

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



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Application of James L. and Marianne S. A 1104013 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

**REPLY TO ASPEN OPPOSITION TO MOTION
OF RATEPAYERS OF LAKE ALPINE WATER COMPANY
TO COMPEL RESPONSES FROM ASPEN FOREST INVESTMENT COMPANY
AND LAKE ALPINE WATER COMPANY TO DATA REQUEST 4-1 AND TO
IMPOSE EX PARTE BAN ON FURTHER COMMUNICATIONS**

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On behalf of the Ratepayers of Lake
Alpine Water Company

July 18, 2012

Pursuant to Rule 11.1(f) of the Commission's Rules of Practice and Procedure and ALJ Wilson's email ruling on July 5, 2012, the Ratepayers of Lake Alpine Water Company ("RLAWC") hereby reply to the Opposition of Lake Alpine Water Company and Aspen Forest Investment Co. To Motion of Ratepayers of Lake Alpine Water Company to Compel Responses ("Aspen Response"). None of the arguments raised by Aspen justifies denying the motion, which would have the effect of blocking RLAWC's discovery on a pivotal issue in this case.

Aspen failed to demonstrate in its Opposition that any of the three exceptions to full disclosure under Rule 10.1 apply. The material sought is relevant (indeed Aspen has produced a partial answer), it is not privileged and it is not unduly burdensome. RLAWC respectfully submits that the motion should be granted to the extent necessary for RLAWC to obtain a full disclosure about emails and discussions between Aspen's counsel and a high level Commission employee in the legal division about legal issues raised in RLAWC's testimony.

I. The Subject Of The Communications From Aspen's Counsel To The Legal Division Is Directly Relevant To RLAWC's Case

Aspen provided a partial response to Data Request 4-1 that revealed email communications from Aspen/LAWC counsel (Mr. MacBride) to a high level Commission employee discussing and seeking private legal interpretations on issues *directly* related to this case -- whether Aspen's purchase of half of LAWAC constitutes the level of control that triggers the need for prior approval from the Commission.¹ Aspen argues that the advice it sought was not legal opinion, but instead simply sought a

¹ Aspen does not refute this point. Instead, it argues that the motion to compel should be denied because the emails and verbal communications in question are not purportedly not relevant to whether the purchase of half of LAWAC is in the public interest.

confirmation on a procedural issue. Specifically, Aspen states that it merely wanted to verify that an email in which a member of the legal division stated that purchasing half of LAWC constituted control because the purchaser could block other shareholders was not a formal opinion of the Commission.² However, the portion of the email that Aspen did not quote suggests otherwise. The portion of the email omitted by Aspen in its Opposition states:

“Can we talk again before this goes any further in LD?”³

Thus, the email text itself makes clear that there had already been a conversation and it strongly suggests that the matter “going further in LD” was not a procedural matter. If the only issue was the status of a Legal Division staffer’s email, there would have been nothing to “go further” because it is quite clear that the Commission has a “long standing” policy of not providing advisory opinions.

RLAWC acknowledges that Commission speaks only through its five commissioners in a formal vote. Thus, it is not clear why Aspen needed to contact the Legal Division to render an equally non-binding opinion. If Aspen had wanted clarification on the status of the email, it could have researched one of the many Commission decisions refusing to provide advisory opinions.⁴ Or Aspen could have filed a motion seeking clarification or have asked ALJ Wilson to allow briefing on the status of a legal division lawyer’s statements in an email. Instead, Aspen chose to have a private conversation with someone in a supervisory position to the lawyer who wrote the email stating that ownership of 50 percent of a regulated utility constitutes control, and

² Opposition, at p.8-10.

³ Despite the provisional request for the emails to be sealed, Aspen quotes from the emails publicly, therefore RLAWC will respond publicly.

⁴ See e.g., D.12-01-032 (January 12, 2012) at *234 (Lexis); D.08-10-019 (October 2, 2008), at *13 (Lexis).

concluding that Aspen should have filed an application and obtained approval for its purchase of half of LAWC. RLAWC did not claim that the email constituted a formal opinion from the Commission, though the email clearly has some weight because it was rendered to Aspen's own consultant and shortly thereafter Aspen was given a directive by the Water Division to file an application seeking retroactive approval of the purchase.

II. Aspen Still Has Not Answered Whether There Are Other Responsive Documents Or Communications to DR 4-1

In its Opposition, Aspen devotes a portion of only one sentence out of a 14-page Opposition to the substantive question of whether there are other documents or communications responsive to Data Request 4-1. Aspen states that “no answer (written or oral) was received” “with regard to its [the Legal Division’s] policy on the issuance of legal opinions. This response does not fully answer RLAWC’s questions about its communications with the Legal Division, which were directed at broader topics in RLAWC’s testimony, and which were not procedural in nature. Further, Aspen declines to state whether it has had communications with anyone else at the Commission on the topics in RLAWC’s testimony – including the author of the email cited in RLAWC’s testimony. Aspen has it within its control to provide a straightforward and forthcoming response regarding what communications it had with Commission personnel who are, or could counsel decision makers, but it has chosen not to do so.

III. Timeliness Is Not A Proper Basis To Refuse To Produce Responses

Aspen asserts that RLAWC’s Motion to Compel should be denied because it is “hopelessly untimely.” Aspen provides no citation supporting its argument that timeliness is a basis for refusing to produce responsive information, or to deny a Motion to Compel, and RLAWC believes there is no such authority. RLAWC has diligently

pursued the information necessary to present its case in this proceeding. Each set of discovery was necessary to try to sort out the extremely complex set of multiple interlocking business entities, ownership interests and affiliations associated with Mr. Toeniskoetter's real estate development projects in Bear Valley, of which LAWC is an integral component. Filing a Motion to Compel was as an absolutely last resort in RLAWC's view, and it did so only after two attempts to secure production of responsive information, which of course took time.

IV. The Commission Should Not Countenance One Party's Effort To Solicit Private Legal Advice From The Legal Division In An Adversarial Proceeding

Aspen correctly states that members of the Legal Division do not fall within the Commission's formal *ex parte* rules. The lack of formal strictures against seeking *ex parte* legal advice from the Legal Division in an adversarial proceeding, however, does not mean the communications from Aspen were proper. State law clearly favors disclosure of the inner workings of the Commission. The California Legislature mandated years ago that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."⁵ While this code section mandates access by the public to Commission records, it makes clear that the public in general (and litigants in an adversarial proceeding in particular) have a right to transparency in the workings of the Commission. Aspen's decision to pursue private discussions with the Legal Division about issues in a pending adversarial proceeding completely contravenes this mandate for openness.

⁵ Cal. Gov't. Code § 6250.

Aspen's emails and conversations eliciting unilateral legal advice creates a troubling appearance that one party is attempting to obtain an advantage over the other party by proffering its legal views to Commission staff who may be consulted by decision makers in this proceeding. Further, the Legal Division would have a formal role if a petition for rehearing were filed after the Commission issues its decision in this proceeding.

V. Discovery Unrelated To DR 4-1 And Motions Practice Are Irrelevant And Do Not Provide Grounds To Deny The Motion To Compel

Aspen devotes several pages of its Opposition to discovery matters and motions practice completely unrelated to Data Request 4-1 in an effort to paint an unflattering picture of RLAWC's efforts to prosecute its case. RLAWC prefers to focus on a resolution of the actual dispute at hand and will therefore respond only briefly to Aspen's complaints about discovery practice in this proceeding. Aspen has made clear its opposition to discovery by asking repeatedly (as early as last December 2011) to cut off discovery entirely. RLAWC submits that it has carefully tailored its data requests in this proceeding. Indeed, during the course of a year, RLAWC has propounded only 139 questions (barely more than one question per page of Mr. Toeniskoetter's 123-page Direct Testimony) and all of those questions were based on, or drawn directly from, statements in Aspen's pleadings and testimony filed in this proceeding.

Many of Aspen's answers were sufficient, but a number were incomplete or in some instances completely non-responsive, therefore, RLAWC was forced to expend resources to send deficiency notices and eventually to file the Motion to Compel – on a *single* data request. RLAWC regrets that Aspen has chosen to involve the entire service list and ALJ Wilson in complaints about discovery unrelated to the one discovery matter

at issue. RLAWC is further disappointed that Aspen would resort to inflammatory name calling (likening RLAWC discovery to a battle field tactic that killed hundreds of thousands of people during World War II), especially since Aspen's counsel has already had to apologize for a false claim that RLAWC intentionally filed this Motion to Compel during a time when RLAWC supposedly knew that Aspen's counsel was out of the office. Aspen's claims that RLAWC purportedly engaged in a tactical timing of the Motion is all the more remarkable because RLAWC informed Aspen's counsel that it would likely file a motion to compel in the next few days following the unsuccessful meet and confer in late June.

Aspen's complaints about burden are equally unconvincing, as it was (and is) completely within Aspen's control to eliminate any burden by simply stating that no additional responsive communications exist for Data Request 4-1. Aspen did not do so, presumably because it cannot do so; Aspen apparently believes there may be additional responsive materials.

Rather than putting RLAWC's concerns to rest, Aspen's response reinforces the need for full and complete disclosure, since Aspen argues that behind the scenes discussions with high level personnel in the legal division on matters explicitly drawn from RLAWC testimony is "not improper (and are not even unusual)."⁶ Such statement suggests that Aspen's communications with the legal division will continue unabated unless RLAWC's motion for an *ex parte* ban is granted.

For all of the foregoing reasons, RLAWC respectfully submits that its Motion to Compel be granted to the extent necessary to 1) provide full and complete disclosure regarding Aspen's counsel's communications with the Legal Division regarding legal

⁶ Aspen Opposition, at p.12.

issues directly in dispute in this adversarial proceeding and 2) ensure that Aspen's counsel cannot create even the appearance of attempting to influence Legal Division personnel who could consult with decision makers and 3) ensure that one party does not gain an advantage by soliciting personal and private interpretations of Commission precedent or analysis directly relevant to this proceeding.

Signed and dated: July 18, 2012 at Walnut Creek, CA

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