EHM

Decision No. 23762

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

LOUIS GLICKMAN, DAVID GLICKMAN,
A. W. GLICKMAN,

Complainants,

vs.

FORD L. HOWLAND,

Defendant.

Case No. 3031.

Glickman and Glickman, by Louis Glickman,
for Complainants.

V. A. Morgan, for Defendant.

BY THE COMMISSION:

OPINION

Complainants herein are the owners of a tract of land near the town of Temple, in Los Angeles County, comprising 18 acres. Defendant herein is the sole owner of a water utility known as Mariposa Wells, and which is now supplying water for irrigation and domestic purposes in and about the town of Temple. Complainants seek adjudication by the Commission upon an amount due under contract between the parties for the payment of $7.50 per month by complainants to defendant, which they allege is a rate greater than the rate fixed by this Commission for domestic purposes, and is unjust and unreasonable.

Public hearings thereon were conducted by Examiner Williams at Los Angeles, at which time the matter was submitted

on briefs, which have been filed, and the matter is now ready for decision.

The record shows the following facts:

By Decision No. 16573 upon Application No. 12734 this Commission granted authority to Donald T. Condit to transfer a public utility water plant under servitude solely to sell water for irrigation purposes to defendant, Ford L. Howland. This decision was dated April 26, 1926. On October 11, 1926, defendant herein entered into a contract with complainants whereby, in consideration of his permitting his plant to come under servitude as a domestic water utility and supply their tract of land, complainants would pay to defendant the sum of $750.00 "in consideration of first party suffering his said well and pumping equipment to come under the jurisdiction of the Railroad Commission of the State of California, because of his furnishing water for domestic uses to second party on the tract of land hereinafter described under such circumstances and conditions as to make first party a public utility."

There is no dispute as to this payment having been made in full and that defendant did, as required by the contract, make application to this Commission for a certificate of public convenience and necessity to sell and distribute water for domestic purposes, and that such certificate was authorized by our Decision No. 18125 on Application No. 13294 (29, C.R.C. 542, March 30,1927). The contract further requires Complainants to construct water mains and laterals on their land in such manner that they could receive water on the east boundary of defendant's tract of 15 acres on Baldwin Avenue, and that said lines should be conveyed to defendant. There is no dispute but what this portion of the contract was carried out.

The contract is set forth by complainants as their Exhibit "A" attached to the complaint, and its third paragraph is as follows:

> "(3) As a further consideration passing to first party for his engagements as hereinbefore noted, second party shall from the date pipe lines are installed and ready for use, pay to him each month a sum which added to the sum received by first party for water delivered in said month under the rate approved by the Railroad Commission, shall amount to seven and 50/100 dollars ($7.50). This paragraph is to be construed to the effect that first party is to receive a minimum of seven and 50/100 dollars ($7.50) per month for said water and if the rate fixed by the Railroad Commission amounts to seven and 50/100 dollars ($7.50) or more, nothing will be due under this paragraph."
>
> "It is understood that second party shall be relieved from a proportionate part of said seven and 50/100 dollars ($7.50) as land which he alienates bears to the property of second party, and if all land is so alienated he shall be relieved of all obligation as to said seven and 50/100 dollars ($7.50); it being understood that all of the obligation of the parties hereunder to furnish water to land of second party shall also be for the benefit of grantees, his successors and heirs."

The following paragraph (4) provides that unless defendant herein enters into a similar agreement with one Sherwood and one Streit to furnish water for the same purposes on tracts in the same vicinity the contract shall not be binding upon the first party.

The record further shows that the tracts of Glickman, Sherwood and Streit were subdivided and lots sold by the subdividers, and that the contracts, as to domestic water, were the same in each case, and that payments thereunder have all been made according to the tenor of the contracts. The relations between Sherwood and Streit with defendant, however, are not involved in this proceeding except by reference to the contract of the complainants herein.

Complainants base their complaint for relief from the charge of $7.50 per month upon the ground that this payment

is a rate charged by Howland as a public domestic water utility for water served to defendant's tract, although no water has been used for many months and there is only one habitation, owned by complainants, on the tract and that it had been vacant for many months before the filing of the complaint. Complainants contend that the only charge which Howland, as a public utility, is entitled to make is that for water actually served to any consumer in the tract at the rates established by the Commission, which rates are different and less than the payment of $7.50 required by the defendant.

The record shows that complainants have made the payments as required since December, 1926, at the rate of $7.50 per month, subject to deduction for amounts collected by defendant for actual water use during the period prior to September, 1930, since which time there has been no water use on the single dwelling on the tract owned by defendant. A statement, by months and amounts, is appended to the answer of defendant and was stipulated by complainants to be a correct statement. This statement shows that there is now due the sum of $49.22, and this amount has been deposited with this Commission in deposit No. 024-4631, dated March 10, 1931, and it was stipulated by the parties that this amount is subject to disposition by the Commission in the proceeding herein.

The record further shows that when the contract was made in 1926 there were only half a dozen consumers available and that at the time of hearing and for a long time prior to the hearing about 100 were receiving service under the domestic rates; that the tracts of Sherwood and Streit had developed patronage while that of the Glickmans had not, having at all times only one consumer (except for

certain periods when the habitation was untenanted) whose payments were credited to complainants' account with defendant. Complainants contend that the contract was liberally made because of the absence of consumers, but that now defendant has approximately 100 consumers. Defendant contends that had none of the tracts developed any better than complainants' he would have lost such sums as would justify discontinuing service.

The question presented is whether the payment of $7.50 per month specified in the contract is a charge for water service. If so, it is being collected in violation of section 17(b) of the Public Utility Act, which prohibits the charging of a greater, less or different compensation than the rates set forth in a utility's schedules on file and in effect. As complainants point out, a private contract purporting to fix rates for a public utility service is subject to the police power of the state, and the Commission may prescribe uniform rates for service. (Law v. Railroad Commission, 184 Cal. 737). Further, one changing the use of a water supply from a private and particular use to a public use is thereafter "bound to conform to such rates, rules and regulations for the service as may be established by the public body thereunto duly authorized." (Franscioni v. Soledad L.& W. Co., 170 Cal. 221.)

The contract under consideration provides in part -

> "That in consideration of first party suffering his said well and pumping equipment to come under the jurisdiction of the Railroad Commission of the State of California, because of his furnishing water for domestic uses to second party on the tract of land hereinafter described under such circumstances and conditions as to make said property of first party a public utility, and whereas it will be of great benefit to second party for first party to so do,"

complainants promised to pay to defendant $750.00 should defendant

obtain a certificate from the Commission. "As a further consideration passing to first party for his engagements as hereinbefore noted," complainants agreed in substance to guarantee that defendant's revenue from the particular tract of land should be $7.50 per month. If the revenue from service therein at the rates established by the Commission, was less than that amount, complainants agreed to pay the difference.

We are of the opinion that the payment of $7.50 per month is not a charge for water service, but that said sum has been paid in accordance with the terms of a contract not pertaining to public utility rates, and one over which the Commission has no jurisdiction. Being a private contract we may not determine the respective rights of the parties thereunder. Under these circumstances we believe the amount deposited should be returned to complainants and that the duties and obligations of the parties under the contract should be decided by some tribunal other than the Railroad Commission.

ORDER

Good cause appearing therefor, IT IS HEREBY ORDERED that the above complaint is hereby dismissed, and the Secretary of the Commission is directed to forward to complainants a check in the amount of $49.22, being the sum deposited with the Commission under deposit number 024-4631, dated March 10, 1931.

Dated at San Francisco, California, this 1st day of ~~May~~ June, 1931.

Leon O. Whitsell

M. B. Harris

Fred G. Stevenot

Commissioners

I dissent.

The majority order, in my opinion, neither carries out the spirit of the utility law of this State nor, confessedly, does it do equity. The basis of the complaint is a contract entered into between Howland, defendant, and certain subdividers, complainants, under which Howland was to obtain a certificate of public convenience and necessity from the State and dedicate certain water and other property to public use for domestic consumers. The only part of the contract immediately concerned in this case is paragraph three, providing a guarantee of a certain monthly income on account of the dedication of the property. This guarantee remains in force until complainants transfer interest in the entire property, or until revenue from rates to be fixed by the Railroad Commission for water service on the parcels of land equals the guarantee. Paragraph three therefore guarantees a certain income on the property dedicated and prevents that portion of the service from being a burden upon the rest of the consumers and a loss to the owning utility. The contract would seem therefore to be impressed with public interest and subject to this Commission's jurisdiction. The contract, however, was not formally filed as provided by the rules of this Commission. The records of this Commission show, however, that payments under this contract have been accounted for as operating utility revenue.

The terms of paragraph three indicate that this shall be operating utility revenue in lieu of revenue from established rates, and such was evidently in the minds of the contracting parties, for not only has defendant made this accounting as stated but both parties submitted to the jurisdiction of this Commission in this matter without objection and, in addition, stipulated in the hearing to that effect so far as concerns the disposal of the money deposited by complainants under the rules filed by the utility.

Both the terms and conditions of this contract and the facts following its becoming effective on the issuance of a certificate by this Commission may clearly distinguish this case from that involved in Sierra & S.F. Power Co. v. Universal E. & G. Co., 197 Cal. 376. Under the conditions here it is not conceivable that the mere technical failure to file should prevent this Commission from taking jurisdiction and enforcing the public interest, which is the fundamental consideration of this whole transaction. There is nothing in this record to indicate that the contract is unreasonable.

The Commission should order the contract to be formally filed, the money involved paid over to the utility, and the sum accounted for as an operating revenue.

Commissioner.

CARR, COMMISSIONER, CONCURRING.

Regretfully, I concur in the order because the equity is with respondent. I am not entirely satisfied that the contract is a purely private one. However, if not, it was one which, to be enforcable in the respect in controversy or to be cognizable by the Commission, had to be filed. (See Sierra & San Francisco Power Co. v. Universal E. & G. Co., 197 Cal. 376.) It was not filed and respondent apparently does not wish to file it. Hence, under either view, the result expressed in the order follows.

W. J. Carr
Commissioner.