C-4718 - DMC

ORIGINAL

Decision No. 32698

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

EAST SIDE COUNTY WATER DISTRICT

Complainant,

vs.

THE SAN JOSE WATER WORKS
(Formerly San Jose Water Works)

Defendant.

Case No. 4718

BOHNETT, HILL & COTTRELL, by L. D. Bohnett, for Complainant.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE, by Henry D. Costigan, and LEIB & LEIB, by R. C. Leib, for Defendant.

ROWELL, COMMISSIONER:

OPINION

The Complainant, East Side County Water District, was organized in 1926 under the County Water District Act of 1913, its boundaries including about three thousand five hundred acres adjoining the northeasterly limits of the City of San Jose. It was empowered by law to issue bonds for the acquisition of a water supply and distribution system. It will be referred to in this opinion as the "District".

Defendant, The San Jose Water Works, renders a public utility water service within the City of San Jose and its environs, including those areas within the District that have been subdivided for residential purposes. It, together with its predecessor company, will be referred to herein as the "Company".

The prayer of the District is that the Commission order the Company to acknowledge the applicability of "Emergency Rule and Regulation A-2" to a service extension contract executed in 1927 under which the Company incurred the contingent liability to pay the District the sum of $210,000, this being the District's contribution toward the cost of extending the water system of the Company to lands within the District. Such liability upon the part of the Company will cease on October 4, 1947, unless the term of the contract has automatically been extended for the duration of the war by virtue of Emergency Rule and Regulation A-2 imposed by the Com-

mission in its Decision 36528 of July 29, 1943. (44 C.R.C. 776)

It is the contention of the Company that this emergency rule is inapplicable to the extension contract here involved. To understand the claims of each party, it is necessary to review the history of the moratorium rule in question, as well as to set forth in some detail the facts surrounding the contract of 1927 when the Company extended its water service into the area bounded by the District.

The defendant utility, like others, has applied a rule, filed with the Commission, providing that when request is made for the laying of facilities within a real estate subdivision in anticipation of residential development therein, the cost of the extension will be borne in the first instance by the applicant, and its right to reimbursement of the amount deposited is made contingent upon the utility's realization of revenues sufficient to justify such a capital expenditure. The rules applied by various water companies have differed, some providing for an annual refund in an amount related to the annual revenues derived, and some have called for a total refund when and if revenues reach a given sum.[1] Rule and Regulation 20-A filed by the defendant Company is of the latter type, it being obligated to make total refund if, within seven years, annual revenues should equal one-fourth the cost of the extension.

With the beginning of the present war and the imposition of restrictions upon private residential construction, the Commission was importuned to accord relief to those who had theretofore advanced money for utility extensions in anticipation of normal subdivision development. It was proposed that all contract obligations to make refund be ordered extended for a sufficient period after the war to permit the resumption of residential construction. We may take notice also of a measure introduced at the legislative session of 1943 which was designed to accord similar equitable relief to obligors under such public utility contracts.[2] For these

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1. The history of such extension rules was explained in the Commission's Decision 35130 rendered March 17, 1942, in Bayshore Park, Inc. vs. California Water Service Co., Case No. 4493. (44 C.R.C. 74)

2. Assembly Bill No. 1667.

reasons the Commission upon its own motion instituted the inquiry which resulted in its Decision No. 36528 of July 29, 1943, wherein it ordered as follows:

> "All gas, electric, telephone and water utilities having advance deposit contracts covering ordinary line or main extensions or extensions to real estate subdivisions, where refund provisions of said contracts had not expired prior to December 7, 1941, shall file, to become effective on or before September 1, 1943, an Emergency Rule and Regulation No. A-2 as set forth in Exhibit No. 1 attached to this Order. Said filing shall be by advice letter as provided by General Order No. 96."

Emergency Rule and Regulation A-2 which the Commission thus ordered each utility to file, read in part as follows:

> "TIME EXTENSION FOR REFUNDS OF ADVANCE DEPOSIT CONTRACTS
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> "Recognizing that war-imposed limitations due to materials shortages have greatly hampered both the construction of new residences, and the extensions of lines, mains and services, and that these conditions have prevented, and will probably continue to prevent, the connection of new customers to line, main and service extensions upon which advance deposits have been made, it is deemed necessary, in the interest of equity, to extend the term of such deposit contracts. Accordingly, the time limits of refund provisions of all advance deposits covering lines, mains and services, made by contract under extension rules applicable to ordinary extensions and extensions to real estate subdivisions, are hereby extended as follows:
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> "(a) Contracts entered into prior to December 7, 1941, where the refund time limits had not expired prior to December 7, 1941, are modified to provide an extension of the time limit for refund of unrefunded advance deposits by a time period equal to the time interval between December 7, 1941, and a period of six months following cessation of hostilities in the present armed conflict with Germany, Italy, and Japan, provided such extension of time shall not exceed five years."

The defendant Company, along with other utilities of all classes, thereupon filed the rule the Commission had prescribed. It appeared at the hearing held upon the proposed order. It did not then question the validity of the Commission's proposal, nor did it or any utility petition for a rehearing, or seek court review of the order issued. The Company does not now directly challenge the validity of Emergency Rule and Regulation A-2. Its position is that the rule is not applicable to the particular extension contract here involved, and if the Commission should so apply the rule or undertake now to modify this particular contract, the Commission's action would be in excess of its authority and result in a deprivation of the Com-

pany's constitutional rights.

It cannot be denied that the contract which the District and the Company entered into in 1927 differed substantially from the usual agreement for the extension of utility service to a real estate subdivision. The circumstances surrounding the extension were also unusual. Whether the legal effect of their undertaking was so different as to make the moratorium rule inapplicable is the primary issue to be decided.

The record is clear that when the District was formed, the landowners therein envisioned the early subdivision of their property and the successful development of a high grade residential area. Most of the lands lay but a few miles from the central business district of San Jose. The difficulty of obtaining an adequate supply of water was considered to be the only problem. Underground sources of supply were insufficient. Also, as the lands were at an average elevation several hundred feet above the then existing service area of the Company, no extension of the latter's utility service could be obtained without the construction of a boosting plant and storage reservoirs, as well as transmission and distribution mains.

After organization of the District, it at once began negotiations with the Company for an extension of its facilities. A preliminary contract was executed on January 21, 1927. A friendly action was instituted in court to obtain a judgment declaring the proposed contract to be within the powers of the District. The final contract was dated August 12, 1927. The Company was to prepare plans and cost estimates. The District was to "advance to the company" the estimated cost, which was not to exceed $210,000. The Company was to construct the system, but title thereto was to remain in the District until the terms of the contract were fulfilled. The Company was to make a connection with its then existing water system and "to supply water through said system to such residents of said District as may desire to be supplied thereby, in conformity with its rules and rates then in effect and thereafter lawfully to be established." It further agreed that "if at any time within a period of twenty years from the time said System is connected, *** the gross receipts

from the sale of water *** shall, during any twelve consecutive months, amount to at least 25% of the original cost of said System, it will pay to the District for said System a sum equal to its original cost ***." The District agreed that if the Company's gross revenues did not reach such proportions within twenty years, "it will convey and transfer said System to the Company without further consideration than its maintenance and operation of the same and distribution of water therethrough to the inhabitants of said District in conformity with its regularly established rules and regulations."

The District thereupon issued $210,000 of bonds and advanced this sum to the Company. Transmission mains were laid and other facilities constructed by the Company in accordance with the plans agreed upon. Water deliveries were begun on October 5, 1927. During the first year of service there were 269 customers attached, and the Company received a gross revenue of $6,282.35. For the twelve months preceding October 4, 1943, gross revenues amounted to about $41,000, and by this time there were 1,328 water customers. The District introduced evidence to show that there is a reasonable expectation of further residential development as soon as the war imposed building restrictions are removed. Although the twenty year term within which annual revenues of $52,500 must be realized to entitle the District to a refund does not expire until October 4, 1947, it is pointed out by the District that it must be advised now whether an extension of time will be accorded so that it can arrange in advance for the levying of annual tax assessments to meet its bond maturities.

The argument of the Company in support of its contention that Emergency Rule and Regulation A-2 does not apply, may be summarized as follows. It says that the moratorium rule by its own terms applies only to deposit contracts covering "ordinary extensions and extensions to real estate subdivisions" when made under "extension rules" of the Company. It argues that the contract in this case, however, was not with a subdivider of lands but with a public district within which there have since been numerous real estate subdivisions; the extension was not an ordinary one, for it was necessary to construct a whole water system, including pumps and

reservoirs; the money paid to the Company was not an advance deposit, for the District retained title to the facilities; and the contract could not have been made pursuant to the Company's uniform extension rule 20-A, for the provisions of the contract are at variance with that rule in that the term was twenty years instead of seven, and the District was not obligated to pay the entire cost of the facilities constructed if the cost be in excess of $210,000.

A further contention of the Company is that all equitable considerations oppose any reformation of this contract which the parties freely entered into years ago. It introduced evidence to show its own investment in facilities it constructed to bring water service to new subdivisions within the District, and it asserts that if it must also return the District's contribution, the net revenue received from this part of its operations will not exceed a 3.7% return upon the total capital investment fairly applicable to the service. It states the cost of additions made within the District to have been $132,276. It estimates $37,000 more will be required to connect a sufficient number of customers to bring annual gross revenues up to $52,500, and it declares that it would be fair also to apportion to the District more than $168,000 of capital invested in its general water supply system.

Whether or not we arrive at the conclusion that the contract in question comes within Emergency Rule and Regulation A-2, there is no occasion to dwell further upon the Company's contention that the application of this rule would bring about an inequitable result. Such a defense cannot be persuasive unless the Commission disregards its precedents established in similar cases. It has always refused to reform such a deposit contract when the depositor was asserting that the agreement had proven inequitable as to him. A utility, whether it be plaintiff or defendant, cannot occupy a more favorable position.

Moreover, the Commission could not fairly hold that a reasonable extension of the contract would place the Company in an inequitable position. The Company may yet be obligated by the contract itself to make refund to the District, for at least a possibility exists that the revenues yielded by water consumers within the District will reach the requisite amount before the contract expires on October 4, 1947.

Should the District thus perform the contract in exact accordance with its terms, the Company could not well deny its liability thereunder on the ground that the result would be inequitable to it. So, whatever merit there may be to its claim of inequitable result if it be compelled to perform, it is obvious that such hardship arises primarily from the contract itself, not merely from the Commission's order extending the contract for the duration of the war only.

The Commission must conclude that Emergency Rule and Regulation A-2 is applicable to the contract in question. There is nothing to be found in the rule itself, or in the decision imposing the rule, compelling the conclusion that the Commission did not then intend it to apply to such an extension contract as this. The decision made reference to the large number of such deposit contracts in effect, and to the many varying conditions thereof. Yet, with the exception only of those agreements covering defense housing projects, the rule seemingly was made applicable to all classes of contracts relating to extensions to residential developments. Nor are we persuaded by the Company's contention that this particular contract does not fall within the emergency rule because the terms of the contract were at variance with the Company's subdivision extension rule on file and in effect at the time. It is true that the Company accorded the District a twenty year period within which to perform, instead of seven years only as provided in its extension rule. But it does not now assert that such concession invalidated the contract. Neither party takes the position that the contract is not binding in all its terms. The mere fact that the terms accorded were more liberal than those contemplated by the Company's filed extension rule would not justify the Commission in holding that the contract was one necessarily exempt from modification by application of Emergency Rule and Regulation A-2. Any other view of the problem presented would lead to a strained construction of the rule as well as to the ultimate defeat of its essential purpose.

The Company, as alluded to above, makes the assertion that if the moratorium rule is so construed, it is unconstitutional. But if it was within the power

of the Commission to impose such a rule at all without depriving a utility of its constitutional rights, it is difficult to see wherein the application of the rule to this particular contract could have that effect. Although the Commission's decision imposing the rule did not discuss the question of power to thus modify all deposit contracts, it would be inappropriate to reconsider that question now. The decision was rendered in July, 1943. The prescribed rule was then filed by all utilities, as the Commission directed them to do, and doubtless the actions of utilities and of many parties affected by the rule have been influenced by their reliance upon its presumed validity.

It being concluded that the District rightfully claims that Emergency Rule and Regulation A-2 is applicable to its contract with the Company, there remains but one other point demanding brief comment. The prayer of the Complainant is that the Commission order the Company to comply with said rule. What the District asks for, therefore, might appear to be in the nature of a declaratory judgment only, for the contract term does not expire until October 4, 1947, and the District cannot be in default before that date. But an examination of the Commission's Order declaring the Emergency Rule shows that the Order itself required each utility, before October 1, 1943, to notify each party to such a deposit contract of the provisions of the rule. As the Company has denied the applicability of the rule, the Commission will not be making a mere declaratory ruling if it now directs the Company to comply with the requirements of the Order contained in Decision 36528. The following Order is recommended.

O R D E R

The complaint of East Side County Water District against The San Jose Water Works having been duly heard and submitted upon briefs filed, and the matter being fully considered by the Commission, and findings and conclusions having been made as set forth in the foregoing Opinion, IT IS HEREBY ORDERED AS FOLLOWS:

The San Jose Water Works shall, on the effective date of this Order, advise East Side County Water District in writing that it accepts the applicability of the Emergency Rule and Regulation A-2 filed by The San Jose Water Works on August 20, 1943, to that certain contract made with East Side County Water District dated August 12, 1927, and as thereafter amended, as set forth in the exhibits attached to said complaint.

The effective date of this Order shall be the 20th day from and after the date hereof.

The foregoing Opinion and Order is hereby approved and adopted as the findings, opinion and order of the Commission.

Dated at San Francisco, California, this 6th day of March, 1945.

L. Harold Pulsifer

Justus F. Craemer

Richard Sachse

Frank C. Clark

Ira E. Powell.

Commissioners.