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Decision 98-03-078 March 26, 1998 \*\*

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

John P. Duffy d/b/a Vintners Inn,

Complainant,

vs.

Larkfield Water Company,

Defendant.

**ORIGINAL**

Case 94-09-038  
(Filed September 16, 1994)

John P. Duffy, for Vintners Inn, complainant.  
Cooper, White & Cooper, by E. Garth Black, for  
Larkfield Water Company and Herbert E. Niederberger, Jr.,  
for Citizens Utilities Company, defendant.  
Norman H. Knoll, Attorney at Law, for Department  
of Health Services, interested party.  
Arthur Gallegos for the Water Division.

**O P I N I O N**

**Summary**

By this decision, we find that pursuant to a Memorandum of Understanding (MOU) between this Commission and the California Department of Health Services (DHS), the DHS has primary jurisdiction to determine the necessity for installation of backflow prevention devices (BFPDs) on water lines serving residential and/or commercial premises to protect public water sources from pollution or contamination from unapproved water sources. We also find that it is DHS's policy to require the installation of such devices in all situations where property is served by both an approved water source and an unapproved source and no waiver is requested by the supplier of the approved water. We further find that defendant's applicable tariff assesses the cost of such installation against the subscriber of its water service.

On September 23, 1996, DHS issued a Compliance Order requiring Larkfield to cause a BFPD to be installed in each of two water lines servicing complainant's place of business.

Complainant argues that since the water in the well on his property meets state standards for a non-community water supply and is therefore potable, it realistically constitutes no threat to Larkfield's supply, and a waiver of DHS's requirement should have been requested by Larkfield and granted by DHS. Complainant further argues that if BFPDs are required by DHS to be installed, it should be at the expense of Larkfield.

Arguing that its tariff requires that the cost of such installation be borne by the subscriber rather than by it, defendant requests assessment of the \$16,500 installation cost against complainant.

We hold that under the peculiar circumstances of this individual case, Larkfield should deviate from its tariff and bear the cost of the installation, rather than pass that cost on to complainant or other ratepayers.

### **Background of Proceedings**

#### **Nature of Complaint**

By complaint filed with this Commission on September 16, 1994, John P. Duffy, d/b/a Vintner's Inn (Duffy or complainant) sought an order preventing Larkfield Water Company (defendant or Larkfield) (originally sued herein as Citizens Utilities) from terminating water service to his premises because of his refusal to install a BFPD on an eight-inch diameter fire suppression line and on a six-inch domestic water line servicing his place of business.

#### **Complainant's Facilities**

Duffy, a California licensed Professional Engineer, is the managing partner of three highly successful business enterprises situated on two large level plots of land located a few miles north of the City of Santa Rosa in Sonoma County. On the first parcel, a 40-acre plot, is situated Vintners Inn, a 44-room European style luxury hotel, and John Ash & Co., a nationally recognized restaurant. These facilities are located in

separate buildings. The combined facilities have been described most fittingly as a "kind of Lexus, Mercedes Place" (TR. 93). The second parcel, a 50-acre plot, is devoted exclusively to viticulture by complainant's third enterprise, Le Carrefour Vineyards and Winery. The vineyard surrounds three sides of the 40-acre plot and supplies grapes for the winery.

### **Water Supply**

#### **Larkfield Water**

Vintner's Inn and John Ash & Co. are provided water service by Larkfield through a six-inch diameter domestic water main, and fire suppression service by Larkfield through an eight-inch diameter main. Both mains connect with meters in a metering box (curb box) at the property edge adjacent to a public road right-of-way. The meters in turn are connected on their downstream side with complainant's private piping system which distributes the metered Larkfield water to satisfy the domestic and sanitary needs in Vintner's Inn and John Ash & Company.

The only places where the Larkfield domestic water may be released outside the buildings occupied by Vintner's Inn and John Ash & Company are through hose "bibs" situated on the outside of each of those buildings. Each hose bib contains a one-way antisiphon device (Exh. 16) through which water flows from inside the buildings to the outside when the water is turned on by a key designed for that purpose. In this regard, the bib is designed in such a way that it cannot be turned on except by the use of that type of key. The anti-siphon device is designed in such a way that anything passing through the device may flow in one direction only, and the device automatically closes in the event of a cessation of flow in the design direction of flow. This device is also a fail safe device in that the valve(s) inside the device are always in a closed position except when water is flowing through it in the design direction. In short, the bib's default position is closed. Pressure applied in the direction opposite to the design direction of flow results in an increase in resistance to the reverse flow by pressing the valve's spring-loaded check ball(s) or flap barrier tighter to its seal. As an additional safeguard against the possibility of hooking up a hose to the bib in such a way that

water could possibly be forced into the bib in a reverse flow, the bib has a male thread which effectively precludes a reverse hookup of a hose. Even if such an event were to occur, the anti-siphon valve's design would prevent entry of fluids into the protected line. That is the purpose of and the reason why the device is called an anti-siphon or one-way valve.

Larkfield's eight-inch diameter fire suppression pipeline connects with complainant's dedicated fire protection system comprised of heat-activated water sprinklers situated in the guest rooms of Vintner's Inn as well as throughout the common rooms and space of both Vintner's Inn and John Ash & Company. The fire suppression supply lines are also connected to fire hydrants and fire hose connections on the exterior and interior of Vintner's Inn and John Ash & Company. In order to be used, protective caps on the hose fittings on the hydrants and discharge fittings must be manually removed with a wrench, and the water flow manually activated. Special threading on the exterior of these fittings allows direct connection only to fire hoses or to suction hoses from the input side of fire pumper trucks to supply water to the pumper. The pumper then pumps the water at high pressure through a truck-mounted distribution manifold to which hoses for fire fighting are connected. This design precludes inadvertent reverse connection of hoses that might otherwise connect the discharge side of the pumper to the hydrant or other fixture.

#### **Well Water**

The 50-acre plot and the vineyard operation on it is completely separate from the inn and restaurant operations and receives no water whatsoever from Larkfield. Rather, the vineyard's water needs are supplied from a high-quality well located on vineyard property at a point 675 feet from the boundary line of the 40-acre tract occupied by the Vintners Inn and John Ash & Company, and approximately 800 feet from either building. The well is used for watering of lawns and landscaping on the premises, supplying water for a 100-gallon spray rig used in a periodic agricultural spray program, and for irrigation of grape vines comprising the vineyard. Neither the well nor any of the irrigation and landscape watering piping carrying water from the

well is connected in any way or at any point with the separate pipes carrying Larkfield's water or with the fire suppression and domestic water distribution systems supplying the inn and/or the restaurant.

Well water distribution lines are buried 18 to 24 inches below the surface of the ground, and, with one exception, are located at least 200 feet distant from any water line containing Larkfield water. The single exception is where one landscaping water pipe runs approximately 15 feet from one corner of Vintner's Inn. As noted, the water from the well is not used for any domestic purpose. The Larkfield water supplied through the six-inch domestic line is the "house water system" (Exh. 1, Sub-Exh. B, p. 1), used for drinking, washing and sanitation. As previously noted, at no point is the irrigation system (supplied from the well) connected with the house water system, nor does it come within 200 feet from the house water system distribution lines, with the single exception noted above.

Though not used for several years (Exh. 1, Sub-Exh. S), the vineyard irrigation system is capable of being used if necessary. It is a "drip" type system wherein water from the well is directed through a pressure reduction valve which reduces the online pressure to approximately five pounds per square inch (psi) and then is directed through a timer and then through perforated plastic tubing situated along and above each row of vines. When activated by the timer, water flows through the tubing and drips at a predetermined rate directly onto the soil at a point where each individual vine's root stem projects from the soil.

Water for landscaping and lawn watering is directed from the well through a system of individual distribution pipes connected to "pop-up" sprinkler heads located at points where water is needed to supply the needs of lawn, trees, and plants. This sprinkler system is activated by a number of timing devices which determine when and for how long various parts of the system controlled by a particular timer will operate. When a sprinkler head is not actually spraying water, the water pipe to that sprinkler head is unpressurized. When the timer controlling a particular group of sprinklers is activated, the supply lines to those sprinkler heads become pressurized (40-60 psi) and water flows to each of the sprinklers that make up that part of the system. The on-line

water pressure then opens a check valve in the sprinkler head and causes a portion of the head to rise or "pop-up" above the surrounding surface and water is released in any of several predetermined patterns and distances. Obviously, the higher the water pressure reaching the sprinkler head, the larger the spray pattern. Under normal circumstances, shrubs, plants, and trees require water to be sprayed over small sized patterns requiring low pressure. Higher pressure settings are used on open spaces such as lawns where water is needed to be sprayed in greater volume over larger patterns.

In addition, in various strategic locations around the grounds are situated a small number of "plug in" surface level water fixtures connected to the well water distribution system. To these fixtures, hoses may be connected in order to reach areas not covered by the spray patterns of the fixed "pop up" spray nozzles. The lines to these surface level fixtures are normally pressurized, but no water can flow from the fixture until a special fitting is inserted into the surface fixture, and the water manually turned on by a key designed for that purpose. In short, it is a fail-safe system which requires that both of the above actions be performed before water can escape from the fixture.

#### **Well Water Quality**

The well, which was drilled in 1982 and constructed to State of California standards for a public water well, was professionally designed and drilled to a depth of 240 feet; has a concrete casing to a depth of 50 feet at its upper end; and is covered with a concrete cap to prevent contamination by animals or vineyard products falling into it or by surface water runoff.

During the discussion phase of the dispute between complainant and Larkfield, water samples were collected from the well on July 1, 1994, and analyzed by Brelje and Race Laboratories, Inc., a State-approved testing laboratory located in Santa Rosa. The laboratory conducted all California State Health Department recommended tests on the samples, and all results, except for Manganese which the report noted could be easily filtered out, were within the required limits for non-community water systems (Exh. 1, Sub-Exh. 0; Exh. 4). That is, it is potable and safe for human consumption, but under the rules of the DHS may be utilized only for private use of the property owner, not as a

community water source. Since the State allows unlimited private use, including human consumption, of this water by the property owner, one must conclude that the DHS does not consider its consumption to be a threat to the health of humans.

#### **Larkfield's Position**

Citing fears of contamination of its water system through "possible" cross-connection with the water originating from complainant's well, Larkfield insists that complainant install, at his own expense, a BFPD in each of the water lines (6" domestic and 8" fire suppression) supplying Vintners Inn and John Ash & Company. It is undisputed that the cost of installation of the BFPDs would be approximately \$16,500. In the event that complainant does not install the BFPDs, Larkfield intends to terminate water service to complainant's property. It was that threat to terminate service that led Duffy to file the complaint instituting this proceeding.

In support of its position, Larkfield claims that Title 17, California Code of Regulations (CCR), §§ 7583 - 7605 (Exh. 5) and Larkfield Tariff rule 16 (Exh. 10) mandate the installation of BFPDs based on the presence of a "non-approved" water source on complainant's premises. In this regard, Larkfield cited the presence of the "non-approved" well on complainant's property, as well as certain specific conditions which it claimed existed on complainant's premises from which there was a "potential" for cross-connection between complainant's private water system and Larkfield's water system, that is, conditions from which Larkfield's water system could be contaminated by cross-connection with complainant's private water system.

#### **California Public Utilities Commission Hearings and Proposed Decision**

Since this proceeding originated by a complaint filed by Duffy seeking to prevent Larkfield from terminating water service unless he installed the BFPDs in Larkfield's water lines servicing his property, this Commission's jurisdiction was not questioned, and the issue of whether some other agency, State or Federal, had primary jurisdiction was not raised by anyone. Testimony elicited from complainant at the hearing and in subsequent proceedings in which DHS personnel were involved indicated that though

not served with formal notice of hearing, DHS was long aware of the dispute between Larkfield and complainant; DHS field personnel had for an extended period of time taken an active role in attempting to resolve the underlying dispute between Larkfield and Duffy; and at least two officials of DHS were personally advised by Duffy of the scheduled date, time and place of the Commission's evidentiary hearing. Further, Larkfield never objected to the Commission's exercise of jurisdiction over this proceeding; never mentioned the existence of a MOU; and never called any DHS personnel as direct or rebuttal witnesses at the hearing. In short, neither Larkfield nor DHS objected to Commission jurisdiction over the controversy nor took any steps designed to apprise the Commission of the existence of a MOU or that DHS might have some jurisdictional interest. This acquiescence to Commission jurisdiction on Larkfield and DHS's part allowed the proceedings before this Commission to continue, ultimately resulting in a conflict between State agencies and causing unnecessary expense to all parties concerned.

In the absence of any challenge to its jurisdiction having been made at the Prehearing Conference (PHC) held in this matter on March 7, 1995, or at any other time, the Commission held a regularly noticed evidentiary hearing on April 25, 1995. At the hearing, little emphasis was placed on the presence of the "nonapproved" well on complainant's vineyard property, but Larkfield relied mainly on certain specific conditions which it alleged constituted threats of "possible" or "potential" cross-connection with Larkfield's water system. Recognizing that virtually anything could be viewed as a "possible" or "potential" threat, the Administrative Law Judge (ALJ) sought to determine how realistic the "threats" in actuality were; thus he spent considerable time examining and evaluating the alleged "threats" in great detail.

In support of its contentions, Larkfield produced as its sole witness Ronnie A. LeDoux, Operations Manager of Citizens Utilities Company's Sacramento District water operations, who testified that he is certified by the American Water Works Association, California/Nevada Section, as a Cross-Connection Control Program Specialist. In addition, LeDoux stated that he is an American Water Works Association certified Cross-Connection Backflow Prevention Assembly general tester, and is a water



treatment operator certified with the DHS. Further, LeDoux testified that he is the sole owner of a private backflow assembly testing service, and is a consultant for cross-connection inspections evaluating State of California facilities, private businesses, and small water agencies for potential hazards requiring cross-connection protection (Exh. 11). The pre-filed testimony of LeDoux setting forth the results of his October 11, 1994 cross-connection survey of complainant's property and the reasons supporting his opinion were placed in evidence (Exh. 11), and LeDoux was cross-examined by complainant. Following the completion of the hearing and the submission of post-hearing briefs, the matter was submitted.

#### **The Administrative Law Judge's Proposed Decision**

On or about January 17, 1996, in accordance with PU Code § 311, the Commission issued and distributed the ALJ's Proposed Decision (PD) in this proceeding, noting that the Commission would consider the PD as item number CA-11 on the "Consent Agenda" at its January 24, 1996, Commission meeting. In the PD, the ALJ, relying solely on the testimony and evidence produced at the hearing, rejected LeDoux's testimony in its entirety because he found LeDoux biased in favor of his employer, Citizen's Utilities, with which Larkfield had recently merged, and from which LeDoux's private business received approximately 95% of its income, and on the further ground that LeDoux's conclusions and allegations concerning conditions on Duffy's property simply were not supported by the evidence of record. The PD recommended that the Commission order Larkfield to cease and desist from its efforts to compel complainant to install the BFPEs under threat of service termination. It further recommended that if Larkfield desired or felt compelled to install the BFPDs, it could do so, but at no charge to complainant or other ratepayers.

Subsequent to its initial release but prior to the Commission's January 24, 1996, meeting, the PD was removed from the list of matters to be considered at the meeting.

On March 20, 1996, Larkfield filed a motion to set aside submission and reopen the record of this proceeding to receive testimony from DHS, alleging that the DHS:

"has testimony relevant to the issues raised by this complaint case which should be considered by the Commission before it issues a decision in this matter."

The motion continued that [DHS] has:

"developed significant expertise regarding public water supply issues and has promulgated regulations intended to protect the public water supply... These regulations specifically address the use of backflow prevention devices. Because this case focuses on the necessary measures to be taken to protect the public water supply and the required use of backflow prevention devices, testimony provided by the state agency with the most expertise on the issue should be considered before the Commission makes its decision."

However, the motion failed to explain, as required by the Commission's Rules of Practice and Procedure (rules), why the testimony sought was not offered before the case was submitted for decision, or why the testimony sought had not been available to be offered prior to submission of the case for decision. The closest Larkfield came to an excuse for its omission was to state that at the time of hearing, it didn't realize the relevance of the testimony.

Finding Larkfield's excuse inadequate, the ALJ drafted a ruling denying Larkfield's motion to set aside submission, which was not issued, as the assigned Commissioner had the matter under advisement, but which was embodied in an Assigned Commissioner's Ruling to thereafter be issued.

#### **DHS Action**

On or about October 17, 1996, during a recess in an unrelated proceeding, the ALJ (who presided over both proceedings) was told by counsel who represented Larkfield that the ALJ would "receive something from DHS" within the next few days. No further explanation was given. A few days later (October 21, 1996), the ALJ received an envelope bearing the return address of Larkfield's attorney's law firm and postmarked October 16, 1996, at San Francisco. Inside the envelope was a copy of DHS Compliance Order (CO) 02-03-96CO-004 dated September 27, 1996, signed by Catherine S. Ma, P.E., Chief, North Coastal Region, Drinking Water Field Operations Branch,

DHS, indicating that under DHS regulations, BFPDs are required at complainant's premises, and directing Larkfield to install the devices by December 1, 1996.

With the above-referenced copy of the CO, Larkfield's counsel enclosed a request that since the DHS order "resolves the ultimate issue", the Commission should "issue its order dismissing the complaint and requiring Larkfield to apply its tariff to this matter." Larkfield's tariff, of course, assesses the entire cost of installation against the consumer.

#### **Assigned Commissioner's November 18, 1996 Ruling**

Troubled that a DHS field supervisor, having knowledge that this Commission had conducted an evidentiary hearing and had issued a PD resolving the dispute between Larkfield and complainant, would thereafter issue an ex parte Compliance Order involving the same matter without first advising or consulting with the Commission and/or ascertaining whether the parties had waived any DHS jurisdiction, the Assigned Commissioner issued a ruling on November 18, 1996, reopening this proceeding for the limited purpose of taking evidence on specific questions. In that ruling, the Assigned Commissioner specifically denied Larkfield's May 1996 motion to set aside submission and reopen the record.

#### **Questions Directed to be Answered**

In his November 18, 1996 ruling, the Assigned Commissioner sought answers to ten specific questions. Each is discussed and answered below.

##### **a. Does a Valid DHS Order Exist?**

Although never produced of record or even mentioned prior to the evidentiary hearing, it appears that sometime in the middle or late 1980's, the Commission and DHS entered into a MOU under the terms of which DHS exercises primary jurisdiction over the interpretation of the provisions of Title 17 of CCR as they relate to protection of the safety of the State's water supply.

Had any party, intervenor, or other entity having the remotest interest in this subject raised the issue of the existence of the MOU, inquiry would have led to the discovery of such an agreement, and the dispute between complainant and Larkfield

would simply have been immediately referred to DHS for determination of the limited issue of whether Title 17 required the installation of BFPDs on complainant's property. All other questions, including who would bear the cost of the installation would be decided by this Commission. One might expect the Commission's Water Branch to show some interest in such matters and advise of the existence of an MOU at some point prior to the hearing and subsequent issuance of a PD; however, since the complaint in this case involved and was limited to only a single consumer, it may be understandable that this matter went unnoticed by Water Branch staff.

That complainant invoked the jurisdiction of the Commission rather than DHS is likewise understandable since the threat from which complainant sought protection was termination of service by a public utility. There is no reason why complainant would or should know of the existence of an MOU between DHS and this Commission. What is surprising and very troubling to us is that neither DHS nor Larkfield raised the issue until after the ALJ's proposed decision in complainant's favor had been issued. Larkfield deals with both the Commission and DHS on water matters on a regular basis and clearly knew or should have known of the existence of the MOU and was obligated to raise the matter before forcing the complainant to spend a great deal of time and money pursuing his complaint before the Commission. That being the case, the question arises whether the failure of Larkfield to challenge the Commission's jurisdiction, and Larkfield's subsequent active participation in a hearing on the merits should be deemed a waiver of DHS's primary jurisdiction and consent to the Commission's action. It also raises the question of who should bear expenses incurred by the complainant, as well as by the Commission, in the needless proceeding.

We consider Larkfield's failure to object to the Commission's assumption of jurisdiction and its subsequent participation in a full scale evidentiary hearing to be a waiver; however, in light of DHS's ex parte action in issuing the compliance order directing Larkfield to install the BFPDs in its water lines servicing complainant's premises, and solely to avoid an inter-agency dispute, we will, in the spirit of comity, respect DHS's exercise of jurisdiction, and take official notice of Compliance Order No. 02-03-96CO-004 dated September 27, 1996. Thus, for the purpose of this proceeding, we

will accept DHS's compliance order as a valid order binding on Larkfield and compelling it to install the BFPDs in its lines servicing complainant's property. In giving official notice to DHS's order, we specifically note DHS has no jurisdiction over the issue of who is to pay for the installation, as that matter is for the Commission to decide.

**b. Was Due Process Afforded Duffy?**

At a March 26, 1997 conference of all parties to examine the nature and extent of DHS's involvement in the dispute between complainant and Larkfield and the activities leading to the issuance of DHS's compliance order, it was determined that DHS did not hold any type of evidentiary hearing prior to issuing the compliance order requiring the installation of BFPDs in the lines servicing complainant's premises. The Commission's hearing transcript contains the following colloquy between the ALJ and DHS's counsel regarding whether an opportunity existed for complainant to challenge before the DHS the assertion that conditions on his premises require the installation of BFPDs.

"ALJ Ramsey:

"He [Duffy] filed his complaint under a complaint procedure within the jurisdiction of this Commission, and we accepted it as such, and it was tried, very frankly, on a purely factual basis.

"We just didn't feel that the facts as presented on that record that was presented by whoever Larkfield's witness was would support a requirement to put in a back-flow device.

"It's obvious that the Department of Health Services disagrees, and I understand that the Department has a blanket rule that if there's an auxiliary supply of water, you get a back-flow device, period.

"Isn't that correct?

"Mr. Kroll [DHS's counsel]: "That is correct.

"ALJ Ramsey: So there is no meaningful hearing process that would determine the necessity for the installation of a back-flow device under the circumstances present at Mr. Duffy's place of business.

"Mr Kroll: The factual determination of whether there is an auxiliary supply could, of course, be raised, and it's a factual determination that would be made by Department staff in doing an inspection. (RT. p. 39, lines 2 thru 23.)

"ALJ Ramsey: ... But my question was where is there an opportunity for Mr. Duffy or anyone in his position to be heard prior to a determination by the Department of Health Services?

"And I think your answer is: There is none.

"Mr. Kroll: There is not a formal proceeding; that is correct.

"The Legislature has not established one.

"ALJ Ramsey: He would have to seek it in a Writ of Review—

"Mr. Kroll: Yes.

"ALJ Ramsey: - - or in a Writ of Mandamus, some extraordinary writ?

"Mr. Kroll: Yes." (RT p. 40, line 17 thru p. 41, line 2.)

It is thus obvious that insofar as the DHS is concerned, whether the physical conditions on complainant's premises do or do not constitute a hazard or are such that a cross-connection is highly unlikely is immaterial. As a matter of policy, the only fact that matters is the presence of an "auxiliary water supply" (a well) on the premises. If there is one, DHS policy dictates the installation of a BFPD, regardless of the quality of the auxiliary water supply or how remote the threat of contamination.

While such an uncompromising, broad-brush, "all-or nothing" approach to regulatory enforcement is far less burdensome and less expensive to DHS than actually testing the quality of the water in the "offending" auxiliary source and evaluating the real level of risk, if any, that water poses, and while it may in some case protect a public water supply from possible contamination from a private well, it also, as a practical matter, results in the installation of an untold number of otherwise unnecessary and useless BFPDs at huge cost--not to DHS or the profit-motivated water companies--but to the land owners. It is also not lost on us that the only choices available to the

landowner under DHS's policy are the installation of BFPDs at considerable expense or shutting in the "offending" well. If the land owner cannot afford the cost of BFPDs, he/she must shut in the well and make up the reduction in available water from some other source, namely the water company. This, of course, financially benefits the water company, so it is to their advantage to actively seek the installation of BFPDs, rather than to attempt to ascertain whether such an auxiliary water source really constitutes a threat to its water supply.

We cannot, in good conscience, state that such a procedure comports with our concept of due process or even fundamental fairness. The fact that the landowner may have a right to after-the-fact judicial review should he know how and when to proceed, is not, in our opinion, the equivalent of a predetermination evidentiary hearing before an impartial trier-of fact. Since DHS's CO is directed to Larkfield and not Duffy, and Duffy was not a party to DHS's compliance proceeding, it is not a certainty that Duffy would even have standing to seek review. While it is logical to think that Duffy is an aggrieved party and as such should have standing, we think it safe to think that an allegation of standing would be challenged.

**c. Was Duffy Provided Notice of a DHS Proceeding?**

According to Duffy's statement at the March 23, 1997 conference, he had no knowledge of or information concerning DHS's activities between the issuance of the ALJ's PD on January 17, 1996, and his receipt of DHS's compliance order sometime after September 27, 1996, and had no idea that DHS was proposing to take any action. Neither, according to Larkfield's counsel, did Larkfield. Both parties, as well as the ALJ, state that the compliance order came "out of the blue" as a complete surprise, and without notice to any party to this proceeding, nor an opportunity for any party to appear before it and be heard. We find it incomprehensible that DHS, knowing that the Commission had entertained jurisdiction over this matter and had the matter under active consideration, proceeded in this fashion.

**d. Was Duffy Provided an Opportunity to Present Evidence and Confront Witnesses?**

During the several years this matter was pending before DHS's local office in Santa Rosa, Duffy discussed with one or more DHS engineers on several occasions the physical layout of the two water systems servicing his property. He also expressed to DHS why, in his opinion as a licensed professional engineer, there was no threat of cross-connection, and why the two water systems on two separate parcels of land could co-exist without BFPDs. To this extent, he had the opportunity to present "evidence" to DHS on his behalf. He did not, however, have an opportunity to present evidence or argument under oath in any formal proceeding before DHS, nor was he, in any DHS proceeding, allowed to confront or cross-examine sworn witnesses against him. The only opportunity he had for such confrontation and examination of witnesses against him was in the Commission's evidentiary hearing.

**e. Does Duffy Have a Right to an Administrative Appeal of the DHS Order?**

No. There is no provision in DHS's regulations for administrative review of DHS's compliance order. The only review provided for DHS's orders is judicial review by the Superior Court. However, to be considered, the petition for review must be filed with the court within 30 days from the date of issuance of the order sought to be reviewed. In this case, the compliance order, which is dated September 27, 1996, is directed to Mr. Ted Freuer, District Manager, Citizens Utilities Company of California, Larkfield District; not to Duffy. It requires nothing of Duffy, nor does it appear to direct Duffy to do anything. A separate sheet (not a formal certificate of service attached to the compliance order) indicates that copies of the order were mailed to Tony Lindstrom, Superintendent, Larkfield Water Company; Duffy; and this Commission on that date. Duffy was unable to recall the exact date on which he was served, therefore, in the absence of evidence to the contrary, we will accept the notation of mailing as prima facie evidence of the date of mailing. It is worthy of note that the compliance order provides no information advising Duffy of his status or whether or not he is entitled to



seek review of the order. Further, it contains no information regarding how one would obtain review of DHS's order. In passing, it is noted that the ALJ did not receive a copy of the compliance order until October 21, 1996, some three weeks after the order was issued.

**f. Does the DHS Field Engineer Have Authority to Issue an Order Requiring a BFPDs?**

Yes. The compliance order directing the installation of the BFPDs in the two Larkfield water lines servicing complainant's premises was signed and issued by Catherine Ma, P.E., Chief, North Coastal Region, Drinking Water Field Operations Branch [of DHS]. At the March 26, 1997, conference in this proceeding before the ALJ, Ms. Ma stated that as Chief of the North Coast Region of DHS's Drinking Water Field Operations Branch, she has authority to sign orders such as that involved here. We have no evidence to the contrary.

**g. What Were the Circumstances of the DHS Investigation-- Who Performed the Investigation, When Was It Performed, What Was Found?**

According to the narrative contained in the compliance order, two separate cross-connection surveys were performed on the complainant's premises; the first on December 6, 1993, and the second on October 11, 1994. Both surveys, were conducted by Larkfield, and it was determined that within the premises of the Vintners Inn there exists "an unapproved alternate water source" from "an irrigation well", a cooling tower, a sewage pumping station, a spa, and kitchen facilities associated with a commercial kitchen [we note that the well is located on the 50-acre vineyard parcel and Vintner's Inn and John Ash & Co. are located on the separate 40-acre parcel. Thus, the well is not located on the same parcel of land as the inn and restaurant].

The survey also determined that there was "no physical interconnection between the potable water supply of the Vintners Inn and that of the irrigation system supplied by the well."

Specifically, according to the CO, 17 CCR § 7604(b) requires a reduced pressure (RP) principle backflow prevention assembly at the user's connection on

premises where there is an unapproved auxiliary water supply with no interconnection. A double check (DC) valve assembly may be provided in lieu of a RP if approved by the health agency and water supplier.

Also, according to the compliance order, 17 CCR § 7604(a)(2) requires an air-gap separation (AG) at the user's connection on premises where there is a waste water pumping station and there is no interconnection with the potable water system. A RP may be provided in lieu of an AG if approved by the health agency and water supplier.

Further, according to the CO, 17 CCR § 7604(a) requires an AG separation at the user's connection on premises where hazardous substances are handled in any manner in which the hazardous substances may enter the potable water system. The cooling tower is such a facility. A RP may be provided in lieu of an AG if approved by the health agency and water supplier.

In addition, according to the CO, 17 CCR § 7604(c) requires a DC valve at the user's connection for a fire system that is directly supplied from the public water system where there is an unapproved auxiliary water supply on or to the premises with no interconnection.

According to the CO, based on the above, a RP principle backflow prevention assembly is required on the six-inch diameter domestic water main and a DC valve is required on the eight-inch diameter fire suppression main.

Also, the CO stated that "[T]he existence of a spa as well as other associated commercial kitchen facilities such as grease traps, coffee making urns, dishwasher, steam table, soda dispenser, etc. pose an additional potential for cross connection hazards within the premises of Vintners Inn." However, the other hazards previously stated above (i.e., the unapproved irrigation well, the sewage pumping station, and the cooling tower) are much more critical from a public health standpoint, and the backflow protection required in accordance with § 7604, Title 17, CCR supersede those that would be required for spa and other kitchen facilities.

The above-mentioned allegations contained in the CO concerning conditions at complainant's premises are identical to the allegations in LeDoux's pre-filed testimony which were considered at the evidentiary hearing. Based on the evidence

produced before the ALJ at the evidentiary hearing, each of those allegations was found to be without merit.

**h. If Duffy Was Not Afforded Due Process  
In The DHS Proceeding, Then How Well Did  
Larkfield Represent His Interests?**

Larkfield did nothing to protect or further Duffy's interests. In fact, it did everything it could, with the exception of advising the ALJ of the existence of the MOU, to defeat Duffy's complaint. As the caption of this proceeding indicates, Duffy is the complainant and Larkfield the defendant in the dispute between them. As such, they are adversaries and their interests were and are diametrically opposed.

**i. Are All Other Hotels/Inns Operating In Similar Fashion  
Required to Have a BFPD Installed?**

The only reference to this question contained in the record appears on page 60 of the hearing transcript of the PHC held on March 26, 1997. There the complainant, when summarizing his opposition to the DHS procedure for requiring the installation of BFPDs stated:

"...Okay. I still stand on my position that this isn't required on my property.

"I think this is a very good Title 17, Article 2, is a very good section, it's required. But it's just been used on everybody now, and it's been used in this manner of: I'll turn your water off. Put it in. And, therefore, people do it.

"And if we do have an evidentiary hearing, I will bring in a lot of people that they say hotels have installed this thing.

"Well, they've installed it because they did oppose it, they got attorneys that figured out the cost of it, and it's kind of like whiplash; in other words, \$5,000: Pay them off and get them out of here."  
(RT p. 60, lines 7-23.)

Based on the above, we cannot say definitively that hotels/inns and others operating in similar fashion are required to have a BFPD installed; however, given the vigor with which Larkfield and DHS have pursued this matter, one must assume so.

**J. Are the Circumstances Surrounding the Issuance of a Valid DHS Order of Such a Nature As to Warrant Having Duffy Pay For the Installation of a BFPD? If Not, Do the Circumstances Warrant Having Either the Shareholders or Ratepayers Pay For the Installation or Some Portion Thereof?**

Under the provisions of Larkfield's tariff rule 16, no physical connection between the potable water system of the public utility and that of any other water supply or source of actual or potential contamination will be permitted except in compliance with the regulations of the DHS contained in Title 17, §§ 7583-7605 of the CCR under Regulations Relating to Cross-Connections.

We note that the above provision prohibits only physical connections between the potable water system of the utility and that of any other water supply or source of actual or potential contamination. On its face, it does not prohibit coexistence of a utility water system and a system supplying water from another source. Here, Larkfield concedes that there is no physical connection between the piping system which distributes its water on Duffy's property and the private piping system connected to the well on Duffy's property. In fact, no pipes in either of the two systems come within 200 feet of each other except at one point where a single pipe in Duffy's system comes within 15 feet of a building supplied by Larkfield's system. Therefore, insofar as this section of Larkfield's tariff is concerned, the two systems may coexist without the necessity of BFPDs being placed on Larkfield's lines.

Tariff rule 16.C.2, however, provides:

**"2. Backflow Preventers Required:**

**"The utility will evaluate the degree of potential health hazard to the public water supply which may be created as a result of conditions existing on a user's premises. As a minimum, the evaluation will consider the existence of cross-connections, the nature of materials handled on the property, the probability of a backflow occurring, the**

degree of piping system complexity, and the potential for piping system modification."

It was Larkfield's evaluation of conditions on complainant's property that the ALJ found to be without merit.

In spite of the above language that indicates that the utility will evaluate conditions on a customers Property to determine the degree of hazard presented by conditions on the property (emphasis added), rule 16.C.2.a requires the installation of "approved backflow preventers of required type" where a fresh water supply which has not been approved by the DHS is already available [on customer's premises] from a well, spring, reservoir or other source.

Rule 16.C.3 requires any such installation [of BFPDs] to be "... by and at the expense of the customer, in a manner approved by the utility and the public health agency having jurisdiction." (Emphasis added.)

Rule 16.C.4, requires the customer to have any such BFPD tested at least annually, or more frequently if deemed necessary by the utility or health agency, by a tester who has demonstrated their competency to the utility or health agency. (emphasis added.)

The above cited provisions are weighted entirely in favor of the utility, and DHS's inflexible policy of requiring the installation of a BFPD where an "unapproved" source of water, no matter how pure, is available on the premises, in reality, precludes the exercise of judgment regarding the level or degree of actual hazard, if any, posed by any such alternate water source, and forces the customer into the Hobson's choice of paying for the expensive installation of a BFPD in each of the water supplier's lines to his property, or terminating use of the alternate water source (the well in this case) and making up the water loss with additional water purchased from the utility. Either way, the customer loses. Given the findings of fact developed from the evidence and record produced at the evidentiary hearing before us at a time when we entertained jurisdiction over this proceeding (see Findings of Fact in the ALJ's PD) we are of the opinion that being forced to make that choice without the right to demonstrate the actual, as opposed to presumed, risk posed by the well or other non-approved source

would deny Duffy or anyone in his position due process. That being the case, we are hard-pressed to justify imposing on complainant the cost of compliance with a tariff rule which in theory is logical and beneficial, but in actual practice in this case results in the expenditure of a great deal of money by the customer to protect against a risk that is, in actuality, less than that from surface rain water runoff, which requires no such protection.

Here there is no argument that the well on complainant's property is a thoroughly professional project. The evidence produced at the hearing before the ALJ is that it was designed and drilled by professionals. It is 240 feet in depth, has a 50-foot concrete casing with a concrete cap at its upper end to prevent contamination, and the design and construction was under the watchful eye of the complainant, himself a licensed California Professional Engineer. After construction, the well passed all State construction standards tests and the water itself tested out as potable and, with the exception of manganese which is easily filtered out, fit for human consumption as a non-community water source. The potential for contamination of Larkfield's water by that well water is, in our opinion, non-existent.

#### **Imposition of Costs of Installing the BFPDs**

While DHS exercised jurisdiction to determine whether BFPDs must, under their regulations, be installed, DHS readily admits that the question of who is to bear the cost of that installation rests with this Commission.

After reviewing the facts of this case, we are convinced that the cost of such installation should be borne by Larkfield and/or its shareholders, and not by complainant or any other ratepayers. We feel that because no pre-determination procedure currently exists by which the real degree of threat to a community water supply from an "auxiliary water source" may be measured, the landowner has no effective way to challenge the combined actions of the water companies and DHS. As we have observed above, if there is a non-approved well or other "auxiliary water supply" on a landowner's property, all the water company has to do is request DHS to issue a compliance order directing the installation of BFPDs and such an order will be

issued as a matter of course without prior notice to the landowner or an opportunity for the landowner to challenge or otherwise be heard with respect to the water company's request which will be carried out at the landowner's expense under tariff rule 16. In our opinion, judicial review is not equal to, nor a substitute for, a pre-action evidentiary hearing.

Further, in view of the unnecessary expense to which the complainant, as well as this Commission was put by Larkfield's failure to raise DHS's primary jurisdiction, to allow Larkfield to invoke the "customer pays for BFPDs" provision of its tariff rule 16, would be contrary to the public interest. While we will not at this time institute an investigation into those and similar tariffs of other water suppliers to determine if they should be revised to provide a hearing mechanism to decide who should pay for such devices and under what circumstances, we are not convinced that the consumer's rights are best served by the present tariff.

### **Conclusion**

After reviewing the ALJ's PD, which while not adopted remains a part of the record in this case, and reviewing all the facts and circumstances surrounding this matter, we elect to direct Larkfield to deviate from that portion of its tariff rule 16 that imposes the cost of installation of the BFPDs ordered by DHS on complainant, and direct that all costs of said installation be borne in this instance by Larkfield or its shareholders, and not passed on to complainant or other ratepayers. This decision is based solely on the unique facts and circumstances of this particular case, and as such, should not be considered precedential.

Judicial review of Commission decisions is governed by Division 1, Part 1, Chapter 9, Article 3 of the PU Code. The appropriate court for judicial review is dependent on the nature of the proceeding. This is a complaint case not challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in § 1757.1.

### **Findings of Fact**

1. By complaint filed September 16, 1994, complainant, the managing partner of three highly successful businesses in Sonoma County, sought an order preventing Larkfield from terminating water service because of his refusal to install BFPDs on a 6", domestic line and 8", fire line serving his property.

2. Complainant argues that a well and conditions on his property, which are the basis for Larkfield's action, present no hazard to Larkfield's water supply and that the installation of BFPDs is unnecessary.

3. On April 25, 1995, a noticed evidentiary hearing was held by a Commission ALJ, at which a Citizens Utilities employee testified to specific conditions on complainant's property which Larkfield alleged constituted a threat of cross-connection and contamination of Larkfield's water source.

4. Larkfield is a wholly-owned subsidiary of Citizens Utilities.

5. In a PD issued January 17, 1996, the ALJ found Larkfield's witness biased and not credible. He also examined each of the allegations of Larkfield concerning conditions on complainant's property and found them to be without merit, and recommended issuance of an order directing Larkfield to cease and desist from its efforts to compel complainant to install the BFPDs. The PD also recommended that if Larkfield so desired, it could install the BFPDs at its own expense.

6. At no time prior to the ALJ's PD, did Larkfield challenge or otherwise question the jurisdiction of the Commission to entertain the complaint.

7. Shortly after the issuance of the ALJ's PD, Larkfield moved to set aside submission and reopen the record to obtain testimony from the DHS on the ground that DHS had expertise in water supply protection and such testimony was relevant to the proceeding.

8. As grounds for its motion, Larkfield indicated that the reason it did not produce the testimony at the hearing was because it had not realized the relevance of DHS's testimony at the time of hearing.

9. Shortly after Larkfield filed its motion to set aside submission and reopen the record, the Assigned Commissioner took the proceeding under advisement.



10. On or about October 17, 1996, Larkfield's counsel advised the ALJ that the ALJ would receive something from DHS within the next few days.

11. On October 21, 1996, the ALJ received an envelope postmarked October 16, 1996, bearing the return address of Larkfield's attorney's law firm. The envelope contained a copy of DHS Compliance Order No. 02-03-96CO-004 dated September 27, 1996, signed by Catherine S. Ma, P.E., directing Larkfield to install BFPDs on the two water lines serving complainants property.

12. Neither the complainant, the ALJ, nor the Commission was given notice of any proceeding pending before the DHS concerning this matter, nor was any of them advised that DHS was considering any action involving the question of installation of BFPDs at complainant's property.

13. On November 16, 1996, the Assigned Commissioner issued a ruling denying Larkfield's motion to set aside submission and reopen the record to receive testimony from DHS. The Assigned Commissioner also directed the ALJ to determine the answer to ten specific questions. The questions and the ALJ's answers are as follows:

- a. Does a valid DHS order exist? Answer: Yes.
- b. Was due process afforded Duffy? Answer: No.
- c. Was Duffy provided notice of a DHS proceeding? Answer: No.
- d. Was Duffy provided an opportunity to present evidence and confront witnesses? Answer: No.
- e. Does Duffy have a right to an administrative appeal of the DHS order? Answer: No
- f. Does the DHS field engineer have authority to issue an order requiring a BPD? Answer: Yes.
- g. What were the circumstances of the DHS investigation who performed the investigation, when was it performed, what was found? Answer: DHS performed two inspections; 12/6/93 and 10/11/94. Alternate source of water (a well) was found. Several specific violations allegedly found. Presence of well admitted by Duffy, but well- tested as satisfactory for a non-community drinking water source. Specific violations not proved at evidentiary hearing before Commission ALJ.
- h. If Duffy was not afforded due process in the DHS proceeding, then how well did Larkfield represent his interests? Answer: Since Duffy and Larkfield are adversaries, Larkfield did nothing to protect Duffy's interests.

- i. Are all other hotels/inns operating in similar fashion required to have a BPD installed? Answer: Unknown, however, given the vigor with which Larkfield has pursued this matter, one would assume so.
- j. Are the circumstances surrounding the issuance of a valid DHS order of such a nature as to warrant having Duffy pay for the installation of a BPD. Answer: No. If not, do the circumstances warrant having either the shareholders or ratepayers pay for the installation or some portion thereof. Answer: In our view, the overall circumstances are such as to require the cost of installation to be borne by Larkfield or its shareholders and not passed on to the ratepayers.

14. We will continue to study this problem to determine if an Order Instituting Investigation/Order Instituting Rulemaking should be issued to determine if Rule 16, which assigns BFPD installation costs to the customer should be eliminated or modified in some fashion.

#### **Conclusions of Law**

1. After a Commission evidentiary hearing had been held and a Commission ALJ's PD issued finding in favor of complainant, the DHS, without notice to the Commission or any party, issued a CO directing Larkfield to install a BFPD on each of two water lines supplying complainant's place of business.

2. Pursuant to a MOU between the Commission and DHS, DHS has primary jurisdiction to determine the necessity of installing BFPDs on water lines to protect public water supplies.

3. Under the MOU, questions regarding who is to pay for the installation of BFPDs are for the Commission to decide.

4. DHS's order directing Larkfield to install BFPDs on water lines supplying complainant's place of business is a valid order of which we take Official Notice.

5. Because Larkfield's failure to advise of the existence of the MOU caused the Commission and all parties to expend time and effort on unnecessary proceedings including a PHC and an Evidentiary Hearing, it should bear the cost of installing the BFPDs rather than complainant or other ratepayers.

6. Larkfield should be ordered to deviate from that portion of its tariff rule 16 that assesses the cost of installation of BFPDs to the customer.

7. This is a complaint case not challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1.

## ORDER

### IT IS ORDERED that:

1. Pursuant to California Department of Health Services' (DHS) compliance order, of which we take official notice, Larkfield Water Company (Larkfield) is to install Backflow Prevention Devices (BFPDs) of the proper type and size on each of Larkfield's lines supplying water to complainant's premises.

2. Larkfield is directed to deviate from that portion of its tariff rule 16 that assesses the cost of such installation against customer, and shall pay all costs of installation of BFPDs in its lines servicing complainant's property, and shall not pass the same on to complainant or other ratepayers.

3. Case 94-09-038 is closed.

This order is effective today.

Dated March 26, 1998, at San Francisco, California.

RICHARD A. BILAS  
President  
P. GREGORY CONLON  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
Commissioners