PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

November 10, 2010

TO PARTIES OF RECORD IN CASE 09-03-024, DECISION 10-11-002

On October 6, 2010, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 15.5(a) of the Commission's Rules of Practice and Procedure provide that the Presiding Officer's Decision becomes the decision of the Commission 30 days after its mailing unless an appeal to the Commission or a request for review has been filed.

No timely appeals to the Commission or requests for review have been filed. Therefore, the Presiding Officer's Decision is now the decision of the Commission.

The decision number is shown above.

/s/ CHARLOTTE TERKEURST for KVC
Karen V. Clopton, Chief
Administrative Law Judge

KVC:tcg

Attachment

Decision 10-11-002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Jurupa Community Services District, Complainant, vs. Empire Water Company, LLP, Defendant.	Case 09-03-024 (Filed March 23, 2009)

(See Appendix A for List of Appearances.)

PRESIDING OFFICER'S DECISION DISMISSING COMPLAINT AND DECERTIFYING PUBLIC UTILITY

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PRESIDING OFFICER'S DECISION
DISMISSING COMPLAINT AND DECERTIFYING PUBLIC UTILITY

1. Summary

In this adjudication the Complainant, Jurupa Community Services District, sought to have the Commission determine that Defendant Empire Water Corporation is a provider of water services that is violating provisions of the Public Utilities Code and ought to be regulated by the Commission. The Defendant contended that it is not the entity providing the water service, that the water involved is not dedicated to the public and that its activities in any event come within an exemption contained in the Public Utilities Code.

This decision holds that the Defendant is not subject to the ongoing regulatory jurisdiction of the Commission because the Complainant failed to meet its burden of proving that the water delivered to the three customers involved is dedicated to public use. The decision finds, however, that the Defendant violated the Public Utilities Code when it failed to seek and receive Commission approval of a December 2007 assignment of assets from the Commission-regulated West Riverside Canal Company to Defendant. Due to extenuating circumstances, a penalty of $0.00, zero dollars, is imposed for that violation.

The certificate of public convenience and necessity of the West Riverside Canal Company is cancelled.

The Complaint is dismissed.

2. Factual Background

Complainant Jurupa Community Services District (Jurupa) provides water and sewage services to residential, business and public facility connections in Jurupa and some surrounding areas of Riverside County. Empire Water

Corporation (Empire) is the Defendant.[1] West Riverside 350 Inch Water Company (350 IWC) is a mutual water company in which Empire owns an 82.40% shareholder interest. Either Empire or 350 IWC, or both,[2] delivers non-potable water to three sites in Riverside County: (a) Indian Hills Golf Course (Golf Course), (b) a residence of John West (West) located on the Golf Course, which he co-owns, and (c) the Patriot High School (High School) within the Jurupa Unified School District (School District). These sites are within the service area of Jurupa.

Ground water is pumped under claim of right at Well Nos. 5 and 7 owned by 350 IWC, conveyed in a canal right- of-way historically owned and operated by West Riverside Canal Company (Canal Company), a Commission-regulated water company.

The water is piped from the canal to the points of delivery. The canal and its right- of- way were assigned[3] to Empire by Basin Water Resources, Inc. (Basin Water) on December 21, 2007. As of May 10, 2007, Basin Water held the right to purchase various properties and corporate shares from a group of sellers

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[1] The intended defendant was and is Empire Water Corporation, a Nevada corporation that answered the complaint and participated throughout the proceedings. In filings in this proceeding, Empire Water Corporation has been erroneously identified variously as a "company," a limited liability partnership, and a limited liability company. *See* Complainant's Notice served on December 16, 2009, at 1-2, and the Evidentiary Hearing R.T. 31: 7-18.

[2] Whether the water deliverer is Empire or is 350 IWC is a matter of factual dispute discussed later in this decision.

[3] We refer to ownership here in a qualified sense because, as discussed below, the December 21, 2007 assignment of a right to assets was not approved by the Commission under § 854(a), Pub. Util. Code.

composed of Indian Hills Water Conservation Corporation (IHWCC), the Canal Company, 350 IWC, and two individuals, Henry C. Cox II (Cox) and West.[4]

Notwithstanding the December 21, 2007 assignment of the canal assets away from the Canal Company, the Commission currently lists the Canal Company in its records[5] as a regulated water utility. Events in March 2006, as well as current conditions, however, lead Empire to contend that either the Commission's jurisdiction over the Canal Company ended before the December 2007 assignment of the Canal Company's assets or that it should be effectively ended by a decision in this proceeding.

The deliveries of non-potable water to the High School for landscape irrigation were begun by the IHWCC under a July 2, 2002 water supply

[4] The cross ownership profiles for IHWCC, the Canal Company, 350 IWC and the Golf Course are somewhat complex. Before and after the 2007 conveyances Cox and West appear to have each owned 50% of the shares of IHWCC. Cox and West, or IHWCC, appear also to have been and continue to be owner(s) of the Golf Course. As of the May 10, 2007 purchase agreement, 350 IWC had 11 shareholders, including IHWCC (owning 176.03 shares, representing 82.40% of the stock) and Cox and West as individuals (owning 0.33 shares collectively, representing 0.16% of the stock). As of then, the Canal Company had 6 shareholders, including 350 IWC (owning 350 shares, representing 73.9% of the stock), IHWCC (owning 19.68 shares, representing 4.2% of the stock), and Cox and West (owning 1 share collectively, representing 0.2% of the stock). This meant that the selling parties (IHWCC, Cox and West), along with the Canal Company, collectively held 176.36 shares or an 82.56% ownership stake in 350 IWC and, along with 350 IWC, collectively held 370.68 shares or a 78.3% ownership stake in the Canal Company. The December 21, 2007, assignment resulted in Empire gaining control of the water and the canal involved in the deliveries at issue in this adjudication, subject to the requirement of Commission approval set out in §§ 851-854, Pub. Util. Code, and discussed in section 5.2.2 of this decision.

[5] Commission-regulated water companies, including the Canal Company, are listed at: http://docs.cpuc.ca.gov/PUBLISHED/GRAPHICS/107172.pdf

agreement with the School District.[6] The agreement provided for delivery of between 525 and 550 gallons per minute, up to a maximum daily requirement of 0.81 acre feet, at a charge of $250 per acre foot for a 20-year term.[7] No representation is made in the agreement that the $250 figure, or any subsequent escalation allowed for under the agreement, is devoid of profit and reflects only cost of service. Empire directly or indirectly (by exercising its controlling interest in the mutual water company, 350 IWC) continued deliveries under the agreement from December 21, 2007 until a December 4, 2009 assignment of that 2002 agreement from IHWCC to 350 IWC.[8] Since at least December 4, 2009, then, those deliveries have been made by 350 IWC.

The water deliveries to the Golf Course were begun, at a time not established in the record, by IWHCC through an oral water supply agreement under which the charge for water was at cost. Empire or 350 IWC continued those deliveries from December 21, 2007 until a December 4, 2009 written assignment of that oral agreement from IWHCC to 350 IWC.[9]

The foregoing two December 4, 2009 assignments represent what Empire characterizes as a restructuring of pre-existing contracts. Empire contends that

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[6] Water Supply, Sale and Purchase Agreement, EWC Exhibit 106.

[7] EWC Exhibit 106, sections 5 and 6.

[8] Assignment Agreement between Indian Hills Conservation Corporation, West Riverside 350 Inch Water Company, and the Jurupa Unified School District, 2009, EWC Exhibit 107.

[9] Assignment Agreement between Indian Hills Conservation Corporation, West Riverside 350 Inch Water Company, Henry C. Cox, II Trust, and John L. West and Beverly J. West, EWC Exhibit 108. Although bearing the same dates and including some of the same signatories, the assignments covering the water deliveries to the High School and Golf Course, respectively, were separate agreements.

Footnote continued on next page

those assignments were made to both clarify and confirm that all of the water deliveries at issue in this proceeding have been made by a mutual water company, 350 IWC, allegedly either at cost (High School) or to shareholders (Golf Course and West), in conformity with § 2705 of the Pub. Util. Code.[10] Both that characterization and Jurupa's differing viewpoint are analyzed below.

3. Procedural Background

Jurupa filed its complaint against Empire on March 23, 2009, alleging that Empire was operating as a provider of water services, within Jurupa's service area, in violation of § 2701 of the Public Utilities Code. The proceeding was assigned to Commissioner John Bohn and Administrative Law Judge Gary Weatherford on April 21, 2009. Instructions to Empire to answer the complaint were filed on April 21, 2009. On May 26, 2009, Empire filed its verified answer that variously denied and admitted contentions of the complaint, asserted that the water services were exempt from the jurisdiction of the Commission, contended that the complaint failed to state a cause of action, and set forth affirmative defenses to the complaint.

The parties filed a joint case management statement on June 22, 2009, and the prehearing conference was held on June 24, 2009, in Fontana, California. The Assigned Commissioner's Scoping Memo and Ruling Adopting Schedule, filed on July 10, 2009, identified two issues for adjudication: first, whether present water deliveries by Empire come within the Commission's jurisdiction and,

[10] All statutory section references in this decision are to the Public Utilities Code unless otherwise indicated.

second, whether prospective water deliveries, after an intended restructuring of existing contracts, would come within the Commission's jurisdiction.

On July 30, 2009, Empire filed a motion to strike those portions of the complaint pertaining to future water service. On August 17, 2009 Jurupa filed its response to that motion and on August 27 Empire replied. By a ruling on September 8, 2009, ALJ Weatherford struck portions of Jurupa's complaint that contained speculative allegations about future events and conditions that were not ripe for consideration. The ruling removed the issue of prospective water deliveries from the proceeding except to the extent that during the course of the proceeding water deliveries might come to be made under a contemplated restructuring of existing contracts. In the ruling Empire was asked to provide information concerning whether any transfer of assets of the Canal Company had occurred under §§ 851-854 and, if so, whether any Commission approvals or denials had resulted. Empire responded to that request on October 8, 2009, stating that the Canal Company was not a Commission-regulated public utility as of the time that Empire purchased the assets of the Canal Company and therefore that §§ 851-854 were inapplicable.

Opening legal briefs were filed by Jurupa and Empire on October 23, 2009, and reply briefs were filed on November 6, 2009. Jurupa and Empire each served prepared testimony on December 4, 2009 and prepared reply testimony on December 23, 2009. Empire's reply testimony focused on the restructuring of existing water delivery contracts and included copies of two assignments, dated December 4, 2009, purporting to place 350 IWC, the mutual water company in which Empire is a majority shareholder, in the role of fulfilling certain preexisting water delivery obligations of the IHWCC.

In accordance with a December 30, 2009 ruling by ALJ Weatherford, which among other things highlighted certain issues, such as the applicability of §§ 851-854, that needed to be covered in oral argument, Jurupa and Empire filed a joint stipulation concerning the admissibility and authenticity of documentary evidence, with exhibit lists attached, on January 5, 2010.

The evidentiary hearing was held in San Francisco on January 6, 2010, with the record held open for the preparation and possible admission into evidence of an Empire exhibit showing the specific assets of 350 IWC that Empire acquired on December 21, 2007. Such an exhibit,[11] after being reviewed and commented on by Jurupa, followed by reply comments by Empire, was admitted by ALJ Weatherford on April 3, 2010. An order was issued on March 12, 2010, extending the statutory deadline for resolution of the adjudication to December 16, 2010. The proceeding was submitted on May 28, 2010.

4. Issues Before the Commission

The overarching issue that survived the motion to dismiss is: Whether the present water deliveries by Empire Water Company come within the regulatory jurisdiction of the Commission, making the company a public utility. With the evidence raising a question as to what entity is actually delivering the water, Empire or 350 IWC, that initial issue has evolved into a compound one: Whether the deliveries to the High School, Golf Course and West are of water dedicated to public use and, if so, whether they are made by an entity that is subject to the Commission's jurisdiction as a public utility. As explained below, if the subject water is not dedicated to public use or is delivered by a mutual water company,

[11] EWC Exhibit No. 109, the Agreement dated January 15, 2010 and characterized by the parties as the Final Closing Memorandum.

there is no Commission jurisdiction. A sub-issue of the applicability of §§ 851-854, concerning the requirement that certain transfers of the assets or control of a public utility be approved by the Commission, was raised by ALJ Weatherford in a September 8, 2009 ruling[12] and presented again in a December 30, 2009 ruling.[13] Empire subsequently argued against the applicability of those provisions in a response[14] and both parties, as instructed, argued positions on the sub-issue during oral arguments at the Evidentiary Hearing on January 6, 2010.[15]

5. Discussion

5.1. Insufficient Showing that the Water is Being Held Out for Public Use

While § 2701,[16] invoked by Jurupa, sets out the statutory elements for what makes a water company a public utility subject to Commission jurisdiction, there

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[12] Administrative Law Judge's Ruling on Motion to Strike and Request for Information Concerning Transfer of Utility Assets at 6, filed September 8, 2009.

[13] Administrative Law Judge Ruling on Oral Argument and Presentation of Documentary Evidence at 2.

[14] Empire's Response to Administrative Law Judge's Request for Information Concerning Transfer of Utility Assets at 2, filed October 7, 2009. That Response was attached as Exhibit 2 to Complainant's Opening Brief filed on October 23, 2009.

[15] *See* R.T. 7:11-8:19; 18:4-21:18; 42:1-8.

[16] Section 2701 provides in relevant part:

> Any … corporation ...owning, controlling, operating, or managing any water system within this State, who sells ... or delivers water to any person, firm, corporation, municipality, or any other political subdivision of the State, whether under contract or otherwise, is a public utility, and is subject to the provisions of Part 1 of Division 1 and to the jurisdiction, control, and regulation of the commission, except as otherwise provided in this chapter.

is a long-standing threshold common law requirement that the water in question be "dedicated to public use" before such jurisdiction attaches.[17] In Decision (D.) 02-05-014 (2002)[18] the Commission summarized the dedication requirement:

> As stated in *Allen v. Railroad Com*. (1918) [citation omitted], "To hold that property has been dedicated to a public use is 'not a trivial thing' [citation], and such dedication is never presumed 'without evidence of unequivocal intention'" [citation omitted] However, such unequivocal intention need not be expressly stated; it may be inferred from the acts of the owner and his dealings and relations to the property. [citation omitted] Dedication is normally evidenced by some act which is reasonably interpreted and relied upon by the public as a "holding out" or indication of willingness to provide service on equal terms to all who might apply. [citation omitted] (*California Water and Telephone* v. CPUC (1959), 151 C.2d 478.)
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> And, [in determining whether one engaged in the business of supplying water is engaged in a public utility business], [t]he test to be applied is whether or not the petitioner held himself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them. (*Van Hoosear v. Railroad Commission* (1920) 184 C. 553.)

[17] Allen v. Railroad Commission (1918), 179 C. 68, at 85-89.

[18] At 5-6. Marshal et al. v. Warner Springs Estates/Sunshine Water Works, Complaint (C.) 01-12-028.

Here, the deliveries of non-potable water for landscaping are made to one institutional customer (High School), one commercial customer (Golf Course), and one residential customer (West), the last being incidental to the delivery of water to the Golf Course. The deliveries are made under contracts containing terms that are specific to those customers and their places of use. There is no indication in those contracts of any intent that other members of the public, such as any portion of the public residing within feasible reach of the distribution canal and pipelines involved, be served from the water supply. To quote again from D.02-05-014, there is no "indication of willingness to provide service on equal terms to all who might apply." In the present circumstance[19] there is no evidence of a holding out of non-potable water service to the public as a class. The customers of the non-potable water are within the potable-water service area of Jurupa but are receiving the benefit of being able to acquire lower cost non-potable water from 350 IWC under individual water supply contracts.

[19] Jurupa did offer evidence that Empire was engaged in negotiations in 2008 that would have led to Empire supplying irrigation water to one or more parks in the Jurupa Area Recreation and Park District. See draft Agreement Regarding Capital Improvements, attached as Exhibit F to Jurupa's Complaint. In Empire's Answer, at 4, it contended "that any such contract is still in draft form and that any future contract will make clear that 350 IWC shall be the entity providing water to Jurupa Parks." Jurupa also attached to its Complaint, as Exhibit H, a portion of Empire's Form 8-K for December 28, 2007, that states under the heading "Business" that Empire's "primary business is to own, develop and sell water to wholesale customers under long term contract.… We are not presently and have no intention of being a regulated utility selling to individuals." Empire's lack of an intent to be regulated does not determine whether the Commission has jurisdiction. *See* D. 78732 (May 25, 1971), at 17: "It may be that defendant was and still is of the opinion that it is avoiding regulatory status, but such would not be a defense against regulation if the acts actually committed have brought it within the ambit of the regulatory statute." Future actions of Empire or the mutual water company it controls could trigger Commission jurisdiction.

5.1.1. Public Character of School District does not Make the Water Delivered to It Dedicated to Public Use

The School District that has contracted with 350 IWC for the landscape irrigation water for the High School is a public institution. This raises a question whether water service to a public entity necessarily implies a "dedication of water to public use" within the legal meaning of that phrase. Following again the reasoning of, and authorities cited in, Decision (D.) 02-05-014 (2002), we do not view the delivery here of water to an institutional site which happens to be publicly owned to be an "act which is reasonably interpreted and relied upon by the public as a 'holding out' or indication of willingness to provide service on equal terms to all who might apply."[20] We do not see in that delivery an "unequivocal intention" to hold out service to the general public. Instead we see a water delivery to a discrete recipient, that happens to be a public school, on special terms.

In short, unless there otherwise has been a dedication to public use, delivery of water to a public school district, standing alone, does not amount to a dedication to public use.[21]

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[20] D.02-05-014, at 5-6, citing California Water and Telephone v. CPUC (1959), 151 C.2d 478.

[21] An example of how discrete deliveries to a public entity need not be deemed dedications to public use can be found in §2704, which states in relevant part:

> Any owner of a water supply not otherwise dedicated to public use and primarily used for domestic or industrial purposes by him or for the irrigation of his lands, who (a) sells or delivers the surplus of such water for domestic or school district purposes or for the irrigation of adjoining lands, or (b) in an emergency water shortage sells or delivers water from such supply to others for a limited period not to exceed one irrigation season, or (c) sells or delivers a portion of such water supply as a matter of accommodation to neighbors to

Footnote continued on next page

5.1.2. Determining What Entity is Primarily Responsible for Delivery of the Water and Whether that Entity is Exempt from Commission Regulation is not Necessary Due to the Finding that the Water is not Dedicated to Public Use

Mutual water companies, wherein recipients of water are shareholders with the capacity to influence their company's actions, are excluded from Commission jurisdiction.[22] Empire, in addition to its argument that the water is not dedicated to public use, contends that because the provider of the water service is the mutual water company, 350 IWC, and because the recipients are shareholders (Golf Course and West) of that mutual and a public school district (High School), respectively, the deliveries are exempt from Commission jurisdiction by operation of § 2705.[23] Jurupa argues that Empire, holder of 82.4%

> whom no other supply of water for domestic or irrigation purposes is equally available, is not subject to the jurisdiction, control, and regulation of the commission. [Emphasis added.]

[22] *See* Larsen, et al. v. San Jose Water Works, D. 92185 (September 3, 1980), at 24: "a mutual water company is not a public utility, and as such is specifically excluded from our jurisdiction under provisions of Section 2705 of the Public Utilities Code…"

[23] The portion of § 2705 relied on by Empire provides:

> Any corporation or association that is organized for the purposes of delivering water to its stockholders and members at cost…and that delivers water to no one except its stockholders or to any… school district…at cost, is not a public utility, and is not subject to the jurisdiction, control or regulation of the commission.

Empire offered limited evidence that the deliveries to the High School were at cost, Empire's Opening Brief at 6-7, citing rates and charges of the Metropolitan Water District of Southern California. Jurupa, whose burden it was to prove otherwise, presented no contrary evidence.

of the shares of 350 IWC, is the entity really behind the water deliveries and as such should be declared to be subject to the Commission's jurisdiction.[24] If, in addition to the 350 IWC shares, Empire owns the water rights, well facilities and right-of-way assets previously owned by 350 IWC and critical to the subject water deliveries, then Jurupa's suggestion that 350 IWC is a mere "shell" entity would appear to have merit. The factual issue whether Empire made a shares-only, or conversely a shares-and-all-assets or shares-and-select-assets, purchase of interests in 350 IWC,[25] was resolved late in this proceeding in

[24] R.T. 28:3-12.

[25] Jurupa correctly noted inconsistencies in the record as to Empire's representation of the interest in 350 IWC that it purchased in December 2007. The inconsistencies are summarized in Complainant's Additional Response/Comments to Defendant's Exhibit No. 109 (March15, 2010) at 2, line 8 through 3, line 24. Empire's clarification and final position on the transfer of assets is found in EWC Exhibit No. 109, the Agreement dated January 15, 2010 that is characterized by the parties as the Final Closing Memorandum. It is signed by the same sellers whose signatures appear on the May 2007 purchase agreement with Basin Water. Among other things, that Agreement states that Empire acquired neither 350 IWC's "wells and associated pumping equipment used in pumping and providing water to Indian Hills and the Jurupa Unified School District," nor its rights to appropriate water, nor its shares in the Canal Company. EWC Exhibit No. 109, Agreement, at para. 1.1(b)(i). This places 350 IWC, which Empire (owner of 82.40% of 350 IWC's shares) controls, as the owner of the source water, wells, pumps and 73.9% of the shares of the Canal Company. That, combined with the assignment of the School District and Golf Course water supply contracts to 350 IWC on December 4, 2009, makes 350 IWC the entity most directly and dominantly behind the water deliveries at issue in this proceeding. Empire, in its own stead, as owner of the canal asset since the December 2007 assignment, provides a physical link in the distribution system used by 350 IWC in making the deliveries to the High School, Golf Course and West. Since we have determined that a dedication to public use is not implicated by those deliveries, the role of Empire in providing the canal asset does not make it a public utility under § 216(c), a provision designed to bring, among other things, indirect or intermediate public utility functions within the reach of Commission jurisdiction.

Footnote continued on next page

Empire's favor with the admission of an exhibit indicating that 350 IWC retained its groundwater right claims, well and pipeline assets. That factual issue lost its materiality, however, upon our finding that the water is not dedicated to public use.

5.2. Approval Prospectively of the Transfer of the Canal Portion of the Water Distribution System Formalizes the Earlier De Facto Change in the Character of the Canal from being Dedicated to being Undedicated as to Public Use

Conveyance of the water to the High School, Golf Course and West is partially through a canal owned, at least until December 2007, by the Canal Company that holds a certificate of public convenience and necessity from the Commission. Water historically delivered through that canal by the Canal Company could be presumed to have been dedicated to public use because the Canal Company was the holder of a certificate of public convenience and necessity. By the time of the December 2007 assignment, however, the water deliveries through the canal had lost attributes of dedication. The evidence of record shows nothing later than 1948 Canal Company rules, regulations and tariffs,[26] and reveals a diminution in canal use by 2002 , i.e., discrete contract deliveries to only a few customers.[27]

The canal was assigned to Empire in December 2007 without approval of the Commission, a subject discussed below. Since we are approving, below, that

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[26] JCSD Exhibit 5 (Rates, Rules and Regulations of West Riverside Canal Company).

[27] *See*, e.g. EWC Exhibit 106 (July 2, 2002 Water Supply, Sale and Purchase Agreement).

conveyance prospectively in this proceeding, the water delivered in the canal formally loses all traces of any remaining imprimatur of dedication to public use.

5.2.1. The Canal Company Itself has not been but should be Removed from the Commission's Jurisdiction

As noted above, the Commission continues to list the Canal Company in its records as a regulated water utility. References to tariff sheets filed by the Canal Company with the Commission as early as May 1922 appear in the evidentiary record.[28] Events in March 2006, as well as current conditions, however, lead Empire to contend that either the Commission's regulation of the Canal Company ended before the December 2007 assignment of Canal Company assets to Empire or it should be effectively ended in this proceeding.

The March 2006 events cited by Empire are these. On March 8, 2006, Cox, then President of the Canal Company, and a Financial Examiner in the Utility Audits and Finance Compliance Branch of the Commission's Division of Water and Audit, spoke together. The conversation was memorialized in an email[29] from the Financial Examiner to Cox which stated that Canal Company was not a public utility and not under the Commission's jurisdiction if it "only provides water service to school districts, golf courses, parks or other public districts."[30] The e-mail advised that a letter would need to be sent to the Commission "to remove" the company from the Commission's jurisdiction and an exemplar apparently was attached.[31] Cox was requested to notify the Financial Examiner

[28] JCSD Exhibit 5 and EWC Exhibit 101.

[29] EWC Exhibit 102.

[30] *Ibid.*

[31] *Ibid.*

when such a letter was sent so that she could "close the files on [her] end."[32] Thereafter, Cox addressed a letter (on Canal Company letterhead and dated March 16, 2006) to the Chief of the Water Branch of the Commission.[33] The letter declared:

> West Riverside Canal Company has been delivering non-potable water service only to school districts and golf courses. We are requesting to withdraw our Certificate of Public Convenience and Necessity (CPCN) as we no longer operate as a public utility. This is in accordance with Public Utilities Code Section 2705. If you have any questions please contact me … otherwise I will treat this matter as resolved.

Neither Jurupa nor Empire offered any evidence of a response by any one at the Commission to Cox's March 16, 2006 letter.[34] According to a draft 2008

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[32] *Ibid.*

[33] EWC Exhibit 103. The copy of the letter composing the exhibit is stamped "received, Mar 21 2006" and contains a cc: to the Chief of the Commission's Utility Audit and Finance Branch.

[34] Against the backdrop of the March 2006 communications between Cox and Commission staff, it is noteworthy that Schedule 2.1(g) attached to the May 2007 purchase agreement (IHWCC to Basin Water transfer), EWC Exhibit 104, makes the following statement:

> Seller Parties believe in good faith that neither WRCC nor 350IWC are regulated by the Public Utilities Commission, though certain official records appear to indicate otherwise.

Cox, the individual, was one of those "seller parties" and he also was a signatory as "President" on behalf of three other "seller parties": IHWCC, the Canal Company and 350 IWC. The December 2007 Assignment and Amendment Agreement (Basin Water to Empire transfer), EWC Exhibit 105, is linked to that May purchase agreement, so the above-quoted statement was part of the binding instruments by which Empire purchased interests in the Canal Company and 350 IWC.

resolution[35] prepared by the Water and Sewer Advisory Branch of the Commission's Division of Water and Audits, however,

> The Water and Sewer Advisory Branch responded by asking Mr. Cox to inform his customers of his efforts to become deregulated. On September 25, 2008 Mr. Cox forwarded by e-mail a letter from the Jurupa Unified School District dated September 24, 2008 and a letter from the Indian Hills Golf Club, both in Riverside California. Each letter expressed satisfaction with West Riverside's wish to be no longer regulated.[36]

The draft resolution called for the decertification of the Canal Company on the ground that water was being served to neighbors as an accommodation within an exemption provided by § 2704.[37] The draft resolution was withdrawn from the Commission's agenda before any vote was taken.[38] The trail ends there.

Empire argues that, absent express provisions for how a CPCN holder withdraws from Commission jurisdiction, the Canal Company effectively withdrew from Commission jurisdiction in 2006 by seeking, receiving and

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[35] Draft Resolution W-4718 (November 6, 2008), Agenda ID #8005. For access to the draft resolution visit http://docs.cpuc.ca.gov/Cyberdocs/AgendaDoc.asp?DOC_ID=363574 .

[36] *Id.* at 2.

[37] The following portion of § 2704, invoked in the draft resolution, exempts from Commission jurisdiction

> Any owner of a water supply not otherwise dedicated to public use and primarily used for domestic or industrial purposes by him or for the irrigation of his lands, who … sells or delivers a portion of such water supply as a matter of accommodation to neighbors to whom no other supply of water for domestic or irrigation purposes is equally available…

[38] Draft W-4718 was withdrawn from the December 4, 2008 Commission Agenda (#3226), http://docs.cpuc.ca.gov/published/agenda/docs/3226_results.pdf. There is no record of it being revived.

allegedly following guidance provided by a Commission staff member.[39] We disagree and find to the contrary. Once certified by the Commission, a regulated water company as a continuing entity cannot decertify itself; that is an action only the Commission can take. The record shows no formal action by the Commission to decertify, nor adequate grounds for finding that the Commission is estopped from denying a claim that informal decertification, or some kind of functional equivalent, has occurred.

Equitable estoppel against the Commission, a theory that can be inferred from Empire's arguments,[40] cannot succeed here. Equitable estoppel of government action occurs only in exceptional cases.[41] Among the elements that define equitable estoppel is ignorance of the "true state of facts" on the part of the relying party.[42]

Acknowledgement in operative documents of the 2007 transaction[43] that "certain official records appear to indicate" Commission jurisdiction over the Canal Company indicates that enough uncertainty was present as to the status of

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[39] R.T. 15:14-17:7.

[40] R.T. 15:15-17:16.

[41] City of Imperial Beach v. Algert (1962) 200 Cal. App. 2d 48 at 52.

[42] *See* Driscoll v. City of Los Angeles (1967) 67 Cal. 2d 297 at 305.

[43] Schedule 2.1(g) of the May 10, 2007 Stock and Purchase Agreement, EWC Exhibit 104:

> Seller Parties believe in good faith that neither WRCC nor 350IWC are regulated by the Public Utilities Commission, though certain official records appear to indicate otherwise.

The December 2007 Assignment and Amendment Agreement (Basin Water to Empire transfer), EWC Exhibit 105, is built upon that May purchase agreement, so the above-quoted disclaimer was part of the binding instruments by which Empire purchased interests in the Canal Company and 350 IWC.

the Canal Company relative to the Commission to cause the insertion of a qualified representation and disclosure. If there were official records extant in May 2007 showing that the Canal Company was no longer regulated by the Commission, there would have been no need for the qualifying phrase, "though certain official records appear to indicate otherwise," in the disclaimer. We find that there was not ignorance on the part of Empire, assignee in the December 2007 transaction, of the fact that the Commission had not removed the Canal Company from its jurisdiction.

With our approval prospectively of the assignment of the canal to Empire,[44] below in this decision, the Canal Company is now without the canal asset upon which its functioning as a public utility has depended, making the Canal Company a candidate for decertification. The Canal Company no longer provides water service to customers; it has no physical capacity to provide water service. We find that the conveyance of its assets to Empire constitutes an abandonment by the Canal Company of both its commitment and capacity to serve as a public utility. When a Commission-regulated water utility ceases delivering water dedicated to public use, abandons its role of serving water as a public utility, and no longer has a customer base to serve, it becomes a candidate for decertification by the Commission. In this decision we order the cancellation of the Canal Company's certificate of public convenience and necessity.

[44] Assignment and Amendment Agreement, JCSD Exhibit 4; also, *see* Agreement, EWC Exhibit 109.

5.2.2. Violation of Requirement of Commission Approval Before Acquisition or Control of Public Utility and Related Penalty

The Public Utilities Code[45] requires that the transfer of a public utility asset must be authorized by the Commission. Both § 851 and § 854(a) come within our analysis[46] in this instance because the assignor (transferor), Canal Company, is a public utility within the reach of § 851 and the assignee (transferee), Empire, as a non-public utility entity, is within the reach of § 854(a). Section 851 deals with the sale of assets and § 854(a) deals with acquiring control of a public utility.

[45] See, generally, §§ 851-856 (Art. 6, Transfer or Encumbrance of Utility Property). ALJ Weatherford brought §§ 851-854 to the attention of the parties in his September 8, 2009 Ruling on Motion to Strike and Request for Information Concerning Transfer of Utility Assets, at 6.

[46] Jurupa argues that § 851 primarily applies and the transfer is void. R.T.18:4-21 and 42:1-8. Empire argues that § 851 and § 854 are inapplicable. R.T. 18:16-20:27.

The relevant portion[47] of § 851 provides: [48]

> 851. A public utility … shall not sell,…assign,… or otherwise dispose of…the whole or any part of its …plant, system, or other property necessary or useful in the performance of its duties to the public … without first having either secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars ($5,000,000), or for qualified transactions valued at five million dollars $5,000,000) or less, filed an advice letter and obtained approval from the commission authorizing it to do so. …Every sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the advice letter and approval from the commission authorizing it is void.

The evidence of record shows that the Canal Company, as the "public utility" whose canal and other assets were being assigned, never sought approval from the Commission under § 851 for the December 2007 assignment. Thus § 851 was violated. The assignor (transferor) directly involved, the Canal Company, is not a party in this proceeding; the assignee, Empire, is, however, and with the approval prospectively, below, of the assignment, Empire formally now owns the canal that supported in the past the Canal Company's status as a public utility.

In the public interest and for practical reasons, we choose not to seek a penalty for the violation of § 851. The violator, Canal Company, with the

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[47] Empire argues that § 851 relates only to a public utility-to-public utility transfer which did not occur here because the Canal Company allegedly was no longer a public utility as of December 2007 and also that Empire was not a public utility. Nothing in § 851, however, requires that the transfer be to another public utility.

[48] Jurupa bases its arguments primarily on § 851, contending that the December 2007 transfer of the Canal Company, lacking any advice letter approval, is void. R.T. 18: 4-21.

approval prospectively of the assignment, below, becomes a shell gutted of essential assets, eligible for the decertification action taken in this decision. With approval of the assignment going forward, Empire owns a 82.40% controlling interest in 350 IWC which in turn owns a 78.3% controlling interest in the now canal-less Canal Company. By one degree of separation Empire becomes affiliated with and in control of the Canal Company. Under these circumstances, to find Empire, an ongoing entity, in violation of § 854 concerning one side of the assignment transaction, as we do next, is an appropriate action.

Section § 854(a), which applies to corporations in general that acquire or obtain control of a public utility, provides:

> 854. (a) No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission. The commission may establish by order or rule the definitions of what constitute merger, acquisition, or control activities which are subject to this section. Any merger, acquisition, or control without that prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this state, and no subsidiary or affiliate of, or corporation holding a controlling interest in a public utility, shall aid or abet any violation of this section.

Although Empire took part in an assignment that purported to give it effective control of the Canal Company on December 21, 2007, Empire contends that § 854(a) does not apply, arguing that the Canal Company was no longer a public utility as of that date (a proposition that we have rejected above), and therefore that no acquisition or control of a public utility occurred in the assignment.

Empire also cites certain Commission decisions[49] in support of an argument that the reason for Commission review is protection of the public interest and where there are no changes in the terms or conditions of service a failure to have obtained contemporaneous Commission approval is curable by a voiding of the particular transfer up to the present, combined with an approval of the transfer going forward.[50]

Jurupa views the transfer of the Canal Company to Empire to be void, yet would appear not to oppose approval of the transfer if the Commission regards Empire to be a public utility subject to Commission jurisdiction.[51]

We conclude that the acquisition of a majority stake in the majority owner (350 IWC) of the Canal Company constitutes the acquisition "or control either directly or indirectly" of a public utility.

Where circumstances and the public interest have warranted, the Commission has approved, long after the fact but only going forward, purchases made of public utility assets without contemporaneous Commission approval. In D.09-03-032 the Commission granted, prospectively not retrospectively,[52] the

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[49] D.08-11-034, D.09-03-032 and D.09-06-024. *See* R.T. 19: 16–20:19.

[50] R.T. 20:28-21:13.

[51] R.T. 9: 23-10: 7.

[52] To grant approval retroactively would be to take an action "*nunc pro tunc*" which, translated, means "now for then," Black's Law Dictionary (9th Ed.) or "that a thing is now done which should have been done on [an earlier] specified date," 35A C.J.S., Federal Civil Procedure § 370, at 556 (1960). Denials by the Commission of requests for *nunc pro tunc* treatment are common, e. g., D.08-02-016 at 12:

> The purpose of these laws [including § 851] is to enable the Commission to review a proposed transaction, before it takes place, so that the Commission

Footnote continued on next page

joint application of a seller and buyer (Lake Forest Utility Company and Tahoe Park Water Company) for approval of an asset sale that had been consummated 12 years earlier without contemporaneous Commission approval. The buyer had been operating the water system, had implemented new rates, had prepared a plan for improving service and was facing a delay in its application for state grant funding for improvements due to the ownership issue created by the unapproved transfer. The Commission gave belated approval under the "unique facts"[53] before it in that proceeding.

Belated approval, again having prospective effect only, was given to a transfer of control through reorganization of a telecommunications company in D.04-09-023. The application[54] to the Commission for authority to transfer was filed five months after the triggering reorganization occurred. As bases for granting approval, the Commission found that the application was unopposed, that there was "no administrative reason to withhold authority," that there was no appearance of public harm, that the public might benefit to the extent of potential expanded and improved service, and that "ordinary business transactions that are subject to Section 854(a)…should be approved absent a compelling reason to the contrary."[55] While approving the transfer of control

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may take such action as necessary to protect the public interest. Granting retroactive authority would thwart the purpose of these laws.

[53] D.09-03-032 at 33.

[54] A.02-11-027 (Application of Comm South Companies, Inc. (U-5943-C) and Arbos Communications, Inc. for Approval of Transfer of Control to Arcomm Holding Co.).

[55] D.04-09-023 at 6-7.

prospectively, the Commission imposed a fine of $5,000 for the violation of § 854(a).

We do not have before us a formal application, joint or otherwise, for either an § 851 or § 854(a) approval of the December 2007 assignment of assets to Empire, including the canal and the ownership of a controlling interest in 350 IW which in turn owned the controlling interest in the Canal Company. While the "Seller Parties" and the assignor Basin Water are not parties to this proceeding, the assignee Empire is. The "Seller Parties" have implicitly reaffirmed the December 2007 assignment by executing the January 15, 2010 Agreement known as the Final Closing Memorandum.[56]

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to § 854(a).[57] The primary standards used by the Commission in assessing a transaction under § 854(a) are whether the transaction will serve the public interest[58] or, conversely, adversely affect the public interest.[59] Allowance of the assignment of the Canal Company assets to Empire going forward is not harmful to the public interest. Without evidence to

[56] EWC Exhibit 109 at 5 (signature page).

[57] D.95-10-045, 1995 Cal. PUC LEXIS 901, *18-19; and D.91-05-026, 40 CPUC2d 159, 171.

[58] D.00-06-005, 2000 Cal. PUC LEXIS 281, *4; D.99-04-066, p.5; D.99-02-036, p. 9; D.97-06-066, 72 CPUC2d 851, 861; D.95-10-045, 62 CPUC2d 160, 167; D.94-01-041, 53 CPUC2d 116, 119; D.93-04-019, 48 CPUC2d 601, 603; D.86-03-090, 1986 Cal. PUC LEXIS 198 *28 and COL 3; and D.8491, 19 CRC 199, 200.

[59] D.00-06-079, p. 13; D.00-06-057, p. 7; D.00-05-047, p. 11 and Conclusion of Law (COL) 2; D.00-05-023, p. 18; D.99-03-019, p. 14; D.98-08-068, p. 22; D.98-05-022, p. 17; D.97-07-060, 73 CPUC2d 601, 609; and D.65634, 61 CPUC 160, 161.

the contrary, it is in the public interest to see non-potable, rather than potable, water being used for landscaping.

Both Jurupa and Empire favor resolution of the issue of the applicability of §§ 851-854. Empire has asked that a "remedy be imposed expeditiously" if Commission approval of the asset transfer from the Canal Company to Empire is deemed to be required.[60] We conclude here that Commission approval is required under both § 851 and § 854(a) and that the assignment of the Canal Company assets and control of the Canal Company are void until the effective date of this decision, but grant the remedy of approving the assignment prospectively.

Jurupa contends that the lack of Commission approval to date should translate into a conclusion that Empire has been operating illegally.[61] We find that Empire has been acting in violation of § 854(a) and to that extent has been operating illegally. This poses the question whether Empire, as the assignee in the December 21, 2007 transaction, should be penalized[62] for not seeking approval under § 854(a) and for operating under an unapproved, and therefore void, conveyance agreement.

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. The Commission indicated that the degree of wrongdoing and the public interest are among the factors to be considered.[63] Here, the degree of wrongdoing, though demonstrable, was not egregious. As

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[60] R.T 21:14-18.

[61] R.T. 8:22-27.

[62] Violations of § 854(a) are subject to monetary penalties under § 2107.

[63] 1998 Cal. PUC LEXIS 1016, *76.

noted above, there is no evidence that any individual was harmed by Empires' violation of § 854(a) or that Empire materially benefited from its unlawful conduct. These same facts also indicate that the public interest was not seriously harmed by Empire's unlawful conduct.

To explore fully the bases for setting a monetary penalty, a supplemental evidentiary hearing would be in order. Given the extenuating circumstances cited above relative to the impact and scale of the violation, and the incomplete administrative record surrounding the events of March 2006, however, we conclude that the public interest will be better served by conserving the resources of the parties and of the Commission and closing the adjudication without a monetary penalty. Based on the existing record, then, we conclude that Empire should be fined $0.00, zero dollars, for violating § 854(a). We emphasize that the zero amount of the fine we impose today is tailored to the unique facts and circumstances before us here.

5.3. Conclusion

Jurupa has failed to meet its burden of proving by a preponderance of the evidence that Empire is a public utility subject to the Commission's regulation as a water service provider. Jurupa specifically has failed to show that the water delivered to the High School, Golf Course and West is dedicated to public use within the meaning of applicable law and that failure is dispositive. Empire, as an acquirer through assignment of the core assets of, and control over, the Canal Company, a Commission-regulated water corporation, is subject to the jurisdiction of the Commission, however, in connection with the § 854(a) requirement that transfers receive Commission approval. Empire violated § 854(a) but extenuating circumstances lead us to set the penalty at $0.00, zero dollars.

This decision is based on current conditions. Empire, as a corporation that has been carrying considerable debt[64] while simultaneously delivering water at cost, could make choices in the future that would have it begin to function as a public utility subject to the Commission jurisdiction.

6. Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Gary Weatherford is the assigned ALJ and Presiding Officer in this proceeding.

Findings of Fact

1. Complainant Jurupa is a potable water service provider in areas of Riverside County.

2. Empire Water Corporation is the correct name for the Defendant that is incorrectly named "Empire Water Company" in pleadings in this proceeding. The Empire Water Corporation (Empire) is a Nevada Corporation operating as a purveyor of non-potable water in Riverside County, California.

3. Empire acquired the West Riverside Canal in December 2007 from the Commission-regulated Canal Company without Commission approval.

4. The 350 IWC is a mutual water company that owns claims of appropriative water rights to ground water, two wells and pump facilities, and pipelines connected to the canal that is owned and controlled by Empire.

5. The foregoing rights and facilities of the 350 IWC and Empire, respectively, underlie the delivery of non-potable water to the High School, the Golf Course,

[64] *See* unaudited balance sheet in the Form 10-Q filed by Empire with the Securities and Exchange Commission for the quarterly period ending December 31, 2008, JCSD Exhibit 1 at 1-3.

and the residence of West. Those recipients are the sole customers of that non-potable water.

6. The Golf Course and West are shareholders in 350 IWC.

7. The School District and the Golf Course each have water supply contracts with 350 IWC that cover the non-potable water that they receive.

8. When the assets of the Canal Company were assigned to Empire on December 21, 2007, the Canal Company continued to hold a certificate of public convenience and necessity from the Commission. Current records of the Commission show that the "Western Riverside Canal Company (WTD 370)" is a Commission-regulated investor owned water utility operating in the Counties of Riverside and San Bernardino. After Empire acquired the canal assets of the Canal Company a resolution was prepared by which the Commission would have removed Canal Company's certificate of public convenience and necessity but that resolution was withdrawn from the Commission's meeting agenda and never voted on.

9. Neither 350 IWC nor Empire has dedicated the foregoing non-potable water to public use. The non-potable water supply is being delivered at cost to two discrete land areas for landscape irrigation under separate water supply contracts containing different provisions. Neither purveyor is holding that water out to serve more generally the public.

Conclusions of Law

1. To be declared a public utility, a water corporation must hold itself out as a purveyor of water that is dedicated to public use within the meaning of the law.

2. A purveyor that does not deliver water dedicated to public use should not be declared to be a public utility under §§ 216 and 2701-2705 of the Pub. Util. Code.

3. When a water corporation that is not a public utility acquires assets or gains control of a public utility, § 854(a) of the Pub. Util. Code requires that the acquisition or gaining of control be either approved by the Commission or considered void. Where circumstances justify, and in the furtherance of the public interest, the Commission, in its discretion, can approve prospectively transfers for which Commission approval was not contemporaneously sought.

4. Defendant Empire Water Corporation violated § 854(a) of the Pub. Util. Code by failing to obtain contemporaneous Commission approval of that portion of the December 22, 2007 assignment pertaining to the assets of the West Riverside Canal Company.

5. The Commission has authority under § 2107 of the Pub. Util. Code to impose penalties for violations of the § 854(a) requirement of advance Commission approval of transfers of control.

6. If a Commission-regulated water utility ceases delivering water dedicated to public use, abandons its role of serving water as a public utility, and does not have a customer base its certificate of public convenience and necessity should be cancelled.

O R D E R

IT IS ORDERED that:

1. The Complaint of Jurupa Community Services District in Case 09-03-024 is dismissed with prejudice on the ground that none of the non-potable water delivered directly or indirectly by Defendant Empire Water Corporation, or by the West Riverside 350 Inch Water Company in which the Defendant holds a majority interest, is dedicated to public use.

2. The assignment of assets of the West Riverside Canal Company to Empire Water Corporation is approved prospectively as of the effective date of this decision.

3. Empire Water Corporation is fined $0.00, zero dollars, for violating Section 854(a) of the Public Utilities Code.

4. The certificate of public convenience and necessity of the West Riverside Canal Company is cancelled.

5. The Complaint is dismissed.

This order is effective today.

Dated November 10, 2010, at San Francisco, California.

APPENDIX A

************** SERVICE LIST *************
Last Updated on 10-NOV-2010 by: JVG
C0903024 LIST

************** PARTIES ***************

Thomas J. Wingard
ED CASEY
ALSTON & BIRD, LLP
333 S. HOPE STREET, 16TH FLOOR
LOS ANGELES CA 90071
(213) 576-1087
Thomas.wingard@alston.com
For: Empire Water Co.

Julie Hayward Biggs
GREGORY M. MURPHY
BURKE WILLIAMS & SORENSEN, LLP
2280 MARKET STREET, SUITE 300
RIVERSIDE CA 92501
(951) 788-0100
jbiggs@bwslaw.com
For: Jurupa Community Services District

************ STATE EMPLOYEE *************

Gary Weatherford
Administrative Law Judge Division
RM. 5020
505 VAN NESS AVENUE
San Francisco CA 94102 3298
(415) 703-2056
gw2@cpuc.ca.gov

*********** INFORMATION ONLY ************

Tammy L. Jones
ALSTON & BIRD LLP
333 S. HOPE STREET, 16TH FL.
LOS ANGELES CA 90071
(213) 576-1087
tammy.jones@alston.com
For: Empire Water Company, LLC

Ed Casey
ALSTON & BIRD, LLP
333 S. HOPE STREET, 16TH FLOOR
LOS ANGELES CA 90071
(213) 576-1000
Ed.casey@alston.com

Gregory M. Murphy
BURKE WILLIAMS AND SORENSEN, LLP
444 SOUTH FLOWER STREET, SUITE 2400
LOS ANGELES CA 90071
(213) 236-2835
gmurphy@bwslaw.com

Peter Jensen
CEO
EMPIRE WATER COMPANY, LLP
25 ORCHARD
LAKE FOREST CA 92630
(949) 215-1100
pljensen@empirewater.com
For: Empire Water Company, LLP

Eldon Horst
General Manager
JURUPA COMMUNITY SERVICES DISTRICT
11201 HARREL STREET
MIRA LOMA CA 91752
(951) 685-7434
For: Jurupa Community Services District

(END OF APPENDIX A)