Decision No. 40818

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

R. D. BECKNER, et al.,

Complainants,

vs.

RICHARD S. OTTO,

Defendant.

Case No. 4848

ORIGINAL

O P I N I O N

R. D. Beckner, Hilda Leeper, and certain other water users in an area known as Baywood Park Estates near the town of Morro Bay, San Luis Obispo County, filed a complaint against Richard S. Otto, the subdivider of part of the area, alleging him to be the owner of the water system therein and requested that the Commission declare such system a public utility and fix reasonable rates. After hearing, the Commission rendered Decision No. 39863 on January 13, 1947, finding the water system, which Otto admittedly owned, a public utility and ordered that he file rates no higher than those in effect prior to June 1, 1946. The Commission further ordered that plans for a water tank and storage reservoir be filed within ninety (90) days, such tank and reservoir to be installed within ninety (90) days after approval of the plans.

Otto filed a petition for rehearing ten (10) days before the effective date of the order. Rehearing was granted by order of March 11. The matter was heard for the second time on May 9; voluminous evidence, both oral and documentary, was presented; and thereafter briefs were filed by both parties in support of their respective

positions. The present opinion represents findings and conclusions based upon a careful appraisal of the evidence introduced at both hearings and upon careful study of the supporting briefs.

We conclude, as we did before, that the great weight of the evidence admits of only one conclusion, viz., that Richard S. Otto, owner of the water system in Baywood Park Estates, has dedicated his system to the public use, that by so doing he has operated as a public utility and, in consequence, must under the law submit to the regulatory control of this Commission.

We make the following findings of fact based upon the evidence of record.

Between 1922 and 1926 defendant, having acquired the major portion of the subdivision referred to, thereafter actively promoted the sale of lots therein. About 1927 or 1928 he installed a water system to serve a part of such subdivision, and in the ensuing years developed it as occasion required. Between the original installation and the present time three cased wells have been constructed, pumping units have been installed, a storage tank (later destroyed) has been constructed, and several thousand feet of pipe of varying diameters laid. At present there are about thirty-three consumers, none metered. Otto estimated at the first hearing that he had invested in the water works at least $25,000. The Commission's engineering staff estimated the historical cost as of April 30, 1947, at $15,074.60. Otto testified that he is the owner of the system, and that fact stands undisputed.

We turn to the circumstances surrounding the supplying of water from the above-described system to various residents of Baywood Park Estates over the years from about 1927 to the present. The evidence shows that in no instance did the contract of sale, or purchase

agreement, or deed of conveyance, or other document relating to a particular purchase of land in the subdivision purport to convey to the buyer a legal interest, proportionate or otherwise, in Otto's water system, or the water rights relating thereto, or bind Otto to furnish water in any degree to the specific land or its occupants. There is no indication, furthermore, that any oral agreement was entered into, whereby the purchaser acquired an interest in the physical plant or water rights pertaining to such system, or acquired from Otto an absolute right to have water in any degree furnished to him.

True it is that representations of varying nature were made to successive buyers of land in the tract, either by Otto or one of his agents, relative to the availability of water. Giving effect to conflicting evidence such representations in the beginning took the form of a statement to the purchaser that water would be supplied for use on the lot at some relatively nominal figure, such as $.75 or $1.00 a month, or even at no charge at all. Witnesses took diametric views on the question whether any money was in fact collected for the use of water up until the year 1932, but we do not consider it necessary to resolve such conflict in arriving at our conclusion. It was not stated by any witness that water service was refused any purchaser of land in the subdivision during this early period. It appears also that Otto assumed sole responsibility for maintenance and for making whatever capital improvements he considered necessary. His purpose, as he stated on the witness stand, was to make the property "salable with a water system." He disclaimed any intention of making a profit out of the system as such, and the evidence clearly shows that no profit was ever made directly from it.

In 1932, according to Otto's testimony, the water system had become financially burdensome to him. A meeting (at his behest, we in-

fer) of water users was called on the 21st of May, attended by him and eleven others. At this time there were apparently about fifteen families being served. It may be noted in passing that Otto was not among the consumers as he did not reside on the tract. Precisely how the meeting of water users was called or organized the evidence does not reveal. In any case, the minutes of that meeting state Otto's intention not to supply water without charge after June 1, 1932, and they set forth an agreement by the majority, pursuant to a proposition moved and carried, to abide by a flat schedule of rates, the proceeds to be collected by an "honorary collector" and turned over by the fifth of each month to Otto's tract manager to defray the cost of gasoline for pumping water. The meeting constituted itself a "cooperative association" for the purpose of furnishing such gasoline and elected officers, all of them to be "honorary." A second meeting was held on June 26th, eight persons being present, including Beckner the complainant but excluding Otto. At that meeting a report was submitted showing receipts from water users and disbursements for gasoline. A motion was carried authorizing the president to notify all persons presently delinquent that service would be discontinued after three days and until back "assessments" were paid.

The evidence does not show how often the water users, or a portion of them, met after the above-mentioned preliminary meetings. Admittedly, the group was loosely knit and meetings were sporadic. Finally, on January 24, 1934, fifteen users met, and a motion was carried that "this cooperative association be hereby disbanded." Much conflict was presented in the testimony on the question whether the disbandment as voted by the majority was carried out.

No by-laws of the "cooperative association" were produced

the record and there was conflicting evidence whether any existed.

To what extent Otto considered himself bound by whatever resolutions the association may have passed we can only surmise, but certain it is that he never once relinquished his full ownership in the water system or conveyed any legal right whatever to the association or any of its members. Furthermore, it is undisputed that he continued to supply water to those who purchased lots from him or who were occupying premises to which he had made extensions. At most, it can be said that he conscientiously turned over the actual management of the system to the users in so far as they were willing, always reserving to himself the prerogatives of ownership. To use respondent's own words, he wanted the users to operate the system themselves cooperatively and on a democratic basis. He continued to make up deficits in operation and to make all capital improvements himself.

As to collection of moneys received for water service during the period from 1932 on, "assessments" or "contributions" were collected by a succession of tract managers. There is considerable conflict whether these men were acting as agents for Otto in making collections or independently as functionaries of the water users' association. We are impelled to conclude the former, but we consider the answer of no importance in view of the underlying fact that the association, to the extent it existed at all, could operate the water system only so long as respondent was benevolently disposed and continued to bestow upon it his sanction.

As to the disposition of funds, the evidence indicates that some tract managers were permitted to keep whatever they collected for water to reimburse themselves for services, while others made remittance directly to Otto. The original plan of 1932 to collect

money for the express purpose of buying gasoline to run a pump was quite obviously lost sight of in later years. There seems little doubt, however, that all money collected over the years was used to defray some part of the cost of operating the water system. In short, the money was paid by the water users in return for a water service furnished by Otto who, as owner of the system, held himself out to supply all who fell within a given class of the public.

Nowhere in the record does it appear who precisely composed the membership of the "cooperative association" formed in 1932, nor is such consideration material in view of the total absence of any tangible legal right relative to which such organization might act. Also, it may be noted that it was Otto's practice not to discriminate in furnishing water between those who presumably joined such association and those who did not.

We turn now to the events of 1944, 1945, and 1946. In 1944 defendant, it would seem, became increasingly anxious to divest himself of all responsibility for actual operation of the water system and sent to his tract manager application forms with instructions that they be signed by every water user. The form committed the signer to membership in the "Water Users' Association" and required him to abide by Association rules and charges. It was stated that "the system is run on a non-profit and cooperative basis, the dues being used for operating expenses only." The form did not purport to convey or represent any legal interest in the water system but on the contrary made clear that Otto remained sole owner and would allow the Association to operate it until he felt otherwise disposed.

The evidence indicates that the Association referred to in the application form was considered as a continuation or revival of the 1932 association. By-laws emanating from Otto's office were intro-

duced and adopted at a users' meeting in the latter part of 1945. They purported to allow membership only to property owners in the tract, and it was further provided that Otto would allow use of the system by the Association free of charge until his inclination dictated otherwise, after ninety days' notice. Trustees were to be chosen by the members and their duties were to include the fixing of rates.

Another meeting of the "Baywood Park Water Users' Association" was held on May 15, 1946, attended by about fourteen persons. A motion was introduced and carried that the above-mentioned by-laws be read in order to aid those present in understanding their contents. No one could find a copy, so the matter was tabled. As pointed out above, those by-laws empowered only the trustees of the Association to fix rates. Notwithstanding, the meeting proceeded to adopt by majority vote a schedule of increased rates to be effective beginning June 1, 1946. It was observed in the minutes of the meeting that Otto had written previously declaring his wish that there be a rate increase to minimize the monthly deficit.

Some effort was made in August of 1946 to coerce users into signing application forms substantially similar to the 1944 forms mentioned above, and letters were sent out threatening discontinuance of water service within three days unless the user became a "bona fide member, in good standing, of the Baywood Park Water Users Association." In practice, those who had been instrumental in adopting this plan for cutting off service thought better of it, and the threat was never carried out respecting anyone who had been receiving water theretofore. Also, the evidence would indicate that water was supplied to the occupier of the premises whether he was a property owner or not.

It was, no doubt, a combination of these tactics and the increased rates which precipitated the complaint filed by Beckner and the others.

Looking behind the various documents and meetings of this period from 1944 to the present, we are unable to perceive any deviation in practice from Otto's plan, adopted at least as early as 1932, to retain absolute ownership of his water system while shifting the actual management thereof upon the shoulders of the water users until he might choose otherwise. There can be no question that he desired to let the water users run the system economically and upon self-determination principles. He has shown convincingly that the water system has never been directly profitable to him and that he has met every deficit without question. But the authorities do not hold that lack of adequate financial return is to be considered a relevant factor in determining utility status. Nor has it been held that one owning a public utility can negative utility status through the device of a users' association organized solely for the purpose of operation and management.

We arrive at the basic conclusion that Richard S. Otto dedicated his water system to public use at least as early as the year 1932. Regardless of his avowed and no doubt sincere intention not to make such dedication, the fact of a holding out of service to a particular group of the public is controlling. Having once made such dedication, he could not divest himself of utility obligation without prior permission from this Commission. Also we conclude that the water users' association, either as constituted in 1932 or later, was neither a public utility nor a mutual non-profit association of the type contemplated in Section 2 of the Act for Regulation of Water Companies (Stats. 1913, ch. 80, as amended). It was at most a mere

banding together of all or a portion of the water users for the purpose of operating the affairs of Otto's public utility in his place and stead and until such time as he should choose to set it aside. It held legal title to nothing, its resolutions and directives were effectual only so long as he approved or acquiesced in them.

Having found Richard S. Otto to be operating as a public utility and, therefore, subject to the regulatory control of this Commission, we turn to the matter of storage facilities which was considered in our first opinion. We there said that respondent should be required to proceed with the installation of a surface storage tank. Reconsideration of this matter causes us to conclude that such requirement should not be imposed at the present time. It may be noted that the proceedings herein put in issue primarily the utility status of defendant and the fixing of reasonable rates rather than the matter of adequate service, and that no evidence was introduced to show Otto's financial ability to install the tank contemplated. Furthermore, need for such installation was not clearly shown in view of evidence that the water system presently maintains three pumps operating independently and so arranged that any one can draw from any or all of the wells. While the ideal situation might call for the installation of a storage tank, we believe this is perhaps not the appropriate time for making an order relative thereto.

Our earlier opinion directed that Otto file rates not higher than those in effect prior to June 1, 1946. Considering this matter anew, however, the record indicates that such former rates would result in substantial out-of-pocket loss, and that the rates charged at the time of filing the complaint were not unreasonably high. Furthermore, Otto at no point in the proceedings objected to them as being unreasonably low. Under these circumstances, defendant will

be authorized and directed to file the latter rates.

O R D E R

The above matter having been accorded public rehearing and the evidence therein having been fully considered, it is hereby found as a fact that the water system owned by Richard S. Otto in Baywood Park Estates, San Luis Obispo County, is a public utility water system and, therefore,

IT IS HEREBY ORDERED as follows:

1. That Richard S. Otto shall file in quadruplicate with this Commission, within ten (10) days from the effective date of this Order, in conformity with the Commission's General Order No. 96, rates for water service rendered in Baywood Park Estates, which rates shall be those set forth in Exhibit A of the complaint herein.

2. That Richard S. Otto, within ten (10) days from the effective date of this Order, shall submit to this Commission for its approval four sets of rules and regulations governing relations with his consumers, each set of which shall contain a suitable map or sketch, drawn to an indicated scale upon a sheet 8½ x 11 inches in size, delineating thereupon in distinctive markings the boundaries of the present service area, and the location thereof with reference to the immediate surrounding territory; provided, however, that such map or sketch shall not thereby be considered by this Commission or any other public body as a final or conclusive determination or establishment of the dedicated area of service, or any portion thereof.

3. That Richard S. Otto, within ten (10) days from the effective date of this Order, shall file with this Commission four copies of a comprehensive map, drawn to an indicated scale of not less than 600 feet to the inch, upon which shall be delineated by appropriate markings the territory presently served. This map should be reasonably accurate, show the source and date thereof and include sufficient data to determine clearly and definitely the location of the property comprising the entire utility area of service; provided, however, that such map shall not thereby be considered by this Commission or any other public body as a final or conclusive determination or establishment of the dedicated area of service, or any portion thereof.

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IT IS FURTHER ORDERED that the Secretary of the Commission is hereby directed to cause this Opinion and Order to be served upon defendant by forwarding to him a certified copy thereof by registered mail, such Opinion and Order to become effective twenty (20) days after such service.

Dated, San Francisco, California, this 10th day of October, 1947.

Harold P. Huls

Justin F. Orrick

Dwight L. Fowell

R. J. Townsend

Commissioners