

SEP 3 1992

Decision 92-09-033 September 2, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Janet A. Webb,

Complainant,

vs.

Robert Ukestad, DBA West San Martin Water Works, Craig Pierce, DBA Briarwood Nursery, and Earl Powell, DBA San Martin Water Works, Inc.,

Defendants.

Case 92-07-013
(Filed July 7, 1992)

Janet A. Webb, for herself, complainant.
Craig Pierce and Robert Ukestad, for themselves,
and Rolf M. Bondelle, Atty. at Law,
as Conservator of Earl Powell, defendants.
James S. Rood, Attorney at Law, for the
Division of Ratepayer Advocates.

ORDER RESCINDING TEMPORARY RESTRAINING ORDER

Background

On July 22, 1992 we issued Decision (D.) 92-07-073, a Temporary Restraining Order (TRO), directing Craig Pierce, co-defendant in this proceeding to immediately reconnect his well so as to provide service to the customers of Earl Powell, doing business as San Martin Water Works. We also directed that public hearing be conducted as soon as possible concerning the circumstances surrounding this complaint proceeding.

Administrative Law Judge (ALJ) John Lemke ruled on July 24 that oral argument would be held August 3 in San Martin, at which parties could argue the applicability of Public Utilities (PU) Code Section 2704 to the circumstances of this proceeding.

Oral argument was held in San Martin on August 3 with all parties attending and presenting argument. The Commission's

Division of Ratepayer Advocates (DRA) also participated, and was represented by legal counsel.

Our TRO was issued as an emergency measure, based upon information contained in the complaint of Janet Webb, and in the affidavits of two Commission staff members stating that the water furnished by Pierce was necessary for the health and safety of the customers of Earl Powell.

Oral argument on the applicability of PU Code Section 2704 was held because of information contained in the Answer to Complaint filed by Robert Ukestad, Manager and part owner of West San Martin Water Works, Inc., alleging that Mr. Pierce had provided water for the past several years to Earl Powell's customers on an accommodation basis, under a contract providing that the well may at any time be shut off from the public utility system to serve the needs of Pierce's nursery business; that Pierce has been compensated for the use of his well, i.e., wear and tear on the well, pumping expense, etc., rather than for the amount of water delivered; and that Pierce is solely in the nursery business, and supplies water to West San Martin Water Works, Inc., who in turn provides it primarily to serve the needs of several customers in the eastern portion of the Powell system.

After the proceeding was set for oral argument, Craig Pierce filed his Answer to Complaint, asserting generally that since he has provided water solely on an availability basis, for the purpose of assisting his neighbors, the TRO was inappropriately issued.

The above information set forth in Ukestad's and Pierce's answers was uncontroverted during the course of oral argument. The issue concerning whether the TRO should be lifted depends upon the applications of PU Code Sections 216(c) and 2704(a) and (c).

PU Code Section 216(c) states:

"When any person or corporation performs any service for, or delivers any commodity to, any person, private corporation, municipality,

or other political subdivision of the state, which in turn either directly or indirectly, mediately or immediately, performs that service for, or delivers that commodity to, the public or any portion thereof, that person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

And PU Code Section 2704 provides as follows:

"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 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."

Janet Webb argued that the provisions of PU Code Section 216(c) are clear and should be found applicable to these circumstances.

DRA conceded that there is indeed a conflict between the two above quoted PU Code sections.

Rolf Bondelie answered the complaint for Earl Powell. He is Powell's court-appointed conservator. Bondelie included with his Answer an order issued in the Superior Court of California, County of Santa Clara dated June 16, 1987 appointing West San Martin Water Works, Inc. receiver to assume possession of the property of San Martin Water Works, and to operate the system until the conservators of Earl Powell are willing and able to operate the system as determined by the County Department of Health, or until such time as a district is in place and able to provide service to

the customers of Earl Powell. Bondelle argues essentially that because Pierce has been acting as a public utility, for compensation, the TRO should be continued.

In light of the information contained in the answers to the complaint by Ukestad and Pierce, as well as that presented during oral argument, it appears to us that the circumstances of Pierce's water delivery definitely fall within the exemption stated in PU Code Section 2704(a), and possibly within the exemption stated in Section 2704(c). We are bolstered in this decision by La Mirada Water Co. v McComber (1961) 58 CPUC 118, and Regina v. Mendocino State Hospital, et al. (1953) 53 CPUC 108. Pierce is owner of a water supply not otherwise dedicated to public use, and his well water was and is used primarily for his own industrial purposes i.e., his nursery business, only surplus water being delivered to the public utility water system.

We find that the delivery of water from Pierce's well to the public utility water system is not subject to the jurisdiction of this Commission. It follows that the TRO should be rescinded.

Ukestad stated that negotiations are underway to provide water to the eastern portion of Powell's system at increased pressure through means of a booster pump, expected to be installed by West San Martin Water Works, Inc., no later than the middle of September. Moreover, Pierce has reconnected his well to the water system and is delivering water under the same conditions which existed prior to his disconnection from the system on July 17, including the condition that his own nursery business has first priority to the water. Pierce agreed to this reconnection for one month. The ALJ informed the parties that any further action by the Commission on the complaint in chief would await the (hopefully) successful outcome of the installation of the booster pump.

To keep this matter before us, and to ensure that the water pressure problems do not extend indefinitely, we will direct Ukestad to provide the ALJ with written progress reports, with

copies to the complainant and co-defendants, until the problems are remedied.

Findings of Fact

1. By D.92-07-073 the Commission issued its TRO directing Pierce to reconnect his well to the public utility water system operated by West San Martin Water Works, Inc. on behalf of the customers of Earl Powell, doing business as San Martin Water Works.

2. The TRO was based upon information contained in the complaint of Janet Webb, as well as information set forth in the affidavits of two Commission staff members that the water from Pierce's well is necessary to maintain the health and safety of the customers of Earl Powell.

3. Pierce's well is not otherwise dedicated to public use, and is used primarily for servicing his nursery. The water provided to Earl Powell's customers is surplus water over that required to serve Pierce's nursery.

4. Information contained in the answers to the complaint by Ukestad and Pierce indicates that Pierce's delivery of water to Powell's customers falls under the exemption from regulation described in PU Code Section 2704(a), and possibly falls under the exemption stated in Section 2704(c).

Conclusion of Law

The TRO directing Pierce to reconnect his well to the public utility water system operated by West San Martin Water Works, Inc. on behalf of the customers of Earl Powell, doing business as San Martin Water Works should be rescinded.

IT IS ORDERED that:

1. The Temporary Restraining Order in Decision 92-07-073 directing Craig Pierce to reconnect his well to the public utility water system operated by West San Martin Water Works, Inc. on behalf of the customers of Earl Powell, doing business as San Martin Water Works, is rescinded.

2. Further hearings on this proceeding, if necessary, will be held at a time and place to be determined.

3. Robert Ukestad shall furnish Administrative Law Judge John Lemke with a monthly progress report sent to his office at 505 Van Ness Avenue, San Francisco, CA 94102, commencing October 1, 1992 and on the first working day of each month thereafter, concerning the status of measures being taken to remedy the low pressure problems currently experienced by the customers of Earl Powell. A copy of each report shall be furnished to complainant and each co-defendant.

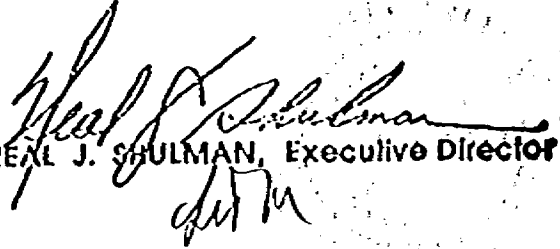
This order is effective today.

Dated September 2, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

Commissioner Patricia M. Eckert,
being necessarily absent, did not
participate.

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY


NEAL J. SHULMAN, Executive Director