EL

Decision No. 45608

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

J. RICHARD CO., a corporation, and ALBERT GERSTEN, an individual, Complainants vs. SAN GABRIEL VALLEY WATER COMPANY, a corporation Defendant	Case No. 5116
MILTON GERSTEN, ALBERT GERSTEN, and MYRON P. BECK, a partnership, doing business as Whittier Downs, Complainants vs. SAN GABRIEL VALLEY WATER COMPANY, a corporation Defendant	Case No. 5117
J. RICHARD CO., a corporation, and ALBERT GERSTEN, an individual, Complainants vs. SAN GABRIEL VALLEY WATER COMPANY, a corporation Defendant	Case No. 5122
REX LAND CO., a corporation, and ALBERT GERSTEN, Complainants vs. SAN GABRIEL VALLEY WATER COMPANY, a corporation Defendant	Case No. 5123

C-5116 EL
C-5117
C-5122
C-5123

Gordon & Knapp, by Wyman C. Knapp, for complainants; Faries & McDowell, by McIntyre Faries, for defendant.

O P I N I O N

These four complaints "for refund of money" will be considered in a single decision. They were filed by a subdivider and his associates and seek from defendant water utility portions of amounts deposited with the utility in connection with the extension of water mains into certain subdivisions. Each complaint alleges that the deposit required by the utility exceeded "the reasonable actual cost" of construction, and covered "excess construction beyond that reasonably required for the purpose of serving said tract."

In one complaint, the utility, by counterclaim and cross complaint, alleges that the required deposit was insufficient and that the subdivider should be required to deposit an additional sum. The respective claims, in terms of dollars, are set forth below:

	Deposit Required	Reparation Claim in Complaint	Reparation Claim in Amendment to Complaint	Counter-claim
Case No. 5117	$18,075.00	$ 2,207.50	$ 3,500.92	$4,169.14
Case No. 5116	23,764.00	10,146.00	12,816.60	-
Case No. 5122	15,258.00	6,002.60	5,694.93	-
Case No. 5123	14,707.20	6,170.10	6,348.72	-
Totals	71,804.20	24,526.20	28,361.17	4,169.14

Before discussing any of the issues, it will be helpful to set forth briefly certain of the facts relating to each complaint.

Case No. 5117. On September 5, 1946, the subdivider and the utility entered into the following letter agreement:

> "In consideration of the sum of $18,075.00, receipt of which is hereby acknowledged, San Gabriel Valley Water Company agrees to extend pipe lines for the service of water to Tract 13977, located near Whittier, Los Angeles County, California, as said tract is shown on map heretofore furnished, said map

consisting of five sheets prepared by Seaboard Engineering Company, from a survey made by Mark A. Robin, registered Civil Engineer No. 2059, in June, 1946.

"San Gabriel Valley Water Company will refund to the depositors, annually, one-third (1/3) of the gross revenues derived from the sale of water in said tract. Refunds shall cease at the end of ten (10) years from date hereof, or shall cease at the time the entire amount advanced has been refunded should this occur prior to the expiration of said ten (10) year period."

Before September 5, 1946, the date of the above agreement, the vice-president of defendant utility and the subdivider, or the latter's representative, considered blue prints and sketches of the tract and the lot plan, and discussed the pipe lines proposed to be installed. Maps of the subdivision were received by the utility as early as June of 1946. The estimated cost of lines was also given to the subdivider or his representative. The subdivider did not ask to see the plan of the distribution system designed by the utility.[1/] There was no disagreement of any kind between the parties. Work commenced in January of 1947 and was completed early in 1947. The last pay roll period for the construction was concluded May 15, 1947. There was no disagreement between the utility and the subdivider at the time of installation, nor until May or June of 1949 when the utility's president, in a telephone conversation with the subdivider, was informed of the latter's dissatisfaction.

1/ The utility's president testified in part as follows:

"A. It was a map of the subdivider prepared as stated by the Seaboard Engineering Company.

"Q. Then you arranged the water system based upon those maps, is that it? A. It is a map of the subdivision, and naturally what we had to design, the distribution system feature.

"Q. Do you know whether that was submitted back to the persons with whom you contracted after the water system had been designed, with the water lines as shown on these five sheets? A. I don't believe that other than telephone conversations after that, I don't believe they ever saw or asked to see the distribution system which was designed."

By letter of August 3, 1949, the subdivider made demand upon the utility for refund of a claimed over-deposit of $2,207.50. The utility replied on August 25, 1949, taking the position that there had been no over-deposit and that the deposit was less than the reasonable actual cost of the work. The complaint herein was filed on August 30, 1949.

At the time of the agreement of September 5, 1946, between the utility and the subdivider, the utility's filed and then effective Rule and Regulation No. 19, covering extensions, provided in part as follows:

> "* * * Applicants for extensions to serve tracts or subdivisions or for extensions of more than 150 feet will be required to enter into a written contract for such extensions and will be required to deposit with the company, the estimated reasonable cost of the necessary facilities before construction is commenced. The size, type and quality of the material and locations of lines shall be specified by the company and the actual construction shall be done by the company or by a contractor acceptable to it.
>
> "In case of disagreement over size, type and/or location of the pipe lines, the matter may be referred to the Railroad Commission.
>
> "Refunds shall be made quarterly, on the basis of thirty-three and one third percent (33-1/3%) of the gross revenues derived from the sale of water in said tract or on said extension until the entire amount advanced has been refunded, provided, however, no refunds shall be made after a period of ten (10) years from the date of said written agreement. * * *." (Emphasis added.)

Case No. 5116 involves Tracts Nos. 14954 and 15062. By a letter agreement dated November 21, 1947, approved and accepted by the subdivider on December 3, 1947, and in consideration of a deposit of $23,764, the utility agreed to extend lines into the two tracts. Such deposit was made on December 3, 1947. The utility's then

effective Rule 19 was the same as heretofore mentioned.[2/] Construction started in February of 1948, and the last pay roll date thereon was April 30, 1948. Plans of the proposed construction were available to the subdivider. He never asked for them but made the requested deposit, and made no complaint to the utility respecting the amount of the deposit until August 3, 1949. On that date, the subdivider addressed four letters to the utility, claiming that over-deposits had been made as to each of the tracts involved in these four proceedings. The complaint herein was filed on August 30, 1949.

Case No. 5122. By a letter agreement approved and accepted by the subdivider on December 2, 1948, and in consideration of a deposit of $15,258, the utility agreed to extend lines into Tract No. 11838. The work was done in January and February of 1949. On August 3, 1949, the subdivider advised the utility of a claimed over-deposit of $6,002.60. The complaint herein was filed on September 12, 1949.

Case No. 5123 involves Tract No. 11960. By letter agreement dated February 3, 1949, and accepted and approved by the subdivider on February 9, 1949, and in consideration of a deposit of $14,707.20, the utility agreed to extend lines into this tract. On the above date (February 9, 1949), the utility's then applicable extension Rule 19 (by a refiling of December 29, 1948, which became

2/ This particular agreement contained the following provision: "At the request of the depositor that portion of the Company's Rule 19 respecting adjustment of the final cost is hereby waived by the Company and the depositor." But the utility's then effective (December 3, 1947) Rule 19 contained no provision respecting adjustment of the final cost of a subdivision extension. However, on May 26, 1947, the utility had attempted to file a revision of its Rule 19 which contained, among other things, the following provision: "Adjustment of any substantial difference between the estimated and reasonable actual total installed cost thereof, shall be made after the completion of the installation, subject to review by the Commission." However, the filing of May 26, 1947, was rejected, and a provision similar to that last quoted did not become a part of the utility's effective Rule 19 until January 23, 1949.

effective on January 23, 1949, being Revised Cal. P.U.C. Sheet 14-W) contained the following provision:

> "Adjustment of any substantial differences between the estimated and reasonable actual cost thereof shall be made after the completion of the installation, subject to review by the Commission."

The agreement of February 9, 1949, provided in part as follows:

> "It is further agreed that the company and depositor waive adjustment of the above amount to the final cost at completion of the extension." 3/

3/ Concerning the waiver of adjustment, the utility's vice-president testified that some time within the week prior to February 3, 1949, he had a telephone conversation with the subdivider.

"THE WITNESS: Mr. Gersten" (the subdivider) "requested that the contract be so written because he desired to know exactly what the installation of the water service would cost him and not have something left open for which he might be billed an amount of money after the construction was done. I might say that is a common desire of many other subdividers.

"MR. FARIES: Was that suggested by you or by Mr. Gersten? A. By Mr. Gersten. * * *."

* * * * * *

"* * * When Mr. Gersten requested that this waiver be placed in there, was there any discussion of the fact that in addition to the company's waiving its right to require more from him, he would also waive any right to recover for any overcharge? A. Yes, he knew that the rule specified either direction from the estimate, either under or over. We refund him money or he pays us additional money.

"Q. You say he knew that? A. Yes, he had discussed it with me."

* * * * * *

"A. In respect to this particular contract I told Mr. Gersten that it differed from our previous contracts because of a new rule in that the refund rate would be now 35 per cent and that the rule provided that the amount would be adjusted upon completion of the job; either he would deposit additional money with us or we would refund money to him depending upon the cost of the work.

"Q. What did he say? A. He asked me to have the contract a flat amount.

"Q. Then did you draft the contract that is Exhibit 6? A. I did.

"Q. Did you have a further conversation with him before it was signed, or did he sign it and return it to you? A. He signed it and returned it.

"Q. Without further conversation? A. Yes."

The cost of the extension was estimated in November of 1948, and 10% of the deposit was paid on or about November 23, 1948, and the balance on or about February 9, 1949. Work commenced on January 15, 1949, and was completed in April of 1949. As in the other matters, on August 3, 1949, the subdivider advised the utility of a claim of over-deposit. The complaint herein was filed on September 12, 1949.

Each complaint is entitled "complaint for refund of money," and is based upon an alleged "over-deposit" within the meaning of the utility's Rule 19. Under Section 71(a) of the Public Utilities Act, the Commission may award reparation under the following circumstances:

> "(a) When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an unreasonable, excessive or discriminatory amount for such product, commodity or service in violation of any of the provisions of this act, including sections 13, 17(a)2, 17(b), 19 and 24 the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection; provided, no discrimination will result from such reparation; * * *."

Complainants also rely on a number of other sections. Section 13 prohibits unjust or unreasonable charges for any "product or commodity or service," and provides that utilities shall provide such service, equipment, and facilities as shall be just and reasonable. Section 14(b) requires utilities to file with the Commission schedules showing their rates, rules, and regulations. Under Section 17(b), utilities are required to adhere to their filed schedules. Section 19 prohibits the granting of preferences.

Both sides rely on the utility's Rule 19. In all four cases, the then applicable rule required subdividers to enter into written contracts for extensions and to deposit with the utility

(subject to future refund provisions of the rule) the estimated reasonable cost of necessary facilities before commencement of construction. The rule provided that the utility should specify the size, type, and quality of material, as well as the location of lines. In three of the cases, the applicable rule then provided as follows:

> "In case of disagreement over size, type and/or location of the pipe lines, the matter may be referred to the Railroad Commission."

In the fourth case (Case No. 5123), the applicable rule contained the following provision:

> "In case of disagreement over size, type, and location of the pipe lines and the constructing medium the matter may be referred to the California Public Utilities Commission for settlement."

The record shows that blue prints and plans of the neighboring tracts involved were submitted to the utility by the subdivider, and that there were discussions between the subdivider and the utility before the utility prepared plans of water facilities, estimated the cost thereof, and furnished such estimates to the subdivider. There was no disagreement between the subdivider and the utility at the time the respective contracts were entered into. The subdivider did not even ask to see the plans of the facilities designed by the utility, but promptly advanced the requested deposits. Indeed, the record suggests that the subdivider was not then particularly interested in the plans or the amounts of the deposits. As heretofore indicated, it was not until some time after completion of the extensions that the subdivider advised the utility of any dissatisfaction.

In so far as the Rule 19, applicable in the first three complaints herein, may have given any right to appeal to the Commission concerning any disagreement in connection with the

proposed extensions, it seems clear that the intent of the rule was that any such disagreement should have been called to the attention of the Commission before the contracts were entered into and the deposits made, and not after completion of the work and the lapse of substantial periods of time.

In Case No. 5123, the applicable utility rule, immediately after the provision relating to disagreements, provided as follows:

> "Adjustment of any substantial differences between the estimated and reasonable actual cost thereof shall be made after the completion of the installation, subject to review by the Commission."

This utility rule contemplates adjustment of a deposit, after the completion of the work, of any "substantial difference" between the estimated and the reasonable actual cost of the installation. A utility is under the duty of complying with its filed and effective tariff rules. However, in this case, the complainant subdivider insisted that the utility enter into a contract deviating from the filed rules. Any right to adjustment was expressly waived by the subdivider who insisted that the contract provide a "flat amount," not subject to subsequent adjustment either way. Under the circumstances, we are of the opinion that the subdivider may not make a claim for reparation which is necessarily based upon repudiation of a provision which he persuaded the utility to place in the contract.

In view of our conclusion that these proceedings should be dismissed for the reasons indicated, no useful purpose would be served by discussion of other issues raised by the parties.

O R D E R

Hearings on the above complaints having been held before Examiner Rowe, briefs filed, and the matters submitted, and based upon the record and the findings and conclusions contained in the foregoing opinion,

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IT IS ORDERED that the complaints in Cases Nos. 5116, 5122 and 5123, the complaint and cross complaint in Case No. 5117, and each of them, are hereby dismissed.

The Secretary is directed to cause copies of this order to be served by mail upon the parties to these proceedings.

Dated at San Francisco, California, this 24th day of April, 1951.

Commissioners.