the circumstance that Kingvale applied to the Commissioner of Corporations for authority to issue 70 shares of stock to owners of lots located in the Kingvale Subdivisions in 1965. However, that issuance did not create a new restriction on stock ownership to owners whose lots are within the Kingvale Subdivisions.<sup>7</sup>

Even if Miller were correct that Kingvale is furnishing service beyond territorial limits established in its corporate documents, that fact would not end our inquiry. Unless the violation is also an indication that Kingvale is serving as a public utility by holding itself out as dedicating its facilities to public service, we cannot assert jurisdiction. We see no such evidence here. The credible evidence is that provision of water service is limited to those with stock certificates (or membership certificates) in return for payment of a fixed annual assessment and fixed fees. These fees and assessments pay Kingvale's operating costs only, with the exception of a reserve established for repairs and improvements. We find no evidence of overreaching in the use of this revenue that would negate Kingvale's status as a mutual water company.

---

<sup>7</sup> Nor, for that matter, is Kingvale's board constrained in determining which "building lots" may qualify for issuance of a stock certificate. Miller is collaterally estopped from raising that issue in this proceeding by reason of the Nevada County Superior Court's earlier determination in Case No. 73315. *See* Statement of Decision, *id.*, at 3, Findings 4 and 6, and at 5, Finding 12. Furthermore, we note that the name of the corporation appears to be stated in the disjunctive by reflecting a distinction between *property owners* and *water users*. This distinction would not be necessary if the incorporators had envisioned that the two groups were necessarily one and the same.

There are no residual funds available to compensate Kingvale's owners, as there might be if it were an investor owned utility subject to our regulation. Kingvale's board and officers serve without compensation, and its stockholders receive no dividends. Indeed, its stockholders (or members) are called upon each year to serve on work parties to maintain the water system. These are not the hallmarks of a public utility, but of a mutual water company that pools its resources to serve its members.

### **Conclusion**

We find no factual support for Miller's contentions. Even if Kingvale exceeded its corporate powers in some respect by serving lots outside the Kingvale Subdivisions, this conduct does not indicate that Kingvale is acting as a public utility. There is no evidence that Kingvale has dedicated its system to public use, or that it is attempting to earn a profit or return for its owners. We conclude that the Commission lacks jurisdiction to grant the relief Miller seeks, and we must dismiss his complaint.

### **Assignment of Proceeding**

Catherine J.K. Sandoval is the assigned Commissioner and Victor D. Ryerson is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. Complainant is the owner of 41 lots located in Kingvale Subdivision Unit 2 in Nevada County.
2. Defendant was organized in 1960 as a non profit corporation for the purpose of furnishing water to its stockholders at cost. It is a mutual water company that, *inter alia*, provides water service to lots located within Kingvale Subdivision and Kingvale Subdivision Unit 2. Under the terms of its Articles of

Incorporation, Kingvale is not authorized to carry on the business of a public utility.

3. Pursuant to its By-Laws, Kingvale is only permitted to provide water service to owners of its capital stock. Capital stock is appurtenant to “certain lands” described in the certificate issued therefor, and each share is “attached and appurtenant to one building lot.” The By-Laws provide that the Kingvale’s board of directors is the exclusive judge of what constitutes a “building lot” with respect to which a share of stock may be issued.

4. Kingvale’s Rules and Regulations governing water service provide that the company’s service area includes the two Kingvale Subdivisions. There is no express limitation contained therein, nor in the company’s Articles of Incorporation or By-Laws, precluding Kingvale from providing service to lots that are not within the Kingvale Subdivisions.

5. Kingvale’s Articles of Incorporation authorize it to issue 500 shares of capital stock with no par value. In 1965 Kingvale applied to the Commissioner of Corporations for authority to issue 70 shares of capital stock to specific lot owners whose lots were located within the Kingvale Subdivisions, a list of whom was attached to its application.

6. Kingvale collects a fixed annual assessment (dues) and fixed fees from its stockholders (or members), and in return delivers water to their lots. Apart from funding a reserve for depreciation and repairs, these assessments and fees do not generate any excess revenue.

7. Kingvale does not pay any dividend to its stockholders.

8. Kingvale is governed by a volunteer board of directors who serve without compensation.

9. Kingvale's stockholders (members) are called upon to serve each year on work parties to perform maintenance and accomplish other work on Kingvale's water system.

**Conclusions of Law.**

1. Kingvale's status is that of a mutual water company by reason of the matters set forth in Findings of Fact 2, 4, and 6 through 9.

2. Pursuant to Public Utilities Code Sections 2725 and 2705, Kingvale is not a public utility, and is consequently not subject to the jurisdiction, control or regulation of this Commission, by reason of Conclusion of Law 1.

3. C.10-04-001 should be dismissed for want of jurisdiction by reason of Conclusion of Law 2.

4. The order in this matter should be made effective immediately.

**O R D E R**

**IT IS ORDERED** that:

1. Case 10-04-001, filed by Hal Miller, is dismissed with prejudice.
2. Case 10-04-001 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.