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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

S.W.R.L. Inc.,

Complainant,

vs.

LaPlata Enterprises, Inc.,

Defendant.

Case 11-11-003
(Filed November 3, 2011)

**ADMINISTRATIVE LAW JUDGE'S RULING ORDERING DEFENDANT TO
REFRAIN FROM THREATENING CESSATION OF SERVICE PENDING
OUTCOME OF PROCEEDING AND SETTING DATES FOR PREPARED
TESTIMONY AND AN EVIDENTIARY HEARING**

1. Summary

This ruling orders Defendant to refrain from threatening cessation of fire protection sprinkler water service pending the outcome of the proceeding, and schedules due dates for prepared testimony and an evidentiary hearing. This Ruling also provides procedural guidance concerning the conduct of an evidentiary hearing if one is held in this matter.

2. Background

In this adjudication, the Complainant S.W.R.L. Inc. (SWRL) seeks to have LaPlata Enterprises, Inc. (LaPlata), come within the Commission's jurisdiction for the purpose of setting reasonable water rates. In its Answer LaPlata counters

that it is not a public utility and that none of the service it provides to Complainant SWRL comes within the regulatory jurisdiction of the Commission.

The Complaint was filed on November 3, 2011, and the Answer was filed on December 14, 2011. The assigned Administrative Law Judge (ALJ) issued a Ruling on February 2, 2012, in advance of the Prehearing Conference (PHC) that was held on February 16, 2012, in Hemet, California. Among other things, the parties jointly determined at the PHC that their dispute was not ripe for alternate dispute resolution (ADR) at this time but that they would explore, by March 27, 2012, the possibility of reaching a stipulation of facts upon which a determination of public utility status might be made without an evidentiary hearing. The Assigned Commissioner's Ruling and Scoping Memo of March 3, 2012, confirmed the March 27, 2012 deadline and set April 10, 2012, as the due date for an assigned ALJ ruling as to whether an evidentiary hearing would be needed based on a stipulation of facts or the absence of such a stipulation.

On March 15, 2012, Robyn Garrison, the party appearing on behalf of the Complainant, SWRL, sent an email to me (and intended also for assigned Commissioner Catherine J.K. Sandoval) with an attached file containing documents, copying Defendant's Counsel. Included in those documents was the copy of a February 27, 2012, letter from Defendant's Counsel, Mark S. Rosen, to both Ms. Garrison of SWRL and a representative of a mini-mart/gasoline station that apparently is also served by Defendant. A copy of that letter is hereby made a part of this Ruling as Attachment A. Attachment B to this Ruling provides guidance concerning the conduct of an evidentiary hearing, if one is held in this matter.

3. Discussion

Attachment A is a copy of a February 27, 2012, letter from Mark S. Rosen, Defendant's Counsel, to both Ms. Garrison of SWRL and a representative of a mini-mart/gasoline station that apparently is also served by Defendant. The letter questions whether there is a service contract between the Defendant and Complainant (a Dairy Queen) or the mini-mart/gasoline station,¹ and includes the following statements:

LaPlata does not provide water to you. It has never provided water to you. All it provides is a fire sprinkler system. LaPlata loses money on the system because the charge of \$100 a month does not come close to covering the cost of maintaining the system. LaPlata is not a government agency and has no obligation to continue to provide a service at loss or to subsidize your business out of its pocket.

The PUC filing by Ms. Garrison does not prevent LaPlata from making business decisions and carrying them out. We are not going to wait for the PUC process, particularly when we do not believe that the PUC has jurisdiction over this fire sprinkler system. (See the hearing officer's references to the Public Utilities Code and the PUC administrative decision.)

Accordingly, we are prepared to wait until April 1, 2012, to resolve this matter. If you want continued service, you must pay the past due amounts billed to you by LaPlata, and enter into a contract at a price that allows LaPlata a reasonable rate of return. Otherwise, La Plata will have to cease providing

¹ Attached to the Complaint as an exhibit is a March 10, 2000 "Memorandum of Fire Protection Development Agreement," to which neither the Complainant nor the Defendant is a signatory but which appears to cover the parcel (No.7 on Parcel Map No. 26396) where Complainant's Dairy Queen business is located. Whether it represents a binding service contract between the Complainant and Defendant has not been determined in this adjudication. In its Answer, at 3, Defendant states: "All contracts were made by defendant's predecessor."

service. If LaPlata ceases to provide service, this does not mean that LaPlata will not continue its collection efforts for past due moneys. Neither utilities nor private businesses are required to subsidize their customers at a loss.

Neither assigned Commissioner Sandoval nor I was aware of Defendant's February 27 letter when the Ruling and Scoping Memo was issued on March 7, 2012. Statements by Defendant's Counsel concerning the possible termination of service appearing in the transcript of the February 16 PHC hearing did gain the Commissioner's attention, however, leading her to include the following footnote² in the Ruling and Scoping Memo:

Once water service has been dedicated to the public, the provider as a de facto public utility may not terminate service without the approval of the Commission. *Beckner v, Otto* (1947) 47 Cal. P.U.C. 480, at 48. Pending the outcome of this proceeding, there is the possibility that LaPlata could be found to be a public utility having an obligation to serve until and unless relieved of that obligation by the Commission. I caution LaPlata against making any statements or taking any action that could be reasonably interpreted by a water customer to mean that pursuit of the instant complaint carries an increased risk of termination of water service.

Had the letter of Defendant's Counsel been sent after Commissioner Sandoval's Ruling and Scoping Memo, it clearly would have run counter to the cautionary footnote quoted above. Coming later, it still is troubling in the tone it takes toward the Complainant and in its implicit disregard for the Commission's authority under § 2707, Pub. Util. Code, to determine whether Defendant is a public utility:

² Assigned Commissioner's Ruling and Scoping Memo, at 3, fn2.

For the purpose of determining the status of any person, firm, or corporation...owning, controlling, operating, or managing any water system or water supply within this state, the Commission may hold hearings and issue process and orders in the manner and to the same extent as provided in Part 1 commencing with Section 201), and the findings and conclusions of the Commission on questions of fact arising under this chapter are final and not subject to review, except as provided in Part 1 (commencing with Section 201).

For Defendant to tell Complainant, “LaPlata does not provide water to you” and, further, “[i]t has never provided water to you,” while at the same threatening to continue efforts to collect a balance owing in fees for standby water service for fire protection invites a very fine line to be drawn in interpreting the Commission’s jurisdiction.³ Any parsing of the statutory bounds of the Commission’s jurisdiction needs to await the compilation of a factual record, complemented by legal briefing. Defendant’s current belief that the Commission is without jurisdiction does not trump the Commission’s clear authority under § 2707 to decide whether it has jurisdiction.

There appear to be legitimate and serious jurisdictional issues posed by the pleadings here. On the one hand it does not take much to constitute a public utility water system;⁴ on the other, service from such a system to select

³ The implication of those words appears to be that until a fire sets off sprinklers there is no water service relevant to the Commission’s jurisdiction. “The only service LaPlata provides to S.W.R.L. is the standby fire protection water for fire suppression,” Defendant’s Answer to Notice and to Complaint and Objection to Jurisdiction, at 2.

⁴ E.g., in relevant part § 240 of the Pub.Util. Code defines a “water system” as including all “pipes...structures, and appliances...operated...to facilitate” the “supply” of “water” for a “beneficial use.”

non-tenants may not be deemed service to “the public or any portion thereof.”⁵ The sooner a factual record can be compiled, to which the relevant law can be applied, the better. In the meantime, Defendant should refrain from threatening cessation of the services it provides Complainant and other similarly situated customers.

4. Schedule

Since there no longer is a reasonable prospect that the parties will reach a stipulation as to jurisdictional facts, I am moving ahead to schedule the dates for serving Opening and Reply Prepared Testimony and for an Evidentiary Hearing.

May 2, 2012	Concurrent Opening Prepared Testimony Served
May 30, 2012	Concurrent Reply Testimony Served
June 14, 2012	Evidentiary Hearing, 10:00 a.m. City of Hemet Council Chambers, 450 E. Latham Ave, Hemet, Ca
July 18, 2012	Opening Briefs filed and served
August 1, 2012	Reply Briefs filed and served
October 2, 2012	Presiding Officer Decision mailed

I may make revisions to the schedule where circumstances warrant.

IT IS RULED that:

1. LaPlata Enterprises, Inc. and its Counsel shall refrain from threatening cessation of fire protection sprinkler water service to S.W.R.L. Inc. and other similarly situated customers during this proceeding. Accordingly, it shall not act

⁵ See definition of “Public Utility” in § 216, Pub. Util. Code.

upon the conditional cessation date of April 1, 2012, contained in the February 27, 2012, letter, Attachment A to this Ruling.

2. The schedule for this proceeding is modified as set forth in Section 4 of this Ruling. The assigned Administrative Law Judge may make revisions to the schedule where circumstances warrant.

3. The parties are notified in Attachment B to this Ruling of the procedures to be followed at the Evidentiary Hearing. This is to inform Complainant, who is not represented by counsel, that the services of the Commission's Public Advisor (publicadviser@cpuc.ca.gov) are available for guidance concerning the preparation of testimony, participation in hearings and post-hearing briefing of issues.

Dated March 28, 2012, at San Francisco, California.

/s/ GARY WEATHERFORD

Gary Weatherford
Administrative Law Judge

ATTACHMENT A

03/13/2012 TUE 10:16 FAX 951 7630380 ERA Excel Realty

015/023

MARK S. ROSEN
ATTORNEY AT LAW
CIVIC CENTER PLAZA TOWERS
600 W. SANTA ANA BOULEVARD
SUITE 814
SANTA ANA, CALIFORNIA 92701
TELEPHONE (714) 285-9838
FAX (714) 285-9840

February 27, 2012

Robyn Garrison
ERA Excel Realty
56461 Highway 371 #B
Anza, CA 92539

Frank Aledam
Frank's Investment Co, Inc.
8702 Lake Ashmere Drive
San Diego, CA 92119

Dear Ms. Garrison and Mr. Aledam,

I am the attorney for La Plata Enterprises. I met both of you at the PUC hearing on February 16, 2012. I am writing to Ms. Garrison as the representative of the Dairy Queen and to Mr. Aledam as the representative of the mini-market/Mobile gas station.

After further research, I am unable to find any contracts that either of you or your clients have with La Plata. If you have any such contracts, please send me copies. Based on what we have, we do not believe there are any contracts with you or your clients.

As I stated in the answer to the PUC and at the hearing, we also believe that there are only four businesses that fall in your category: the Dairy Queen, the Mobile station, Bank of Hemet, and the church. I have not received any list from Ms. Garrison, but, as I said at the hearing, tenants of La Plata fall in a different category. Because of different circumstances, we are also addressing Bank of Hemet and the church separately and outside the scope of the PUC hearing.

La Plata does not provide water to you. It has never provided water to you. All it provides is a fire sprinkler system. La Plata loses money on the system because the charge of \$100 a month does not come close to covering the cost of maintaining the system. La Plata is not a government agency and has no obligation to continue to provide a service at a loss or to subsidize your businesses out of its pocket.

The PUC filing by Ms. Garrison does not prevent La Plata from making business decisions and carrying them out. We are not going to wait for the PUC process, particularly when we do not believe that the PUC has jurisdiction over this fire sprinkler system. (See the

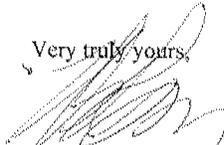
Robyn Garrison
Frank Aledam
February 27, 2012
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hearing officer's references to the Public Utilities Code and the PUC administrative decision.)

Accordingly, we are prepared to wait until April 1, 2012, to resolve this matter. If you want continued service, you must pay the past due amounts billed to you by La Plata, and enter into a contract at a price that allows La Plata a reasonable rate of return. Otherwise, La Plata will have to cease providing service. If La Plata ceases to provide service, this does not mean that La Plata will not continue its collection efforts for past due moneys. Neither utilities nor private businesses are required to subsidize their customers at a loss.

Please feel free to contact me or Mateo Ster directly. I will send you a hard copy of this letter.

Very truly yours,



MARK S. ROSEN

cc: Mateo Ster

(END OF ATTACHMENT A)

ATTACHMENT B

APPENDIX B

PRESIDING OFFICER'S GUIDANCE ON EVIDENTIARY HEARING PROCEDURES AND PROTOCOLS

SUMMARY

Certain Commission rules are highlighted here, and procedures, protocols and assigned Administrative Law Judge (ALJ) practices are cited, for the purpose of assisting parties and the Commission to conduct an efficient evidentiary hearing.

EVIDENTIARY HEARINGS GENERALLY

See Article 13 of the CPUC Rules of Practice and Procedure. The Rules are available at: http://docs.cpuc.ca.gov/WORD_PDF/AGENDA_DECISION/143256.PDF. The Evidentiary Hearing focuses primarily on the (1) cross-examination, redirect and recross, of the sworn witnesses whose written prepared direct testimony has been previously served, and (2) on the offering, stamping and admitting, or not, into evidence of documentary exhibits.

PREPARED TESTIMONY, EXHIBITS AND EXHIBIT FORMAT

Proposed exhibits must have a blank space two inches high by four inches wide on the top sheet, preferably in the upper right corner. (Rule 13.7(a).) If necessary to accommodate the Commission's exhibit stamp, a cover page or cover sheet should be added to the front of the exhibit. Prepared testimony of more than 20 pages must contain a subject index. (Rule 13.8(c).) All exhibits must be clear and concise. Exhibits must contain footnotes to explain sources, as necessary. (See, for example, D.92-12-019, 46 CPUC 2d 538 at 555, 764 (footnote 17); D.93-04-056, 49 CPUC2d 72 at 85-88 on the adequacy and clarity of showings.)

CORRECTIONS TO EXHIBITS

Errata shall be in writing and served before the hearing, to the fullest extent feasible. If necessary, written errata (with copies for other parties, the ALJ and the reporter) may be brought to the hearing. Only as a last resort will oral errata be taken from a witness on the stand. Corrections need not be made to typographical, wording or other minor errors which do not alter the substance of the proposed testimony.

OPENING STATEMENTS

Unless indicated otherwise by the presiding officer, Complainants (collectively) and Defendants (collectively) [or Applicants (collectively) and Protestants (collectively)] will be allowed an opening statement before the cross-examination of witnesses commences.

CROSS-EXAMINATION

Witnesses (i.e., each individual whose prepared testimony has been served in the proceeding) will testify under oath. Complainants will be the first to present witnesses for the Defendants to cross-examine. Defendants' witnesses will follow. Absent good cause, cross-examination shall not be used for discovery or clarification of prepared testimony. (Discovery and clarification were to have been undertaken before hearings began.)

CROSS-EXAMINATION DOCUMENTS

A copy of a document to be used during cross-examination must be provided to the witness's attorney or representative, and the witness, no later than before the witness takes the stand on the day the document is to be used, with sufficient time for reasonable review. Documents in excess of two pages should generally be provided the day before. This procedure helps use limited hearing time efficiently, by avoiding delays while counsel and witness read new material. For good cause, an advance copy need not be provided to opposing counsel and witness (e.g., if the document is for the purpose of impeachment or to obtain a spontaneous reaction).

CROSS-EXAMINATION TIME

It may be necessary to limit the number of witnesses, or the times for cross examination, redirect examination or recross examination. (Rules 9.1, 13.5.)

EXHIBIT NUMBERS AND LISTS

Exhibits will be numbered consecutively. Complainant (or Applicant) shall use numbers 1-199. Defendants (or protestant) shall use numbers 201-399. Joint exhibits shall be numbered 400-499. No later than five (5) business days before the first day of hearing, Complainant (or Applicant) and Defendant (or Protestant) shall each serve its proposed exhibit list on the Administrative Law Judge and active parties. Each party may propose an exhibit description that best describes the item.

STIPULATIONS AS TO FACTS AND AS TO AUTHENTICITY AND ADMISSABILITY

No later than two (2) days before the first day of hearing the parties shall jointly serve their written stipulation, if any, as to uncontested facts and their written stipulation, if any, as to the authenticity and further, where possible, the admissibility of exhibits shown on the exhibits list. Such stipulations are encouraged.

HEARING HOURS

Except when the presiding officer indicates otherwise, hearings will generally run from 10:00 a.m. to 12:00 noon, with two morning breaks, and from 1:30 p.m. to 4:00 p.m., with two afternoon breaks.

COURT REPORTERS, LANGUAGE TRANSLATION, AND CLEAR RECORD

It is vital that the record be clear. Common courtesy should always be extended to hearing room reporters and other participants. Counsel should wait for witnesses to finish their answers, and witnesses should similarly wait for the whole question to be asked before answering. [Where an evidentiary hearing is being translated into English from another language, the translation will be “consecutive” not “simultaneous,” meaning that each speaker will have to pause after a few phrases to allow for translation before proceeding. Efforts will be made to provide headsets for attendees and witnesses who speak the other language.] Counsel shall refrain from simultaneous arguments on motions and objections. Conversations at the counsel table or in the audience are often distracting to the reporter and other participants. Such conversations should be avoided. Time to converse off the record may be requested of the presiding officer.

POST-HEARING MATTERS

Parties have 30 days after the last day of hearing to propose, if they so elect, a settlement by written motion. See Article 12 of the Rules of Practice and Procedure. At the end of the evidentiary hearing, a schedule will be set for common-outline opening briefs and for reply briefs. The proceeding will be submitted after the taking of evidence and the filing of briefs.

MODIFICATIONS TO PROCEDURES AND PROTOCOLS

For good cause any party may move for modification of any of these procedures and protocols. Under Rule 1.2, the Commission may permit deviations from the rules in “special cases and for good cause shown.”

(END OF ATTACHMENT B)