Decision No. 35429

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

BAYSHORE PARK, INC., a corporation,

Complainant,

vs.

CALIFORNIA WATER SERVICE COMPANY, a corporation,

Defendant.

Case No. 4493

MARION VECKI, for complainant.

McCUTCHEN, OLNEY, MANNON & GREENE, by Robert M. Brown and Owen Jameson, for defendant.

BY THE COMMISSION:

O P I N I O N

The complainant seeks a reparation award in the sum of $5,443.84. Its claim arises out of a contract made in 1929 with the utility then rendering water service within the City of San Mateo, a contract providing for an extension of the utility's water system to a tract of land being developed by the complainant for residential purposes. In accordance with the terms of that contract, the complainant bore the full cost of installing a system of water mains to be owned and operated by the utility. The utility was only conditionally obligated to make reimbursement, the condition being that the gross annual revenues derived from sales of water to consumers within the tract should become equal to one-fourth the amount complainant expended. If annual revenues of

that amount should be realized by the utility at any time within a seven-year period, it was obligated to make refund in full. Complainant's demand is rested upon the theory that the exaction of such monetary aid, unless unconditionally obligated to make return in full, was unreasonable, discriminatory, illegal and void.

The essential facts appear not to be in dispute. The contract of July 23, 1929, was between Bayshore Park, Inc., and Pacific Water Company, the utility then rendering water service within and in the vicinity of San Mateo. The defendant, California Water Service Company, purchased the Pacific Company's properties in 1931, and succeeded also to all outstanding contractual obligations.

The contract recited that Bayshore Park, Inc., intended to subdivide and offer for sale a tract of land known as "College Park," and that it desired Pacific Company to provide water service by means of a distribution system to be installed at the sole expense of the subdivider. The utility covenanted, however, that "* * * the expenditures of the Subdivider * * * for the period of seven (7) years from the date of the commencement of service in said tract by said Company, shall be subject to refund without interest * * * when and in the event the annual gross revenue derived by the Company from the sale of water through said distribution system in said tract shall have been established at not less than twenty-five (25) per cent of said aggregate sum. If the annual gross revenue of the Company from said distribution system in said tract shall not, during said period, be established at not less than twenty-five (25) per cent of said aggregate sum, any and all right of refund hereunder shall cease and terminate upon the expiration of the seven (7) year period."

It should be pointed out at once that the terms of such contract were in substantial accordance with the tariff rules and regulations of the Pacific Water Company then on file with this Commission. The contract itself recited that the utility was willing to proceed with the extension in accordance with its filed rules. Its filed Rule No. 17 respecting extensions to real estate subdivisions contained a seven-year limitation on its obligation to make refund. The defendant utility has since retained a similar extension rule applicable within its San Mateo service area, except that its rule accords a ten-year period within which the requisite ratio between annual sales and original cost may be developed.

The facts relating to the actual development from water sales within the College Park tract are these: The system of water mains was completed sometime prior to January 1, 1930. During the succeeding seven years the maximum annual revenues from sales to residents within the tract amounted to only $190.75. During the tenth year the revenue of the utility increased to $478.85. In addition, however, the utility regularly derived some revenue from sales of water by means of several extensions made from the tract system to customers outside the tract. This was true particularly in the year of 1936 when sales to a municipal golf course outside the tract yielded revenue of $914.22. Nevertheless, its total sales that year, both within and without the tract, did not equal one-fourth the system cost of $5,443.84. During the first seven years there appear to have been no more than three resident consumers within the tract. By the end of the tenth year there were sixteen consumers. It was not until January 23, 1940, that complainant first made demand upon defendant for a refund, or for an extension of the contract period. In its complaint here, filed soon thereafter, it

alleged that prospective residential development within the tract would soon increase the annual revenue to an amount in excess of the contract requirement.

In the light of these facts, it cannot be found that the terms of the contract itself obligated the defendant utility to make refund to complainant. Indeed, this is not the complainant's real contention. The burden of its pleading and of its argument is that the contract, together with the filed rule authorizing such a contract, was void, or at least unjust, unreasonable and discriminatory. Defendant's answer denies these charges. It further defends by invoking the statute of limitations, and also challenges the jurisdiction of the Commission to make any such order as complainant demands.

Voluminous briefs have been submitted. Although we need not attempt in this opinion to follow all the paths explored by the parties in support of their respective contentions, certain fundamental issues command our consideration.

First of all, it is earnestly contended that the utility's filed rule relating to real estate subdivision extensions was a void rule, void from the beginning because inconsistent with the legal duty of a utility to make all service extensions at its own expense, and void also because it was a rule filed in contravention of an express order previously issued by the Commission prescribing adherence to a different rule. Next, it is contended in the alternative that this rule, even if not illegally filed, should be declared to have been an unreasonable rule from the beginning. This presupposes the existence of authority to give retroactive effect to whatever rule the Commission might find reasonable today. But complainant does not allege just what would have been a reasonable and non-discriminatory rule. The allegations and prayer of its complaint are firmly rested upon the premise that any kind of extension rule

that permits the exaction of a deposit without an absolute obligation to make full refund is inherently unreasonable. In its briefs only does it rather faintly suggest that some other form of rule might be within the realm of reasonableness.

The contention that the rule filed by Pacific Water Company was a void rule does not require extended discussion. We are satisfied that the premises assumed are unsound. As a matter of law, a public utility is not obligated to make every kind of service extension demanded, particularly when the demand is for the construction of an extensive system of distribution facilities within an area where the attachment of actual customers is only a future possibility. The law does require that a utility file and publish all such rules and regulations as it intends to enforce, and there has been committed to this Commission the power to determine whether such rules are just and reasonable. But when a filed tariff rule is not in violation of an express provision of law or outstanding order of the Commission, it is not void. On the contrary, the rule itself becomes the law observable by utility and patron alike until legally changed. Complainant is in error also when it asserts that the service extension rule of the Pacific Water Company was filed in violation of an order directing it to file and observe a different rule. It incorrectly interprets the Commission's two decisions of 1915, reported in 7 C.R.C. 830 and 8 C.R.C. 372, as having such meaning and effect. Those decisions will be referred to in more detail presently.

The second general contention, with its various implications, demands more extended discussion. Because the claim of unreasonableness is so largely rested upon certain declarations or findings made by the Commission itself in its two decisions of 1915

above mentioned, it is necessary to observe just what the Commission then did. That was an inquiry upon the Commission's own motion into the reasonableness of utility practices in requiring their customers to make monetary deposits for any purpose, one aspect of the inquiry being the ownership of customer service facilities and the practice of exacting deposits in aid of customer service extensions and connections. On this subject the conclusions of the Commission (7 C.R.C. 830, 863) were expressed as follows:

> "The utility should own all the facilities which it uses to serve the public. Endless difficulties and annoyances arise under any other rule. If an applicant for service makes payment in connection with an extension, this payment should be regarded as a loan, to be returned under reasonable conditions. The title to the extension should become vested in the utility.
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> "It can not be said that any one method of returning such loan is in itself the only reasonable rule. At times, such loans are returned piecemeal as additional services are installed; or piecemeal by crediting periodically stated portions of the consumer's bills; or in a lump sum when the entire periodic revenue from the extension totals a designated sum. The utilities should in the first instance adopt such rule or regulation as they consider reasonable under the general principle herein established, subject, of course, to review by this Commission."

In accordance with that finding, there was formulated a general rule to be observed by all utilities of the classes considered. As the rule was later amended (8 C.R.C. 372, 375), it was stated in these words:

> "In cases in which applicants make payments to secure the construction of extensions by water, gas, electric or telephone utilities, such payments shall generally be considered as loans to the utilities, to be repaid, as soon as conditions warrant, under reasonable, nondiscriminatory rules and regulations."

The above quotations from those early decisions of the Commission are sufficient, we believe, to reveal a fundamental error in the facts assumed by complainant throughout its extended argument. True,

that so-called rule directed all utilities to conform their filed rules and regulations to the "general principle" expressed. Obviously, however, it was intended only as an outline by which each utility might devise a complete working rule, not the prescription of a particular rule applicable to all. It has never been construed otherwise. The fact is that utilities of all the classes mentioned have been permitted to propose and file rules which to the Commission appeared reasonable under the particular conditions confronting each. And from the beginning, as the Commission's opinion and order clearly permitted, the extension rules actually filed by some utilities made detailed provision for the return of customer deposits in "piecemeal installments," while others provided for refund "in a lump sum when the entire periodic revenue from the extension totals a designated sum." The rule of the Pacific Water Company was of the latter type. It was not dissimilar in form to the corresponding rules applied by other water companies serving in the San Francisco Bay area.

But what the complainant impresses upon us so insistently is that the Commission then referred to the deposit as a "loan," whereas the claimed legal effect of the water company's rule was something quite different from a loan. To use its own phraseology, complainant asserts that its contract with the company was a unilateral contract, without consideration; that it was coercive, illusory, impossible of performance, and compelled a forfeiture. We do not so view the agreement.

Whatever legal concept the Commission may have had when it devised a rule declaring that such a deposit should "generally" be considered as a loan, we know that the Commission's uniform practice ever since that date has been to approve extension rules having exactly the same legal effect as the rule here involved. Every rule

filed has conditioned the utility's obligation to make refund upon the happening of certain events within a specified time. So if the time limitation provision of the challenged rule be said to compel a forfeiture, then all extension rules on file with the Commission today become vulnerable to the same attack. This is true whether the deposit be exacted from an applicant for an individual service extension, or from a real estate subdivider who desires to provide for a system of lines or mains for the purpose of enhancing the sale value of his tract. There was nothing contained in that decision of 1915, nor any other, which indicated that the Commission considered such a time limitation unreasonable. In fact, it has ever insisted upon such a provision. Its accounting rules and its rate-fixing practices are rested upon it. And exactly the same extension rule as here involved was enforced by the Commission in 1933 in Russell et al. vs. San Jose Water Works, 38 C.R.C. 460. The complainants there were demanding the expansion of a water system at the utility's own expense. The Commission refused relief, and referred to the utility's filed rules and their purpose in these words:

> "* * * These rules provide that the utility will install at its own expense 100 feet of main for each bona fide consumer, the additional costs incurred to be paid for by the applicants for such service subject to refund, and, in the case of real estate subdivisions, they provide for prepayment by the party or parties requiring the extension of the estimated cost of the entire installation subject to full refund provided the development becomes compensatory within certain time limitations.
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> "It is plainly evident that this extension can not reasonably be considered compensatory at this time and that the evidence does not warrant the Commission in directing the defendant to make this installation at its own expense. The rules

> and regulations of this utility governing its policy in matters of extensions of service were approved by this Commission and are in substantial accord with standard practice of public utility water works. The demand for service by complainants primarily is based upon alleged favorable prospects of possible future land development. Present requirements do not justify so large an expenditure by defendant. It is to cover just such cases that the Railroad Commission was constrained to adopt proper regulatory measures to prevent public utilities from suffering possible heavy financial losses by participating in highly speculative enterprises where their failure must ultimately place an unfair burden upon the regular water consumers who are required to provide through rates a fair return on utility operations. The complaint therefore will be dismissed."

The charge that the rule is unreasonable and discriminatory is not, of course, made for the purpose of obtaining a new rule applicable for the future alone, but only a finding that it has been an unconscionable rule ever since 1929. Even were it found that a revision of the rule for the future would be proper, it would not follow that reparation should be awarded. The complaint here is one to obtain redress for an alleged private wrong. The consequences of our action, if the demanded relief be granted, would be far more disturbing to utilities and patrons alike than the prescription of a new rule of prospective application only. We may not lose sight of the legal principle established in like cases to the effect that a finding made in respect to a reparation award will inure to the benefit of everyone situated in the same position as the individual complainant. A finding of past unreasonableness and discrimination in this action, upon the broad grounds advanced, would compel the granting of like relief to all those against whom the utilities of this state have applied extension deposit rules of the same general nature.

It cannot be found that the complainant suffered any prejudice or disadvantage not suffered by all those who may have failed to

recover from this utility and others the moneys advanced on extension agreements. Complainant makes its demand here only because its real-estate project did not develop to the extent anticipated within the time limited to qualify for a refund. But that result was not compelled by the utility. The fact that complainant was not able to perform its part of the agreement does not single it out as having suffered unreasonable or prejudicial treatment. So it cannot be found that reparation is due. And complainant's alternative demand that we eliminate the time limitation provision of the rule is likewise an attack upon the same general principle underlying all such extension rules. To grant such relief would bring about discrimination rather than cure it. We are not prepared to take such action. The Commission rejected a like demand in Exchange Securities Corp. v. San Diego G. & E. Co., 39 C.R.C. 354, with the following statement:

> "Assuming the jurisdiction of the Commission to extend the terms of the contract, the reasons advanced for the exercise of such jurisdiction are not impelling. Nearly all utilities in this State have extension rules similar to those here involved and during the period of feverish real estate extension prior to the depression made many extensions. If the period for making refunds were extended here it would lead almost inevitably to similar holdings as to such extension contracts of all the utilities of the State, as no special circumstances were shown here to place these contracts in a class by themselves. The Commission is not prepared to launch upon the policy of extending the terms of all of these contracts, assuming that it has jurisdiction so to do."

Our judgment upon the merits of this complaint renders it unnecessary to examine the claim of the defendant that its extension agreement with complainant was not between a utility and its patron, and did not, therefore, involve a public utility relationship cognizable by this Commission. Nor is it necessary to discuss the other defense based upon the statute of limitations incorporated in

Section 71 of the Public Utilities Act. It need be noted only that in the Exchange Securities case above mentioned the Commission said that its sole authority to give relief in complaints of this character is derived from Section 71, and that the time limitation therein provided begins to run from the date the extension agreement is made.

Perhaps we should advert briefly to another decision being rendered this day in the matter of Shore View Realty Co. v. California Water Service Co., a matter involving facts quite similar to those before us here, and involving the same utility rule, but where the complainant seeks only a finding that the rule was unjust and unreasonable.

O R D E R

A public hearing having been had upon the complaint of Bayshore Park, Inc. v. California Water Service Company, and the matter fully considered,

IT IS HEREBY ORDERED that the relief sought by said complainant be denied and its complaint dismissed.

Dated, San Francisco, California, this 17th day of March, 1942.

Justus F. Craemer

Carl I. Wheat

G. G. Paddock

Frank R. Havenner

Richard Mitchell

Commissioners.