

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Havasu Lakeshore Investments, LLC.,

Complainant,

vs.

Havasu Water Company (U 352-W),

Defendant.

Case 05-04-007
(Filed April 5, 2005)

ADMINISTRATIVE LAW JUDGE'S RULING DENYING HAVASU LAKESHORE INVESTMENTS' MOTION FOR INTERIM RELIEF AND MOTION TO STRIKE HAVASU WATER COMPANY'S POST-HEARING BRIEF

I. Introduction

This ruling denies two motions filed by complainant Havasu Lakeshore Investments (HLI):

- 1) *Emergency Motion of [HLI] for Interim Relief, filed July 8, 2005 (Motion for Interim Relief), and*
- 2) *Motion of [HLI] to Strike Post-Hearing Brief of Havasu Water Company (HWC), filed September 13, 2005 (Motion to Strike).*

In the *Motion for Interim Relief*, HLI asks me to grant it a preliminary injunction requiring HWC to deliver HLI 50,000 gallons of water per day under certain specified conditions. I do not find that HLI has met the four-part test necessary to obtaining a preliminary injunction.

The *Motion to Strike* asks me to strike HWC's post-hearing brief because it does not contain proper citations to the evidentiary record. While HWC's post-hearing brief could be better supported by citations, striking it is a severe remedy

I am not prepared to impose. However, I will require HWC to serve and file a revised version of its brief containing proper citations within five business days of the date of this ruling's mailing.

II. Motion for Interim Relief

A. Overview

In its *Motion for Interim Relief*, HLI seeks an order 1) requiring HWC to provide HLI 50,000 gallons of water per day at HWC's current metered service rate, and 2) enjoining HWC from limiting the manner of connection and use of such water.

HLI is constructing a 320-unit vacation mobile home community called Vista Del Lago near Lake Havasu in San Bernardino County. The project will take three to five years to complete. HWC is a Class D water company with approximately 210 customers.

HWC has provided HLI "upwards of" 50,000 gallons per day during HLI's construction phase,¹ but HLI objects to the conditions HWC has placed on HLI's use of that water. HLI seeks to continue to receive the water under different conditions. While not explained anywhere in its moving papers, I learned at the August 2005 evidentiary hearings on HLI's application that HLI's key concern is that it is currently receiving the water through a fire hydrant into HLI's water tank trucks. HLI wishes instead to receive the water in its own 212,000 gallon

¹ In HLI's post-hearing brief, filed after the August 30-31, 2005 evidentiary hearings, HLI states that it has paid HWC \$13,500 to date for construction water. *Post Hearing Brief of Havasu Lakeshore Investments, LLC*, filed Sep. 9, 2005, Attachment A. According to the same brief, HLI needs "up to 50,000 gpd [gallons per day]. For the past six months HWC has been delivering upwards of that quantity of construction water to [Vista Del Lago]." *Id.*, p. 7.

tank. It does not, however, want the water to be piped into the tank. Rather, it wants to be able to suspend a hose above the tank and have the water fall freely into the tank. HLI desires this arrangement allegedly because HWC's water system is inferior in terms of water pressure to the system HLI has designed for its park.

According to HLI, having water delivered to the tank will allow HLI to ensure there are no leaks, to pressurize the system, to test its fire/life safety systems, and to disinfect and chlorinate the system. HLI also asserts that its inability to fill its 212,000 gallon tank presents a fire safety problem at Vista Del Lago.

HLI failed to explain in its moving papers why HWC is unwilling to provide water to HLI's 212,000 gallon tank. It appears that there are no pipes connecting HWC's water source and the tank. HWC contends that before it delivers water to HLI's tank, HLI must pay for water lines connecting the tank and HWC's water source. HWC alleged that in the past HLI personnel improperly used a fire hose to fill the 212,000 gallon tank with HWC water. At hearing, HWC's owner expressed HWC's concern that the tank and hose are unsanitary and therefore not in compliance with state health code requirements. HWC appears to be concerned that HLI residents, contractors and employees will drink contaminated water and turn to HWC to cast blame. HWC therefore refuses to continue to deliver water to HLI's 212,000 gallon tank.

B. Injunctive Relief Request

HLI claims it is entitled to preliminary injunctive relief under the relevant legal test: 1) likelihood of prevailing on the merits; 2) irreparable injury to the

moving party without the order; 3) no substantial harm to other interested parties; and 4) no harm to the public interest.² I discuss each point below.

1. Likelihood of Prevailing on the Merits

HLI explains that it is likely to prevail on the merits in this proceeding because it has the right to submeter the individual residents at Vista Del Lago in accordance with Pub. Util. Code § 2705.5. I find that this argument is irrelevant to whether HLI is entitled to 50,000 gallons of water per day to facilitate construction of the mobile home park, the relief sought by this motion. HLI does not allege that there are any residents in the mobile home park.

Even if I ultimately find that § 2705.5 applies here, HLI has not established that it currently meets the statutory requirements. The statute only applies to a person, firm or corporation “that maintains a mobile home park....” Vista Del Lago is still under construction. While HLI asserts that mobile homes have already begun to arrive on the property, no one yet lives in them, and the park will take three to five years to complete.

Thus, even if HLI prevails on the merits of its claim that § 2705.5 applies, HLI has failed to make any case that § 2705.5 allows HLI, on an interim basis, to receive construction water in its 212,000 gallon tank. HLI therefore fails the likelihood of prevailing on the merits test with respect to its request for construction water.

² HLI cites *Westcom Long Distance, Inc. v. Pacific Bell et al.*, D.94-04-082, 54 Cal. PUC 2d 244, 259 (1994).

2. Irreparable Injury to Moving Party

HLI claims that it will suffer irreparable injury if the requested relief is not granted. It cites several potential sources of injury: delay in completion of Vista Del Lago, financial loss, injury to business reputation and goodwill.

Interestingly, while it mentions fire hazards elsewhere in its Motion, HLI does not claim a potential fire hazard as an irreparable injury. Instead, all of its claimed injury is financial.

HLI cites *AT&T Communications of California, Inc. et al. v. Verizon California Inc.*³ in support of its motion. However, as HLI concedes, in that case, the Administrative Law Judge simply preserved the *status quo*. Here, in contrast, HLI seeks to change the *status quo* – to force HWC to deliver water in a new and different manner. HLI ignores the distinction between mandatory and prohibitory injunctive relief. An order requiring a party to take affirmative action – a mandatory injunction – is typically more difficult to obtain than a prohibitory injunction which preserves the *status quo*.⁴

Delivery of water to HLI would require a connection between HWC's water source and HLI's tank. HLI has not paid for such a connection. While HLI alleges that it has paid HWC \$16,000 for a "master meter," it does not claim or demonstrate that this payment covers the cost of a pipeline connecting the two parties together. Indeed, at the evidentiary hearing, HLI's owner testified that the meter "would be installed ... approximately 75 feet away from our tank,"⁵

³ D.04-09-056.

⁴ For a general discussion of the difference between a mandatory and prohibitory injunction, see Weil & Brown, *Civil Procedure Before Trial*, Provisional Remedies § 9:547.

⁵ Hearing Transcript, Vol. 1, page 20, lines 25-27.

demonstrating that the master meter has nothing to do with connecting HWC's system to HLI's tank. Thus, HLI appears to be requesting relief without payment.

Nor does HLI demonstrate why injunctive relief is necessary to mitigate financial harm to HLI's business. As Weil and Brown point out, "injunctive relief is unlikely unless someone will be badly hurt in a way which cannot be later repaired."⁶ Moreover, the threat of irreparable harm must be imminent as opposed to a mere possibility of harm some time in the future.⁷ Finally, and most importantly for purposes of this motion, normally, an injunction will not issue where only money is involved. The rationale is that there is no threat of irreparable harm, because monetary losses are compensable in damages.⁸

The only potential harm HLI cites in its motion relates to delay in completing the park, financial harm, and speculative potential injury to HLI's "business reputation and goodwill if it is unable to provide water to its homeowners." As noted above, the park is years from completion, and has no current residents. The only possible claim HLI can make that it is currently operating a mobile home park is the claim that "homes have already begun to arrive on the property." HLI fails to establish why its reputation would suffer, or that any harm is not compensable in damages. Thus, it fails the irreparable harm test.

⁶ *Id.*, § 9:522, citing *People v. Mitchell Brothers' Santa Ana Theater*, 118 Cal. App. 3d 863, 870-71 (1981),

⁷ Weil & Brown, *supra*, § 9:522.

⁸ *Id.*, § 9:524.

3. Harm to Other Interested Parties

HWC concedes that it is able to deliver 50,000 gallons of water per day to HLI. The dispute is over how the water is delivered. In response to HLI's motion, HWC states that it is willing to continue on a temporary basis to furnish 50,000 gallons of non-potable water for construction purposes only. I will enforce this offer, as discussed below. HWC is not willing to deliver the water to HLI's tank, however, because doing so would "include HWC in the responsibility for the contaminated water currently in the system." HWC notes that "[t]here are 100 stub-out faucets already in the Vista Del Lago system and no amount of supervision will eliminate the possibility of a construction worker or someone else drinking from one of the faucets."⁹

HWC's assertion raises at least an inference of harm to other interested parties – namely HWC itself – if HLI is allowed to receive water in its tank at this time. Thus, HLI fails the harm to others test.

4. Harm to the Public Interest

HLI alleges that it meets the public interest test because not granting the motion will threaten the public interest. This is not the test required to obtain injunctive relief. Rather, the moving party must affirmatively demonstrate that changing the *status quo* will do no harm to the public interest.

HLI asserts that change is required for three reasons. First, it states that its inability to fill its water storage tank leaves a portion of its property with inadequate fire safety protection. Second, according to HLI, requiring a

⁹ *HWC Response*, filed July 25, 2005, at 2.

“permanent hook up”¹⁰ to HLI’s tank prevents harm to the public because the County of San Bernardino prohibits HLI from obtaining the water through a temporary connection for water quality reasons. Third, HLI alleges HWC’s conduct is retaliatory and thus against the public interest. According to HLI, HWC imposed unworkable conditions on HLI’s use of the 50,000 gallons of water per day only after HLI filed its complaint with the Commission.

I find the key concern to be the alleged fire hazard. HWC must continue to deliver 50,000 gallons per day of non-potable water to HLI so that it may continue to offer fire protection to its property. However, I agree that it is not feasible for HWC to deliver that water to HLI’s tank through a fire hose or other impermanent connection. Rather, the entire system will have to be upgraded so that HLI’s pipes and tank are connected to HWC’s system at consistent water pressure. How to effect such upgrade, and who pays, is at the crux of this case, and will be the subject of a Commission decision on the merits of HLI’s complaint.

In the meantime, HWC must deliver HLI construction water, but not to HWC’s tank. That tank leads to HWC’s water pipes, and I agree that if the water travels through a hose (as HLI requests), enters the 212,000 gallon tank, and then travels into HLI’s pipes, there is a significant water quality risk to those who might access the water through the many faucets attached to those pipes. Rather, HWC shall continue to distribute 50,000 gallons per day of non-potable water to HLI for construction purposes only (essentially to keep down construction dust through watering). HWC may do so in any way it desires – such as a tank truck

¹⁰ HLI appears to define a “permanent hook up” as one in which a hose drops water freely into HLI’s tank.

– that makes clear to all who may use the water that it is non-potable. The same water may be used to mitigate any fire danger at HLI’s site.

As for HLI’s second allegation of harm – that it desires a permanent hook-up for water quality reasons – I find the facts do not support HLI’s claim. Indeed, HLI does not seek a “permanent hook-up” at all; rather, it seeks to have the water fall freely into the 212,000 gallon tank. Rather than curing water quality risks, this arrangement simply perpetuates them. Thus, this ground does not persuade me to grant HLI’s motion.

HLI’s third allegation of harm to the public interest asserts that HWC is acting in retaliation for HLI filing its complaint. HLI makes the same allegation in its case in chief, and it is premature to rule on it. Even if I were to find evidence of a retaliatory motive, I do not find HLI otherwise eligible for injunctive relief. I thus find that HLI fails the harm to the public interest test.

Thus, I find HLI is not entitled to injunctive relief, and I deny its motion. By the same token, HWC shall continue to deliver 50,000 gallons per day of non-potable water to HLI through any means it desires – such as a tank truck – that makes clear to all who may use the water that it is non-potable.

III. Motion to Strike

HLI’s *Motion to Strike* seeks to have me disregard HWC’s post-hearing brief because it makes factual assertions without proper citation to the record. I agree that HWC’s brief fails in most cases to contain citations, but striking the brief altogether is too draconian a remedy. However, I will require HWC to serve and file a revised version of its brief containing proper citations to the hearing record and exhibits within five business days of the date of this ruling’s mailing.

IT IS RULED that:

1. The Emergency Motion of Havasu Lakeshore Investments for Interim Relief, filed July 8, 2005, and the Motion of Havasu Lakeshore Investments to *Strike Post-Hearing Brief of Havasu Water Company*, filed September 13, 2005, are both DENIED.

2. Havasu Water Company (HWC) shall continue to deliver 50,000 gallons per day of non-potable water to Havasu Lakeshore Investments, LLC through any means it desires – such as a tank truck – that makes clear to all who may use the water that it is non-potable.

3. HWC shall serve and file a revised version of its brief containing proper citations to the hearing record and exhibits within five business days of the date of this ruling's mailing.

Dated October 12, 2005, at San Francisco, California.

/s/ Sarah R. Thomas
Sarah R. Thomas
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge’s Ruling Denying Havasu Lakeshore Investments’ Motion for Interim Relief and Motion to Strike Havasu Water Company’s Post-Hearing Brief on all parties of record in this proceeding or their attorneys of record.

Dated October 12, 2005, at San Francisco, California.

/s/ Antonina V. Swansen
Antonina V. Swansen

N O T I C E

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