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ORIGINAL

Decision No. 62771

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

S. & G. Properties, Inc., a California corporation,

Complainant,

vs.

Crest Water Company, a California corporation,

Defendant.

Case No. 7053

D. Bianco, for complainant.
Kenneth H. Bates of Deadrich and Bates, for defendant.
W. E. Moltke, for the Commission staff.

OPINION

Complainant, a developer of residential subdivisions, seeks payment, by way of reparation, of the sum of $43,809.21 (corrected by the record to $43,809.81) alleged to have been exacted early in 1960 by defendant water utility, in violation of its water main extension rule (Rule 15, Par. C), as the cost of certain off-site facilities to produce and convey water to Tracts 2321 and 2322, then being developed by complainant in the SE¼ of Section 15, Township 29 South, Range 28 East, M.D.B.&M., within the utility's acknowledged service area northeast of Bakersfield. Complainant also requests that the Commission direct the utility to extend service, in accordance with its rule, to two additional subdivisions (Tracts 2323 and 2324), located immediately east of Tracts 2321 and 2322, upon deposit by complainant of $46,182.49 (plus whatever amount may ultimately be required) as the cost of on-site facilities for Tracts 2323 and 2324.

Complainant alleges that the utility, contrary to the provisions of its tariff rule, has rejected a tender of the on-site costs for Tracts 2323 and 2324 and that, as a condition to extending service, the utility has demanded an additional amount of $54,958.56 as the estimated cost of certain off-site improvements to its system.

Defendant utility disclaims any obligation to reimburse complainant for the off-site costs for Tracts 2321 and 2322. The utility alleges that the deposit was received as a nonreimbursable contribution in aid of construction for supply, storage, transmission and other "backup" facilities required for service to complainant's tracts and to other subdivisions being developed in the vicinity, following arrangements concluded in the latter part of 1959 between the utility and the subdividers for a "master plan" for improvements to the water system.

The utility had claimed that its water supply was inadequate and its financial capacity insufficient to provide either the water or the means of transporting it to the various tracts unless the subdividers were willing to contribute the costs of the off-site improvements, subject to their being reimbursed, along with the on-site costs, if the Commission, upon application by the utility were to authorize such a deviation from the company's water main extension rule. The Commission, after hearing, declined to grant the requested authority (Decision No. 60943, October 25, 1960, Application No. 41991). Instead, it authorized the utility to provide a portion of the funds required for the off-site improvements by the sale of 3,000 shares of its $10 par value common capital stock, which were issued to Crest Land Company, an affiliate engaged in developing subdivisions in the vicinity of complainant's tracts and a participant in the "master plan" arrangements.

With respect to the portion of the complaint relating to Tracts 2323 and 2324, defendant admits rejection of complainant's tender of the on-site costs and its refusal to extend its facilities without a nonreimbursable deposit of the cost of certain off-site facilities. In justification of that action, defendant alleges that it has reached the limit of its capacity to supply water from its present system to additional consumers "without injuriously withdrawing the supply wholly or in part" from present consumers (Public Utilities Code, Section 2708). The present total supply of 2,037 gallons per minute supplying 1,256 "service units", it is alleged, is less than the 2,260.8 gallons per minute required by Commission standards for such service (General Order No. 103).

Defendant further alleges that it has neither capital nor credit to provide funds for installation of off-site facilities to supply, store and transport water both for the 235 additional service units in Tracts 2323 and 2324 and for the balance of service requests received in 1959; that such additional off-site facilities, including two wells, one storage tank, a pressure system and enlarged transmission capacity, are estimated to cost $128,769; and that "to require defendant to install off-site improvements solely to supply water to applicant would injuriously affect the existing consumers of defendant and would inevitably require a substantial increase in the rates charged to all customers".

Finally, defendant, requesting dismissal of the complaint, alleges that it is willing to extend service when and if that can be done without injury to existing consumers; further, that it has been at all times and now is "ready and willing to relinquish any rights in Tracts 2323 and 2324 to enable applicant to obtain water from East Niles Service District, California Water Service Company, or

any other water company willing and able to extend services to said tracts".

The relevant facts concerning these transactions were developed at a hearing, held April 4 and 5, 1961, at Bakersfield before Examiner John M. Gregory, at which time the case was submitted on briefs, since filed.

The evidence reveals that complainant, on November 16, 1959, applied for water service to four tracts in the SE¼ of Section 15 (Tracts 2321, 2322, 2323 and 2324) which were expected to be fully developed in from one to four years. The utility, which then had pending applications for service to tracts of other developers--including its affiliate, Crest Land Company--informed complainant that it would not extend its facilities unless complainant advanced the cost of off-site facilities in addition to those required for on-site installations. Complainant rejected this proposal in the absence of "some kind of refundable contract", which the utility, at that time, was unwilling to offer. Complainant then sought an informal adjustment of the matter by the Commission's staff (File No. U-4206).

Early in December 1959, while the informal complaint was still pending, the utility prepared a survey of existing and required facilities needed to supply current and prospective water users within its certificated service area. The survey (dated December 8, 1959 - Exhibit 9), in addition to noting then existing facilities and demands, also referred to requests for service from the following developers in Section 15: Roy J. Wattenbarger - 109 lots in Tract 2290 in the SW¼; Joe Gannon (one of the complainant's owners) - 455 lots in the SE¼; Crest Land Company - 508 lots in the NE¼. The total cost of off-site facilities required for service to these

developments, including 10 percent for overheads, amounted to $262,769.33, which was divided, in shares proportionate to the respective acreages, so that complainant's share ($102,480.03) came to $225.24 per lot; Wattenbarger's, $236.25 per lot; and Crest Land Company's, $264.84 per lot.

On January 12, 1960, following negotiations between complainant and the utility, the parties executed an agreement (Exhibit 3), prepared by the utility, by which complainant, in consideration of the utility's "guarantee" of a water supply adequate "to meet the requirements of the public regulating bodies", agreed: (a) to deed to the utility an existing water well and well site, located on Tract 2322, for $24,000 and another well site for $3,000, to be credited, in reimbursable contracts, against "costs of such tract or tracts as applicant[1/] elects"; (b) to deposit $20,271.16 for out-of-tract costs for Tract 2321 and "for each and every lot subdivided in said tract or tracts the sum of $225.24 for out-of-tract costs and said amount shall be added to in-tract reimbursable improvement costs in the Standard Crest Water Company Agreement for Refund". The agreement further provided that the value of the well and well sites, together with the sum of $20,271.16 for off-site costs for Tract 2321 (90 lots @ $225.24 per lot) "shall be considered as cash deposits to be used at the rate of $225.24 per lot on the out-of-tract improvement costs as agreed between APPLICANT and UTILITY." The agreement also provided that complainant would withdraw its informal complaint, which it did by letter to the Commission dated January 19, 1960. Thereafter, complainant deposited

1/ Complainant was referred to in the agreement as "applicant".

the $43,809, of which $24,000 was represented by the agreed value of the well and one site on Tract 2322 and the balance by cash.

The record shows that while some uncertainty existed in the minds of the subdividers and the representatives of the utility concerning refund of the off-site costs, all parties--at least by December, 1959 or in the early part of 1960--appeared to recognize that Commission authorization was required. The utility undertook to secure the necessary authority by filing, on February 29, 1960, an application (Application No. 41991, mentioned earlier) for permission to carry out the terms of five agreements, each of which provided for refund of both the in-tract and off-site costs by the "percentage of revenue" option of Section C of the utility's main extension rule, Rule No. 15. Three of the agreements, dated January 12, 1960, were with Crest Land Company and referred to Tracts 2345, 2350 and 2352 then being developed by the utility's affiliate in the NE¼ of Section 15. The two others, each dated February 1, 1960, were, respectively, with W. J. Development Company (Wattenbarger) for 65 lots in Tract 2290 and S. & G. Properties, Inc., for 90 lots in Tract 2321.[2/] The Commission, as indicated earlier, denied the application (Decision No. 60943, dated October 25, 1960). The Commission's opinion, in part, states:

> "Authorization to execute the five contracts will be withheld. Instead, and in accordance with applicant's modified request" (to issue stock to its affiliate, Crest Land Company) "authority will be granted to issue not to exceed 3,000 shares of the utility's common stock of the par value of $10 per share, to finance a portion of the company's investment in backup facilities for the developments projected for 1960. If applicant comes forward with a proposal to finance independently all or a major portion of the off-tract facilities and to use its

2/ Two other agreements of January 12, 1960, with S. & G. Properties, Inc., and Wattenbarger (Exhibits 3 and 8), were not submitted to the Commission for authorization of their provisions for reimbursement of off-site costs, although the amounts of the deposits for such costs were contained in the contracts filed with the application.

> main extension rule only for the distribution facilities required, the Commission will give consideration to such proposal in light of the circumstances then made to appear."

On November 15, 1960, about three weeks after the issuance of the Commission's decision, complainant wrote the utility enclosing signed agreements, dated February 1, 1960, for $21,448.40 and June 8, 1960, for $33,752.30, for in-tract deposits for Tracts 2321 and 2322. The letter, in addition, stated as follows:

> "Upon receipt of this letter will you please refund to us, as per Application #41991 and Decision #60943 of the Public Utility Commission, State of California, the money deposited by us for out-tract cost of $20,271.60 for Tract 2321 and $23,538.21 for Tract 2322."

We turn now to S. & G. Properties' complaint that the utility has refused to extend service to Tracts 2323 and 2324 without a nonreimbursable deposit of $54,958.56 for off-site facilities, in addition to an advance, admittedly subject to refund under the company's rule, of $46,182.49 as the estimated cost of on-site installations for those two tracts. The record shows that water service has been rendered to Tracts 2321 and 2322 and that transmission mains through which water could be delivered to Tracts 2323 and 2324 have been installed; no water, however, has been supplied to the latter two tracts.

On or about January 4, 1961, complainant made application to the utility for water service to Tracts 2323 and 2324. On January 11, 1961, Roland Curran gave Ralph Smith, Jr., the cost estimates for the two tracts, amounting to $46,182.49 for in-tract facilities and $54,958.56 for off-site improvements. When Smith called Curran's attention to the Commission's decision, Curran replied: "Either you put up in-tract and out-of-tract money or you will receive no water in your tracts".

Defendant's contention that it did not have either the water supply or the financial resources with which to serve complainant's tracts is not supported by the record. At the hearing, it was established that the utility, due to a miscalculation, had available an additional water supply to the extent of 544,000 gallons of effective distribution storage.

During all times pertinent to this proceeding the utility had on file with the Commission, open to public inspection, its schedules of rates, rules and regulations governing water service to its consumers and applicants for extensions of service. The company's rule governing extensions to serve subdivisions (Rule No. 15) provides, in substance, that an applicant for a "main extension" to serve a new subdivision, or tract, "shall be required to advance to the utility before construction is commenced the estimated reasonable cost of installation of the mains, from the nearest existing main at least equal in size to the main required to serve such development. . . . If additional facilities are required specifically to provide pressure or storage exclusively for the service requested, the cost of such facilities may be included in the advance upon approval by the Commission". (There is no issue in this case involving the last sentence of the foregoing quotation).

The rule, which is uniform for all water utilities subject to Commission regulation except those serving water primarily for irrigation uses (Water Main Extension Rule (1954), Decision No. 50580, Case No. 5501, 53 Cal.P.U.C. 490), further provides for refund of the money so advanced, without interest, under either a "proportionate cost" method or a "percentage of revenue" method, at the utility's option. Under the "percentage of revenue" option, incorporated in the contracts between the utility and the subdividers here, inclusion

of the cost of off-site facilities of such a substantial nature as those asserted to be required for the developments in Section 15 would normally result in less than full refund of the advance within the 20-year period specified by the rule, thus creating a "forced" contribution by the subdividers in the amount of the unrefunded balance.

Other than the provision for specially required pressure or storage facilities, quoted above, the rule does not contemplate advances by subdivider applicants for off-site installations, the financial obligation for which, in the absence of specific Commission authorization, lies with the utility.

The statutory requirements for observance by a water utility of its rules and regulations and the procedural steps for securing authority to deviate from them are found in various provisions of the Public Utilities Code, in Section X of the Commission's General Order No. 96, and in the water main extension rule itself (Par. A.5).

Section 532 of the Public Utilities Code, as pertinent here, provides that, unless the Commission by rule or order establishes specific exceptions from its operation, no public utility shall charge or receive compensation for any commodity or service different from the applicable rates and charges specified in its schedules, nor extend to any corporation or person any form of contract or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons. In substance, the statute forbids, without the Commission's specific authorization, the exaction of charges not authorized by filed and effective tariffs and also forbids, without

like authorization, the above-mentioned types of discriminatory treatment.

Section X of General Order No. 96, Paragraph A, as applicable here, prohibits utilities of the class specified in the general order, which includes water utilities, from making effective any contract or arrangement for furnishing public utility service at rates or under conditions other than those contained in its filed and effective tariff schedules, unless it first obtain the authorization of the Commission to carry out the terms of such contract or arrangement.

Paragraph A.5. of the uniform water main extension rule (Crest Water Company's Rule No. 15) provides that in case of disagreement or dispute regarding the application of any provision of the rule, or in circumstances where application of the rule appears impracticable or unjust to either party, the utility, applicant or applicants may refer the matter to the Commission for settlement.

The Supreme Court of California, in a recent decision in which a major issue was whether the water utility was entitled, without authorization by the Commission, to make effective a contract with a subdivider (outside its acknowledged service area) calling for contribution of the cost of off-site improvements--involving, as here, a deviation from the utility's main extension rule--said in part:

> "But regulation of compensation charged for actual water deliveries could be substantially inadequate to protect the public interest if public utilities were free from all regulation with respect to the compensation charged for the main extensions which make such water deliveries possible...
>
> "We conclude that section 532 of the Public Utilities Code fully supports the commission's position that when a water public utility undertakes to extend its

> mains beyond its dedicated area it may do so only on the terms and conditions stated in its main extension rule on file with the commission, and must obtain commission authority for any arrangements which deviate therefrom; that until provisions deviating from the utility's main extension rule are approved by the commission, they are of no force or effect." (California Water & Tel. Co. v. Public Utilities Com. (1959), 51 Cal. 2d 478, 501.

As indicated earlier, the Commission, in Decision No. 60943 (Application No. 41991), withheld authority to carry out the proposed rule-deviation arrangements covering off-site improvements for Tracts 2321 and 2322. Those arrangements, and the contracts associated with them, specifically the agreement dated January 12, 1960 (Exhibit 3 herein) and the agreement dated February 1, 1960 (Exhibit B attached to Application No. 41991), are consequently ineffective.

With respect to complainant's request for reparation of the amount deposited with the utility for off-site improvements involving Tracts 2321 and 2322, we find that the complaint was filed within the time specified by the applicable statute of limitations (Public Utilities Code, Sec. 736) and that the sums so deposited constituted an unauthorized exaction of money by the utility in excess of the charges specified in its filed and effective water main extension rule and in violation of Section 532 of the Public Utilities Code. We further find that defendant, in demanding and accepting said sums, has charged an unreasonable, excessive, and discriminatory amount as a condition of extending water service to Tracts 2321 and 2322, and that complainant is entitled to refund of said sums, without interest, as reparation. (See Public Utilities Code, Sec. 734; San Francisco Artichoke Growers' Association v. Ocean Shore RR. Co., 8 CRC 519, 521; Chromcraft Corp. v. Davies Warehouse Co., 57 Cal.P.U.C. 519).

With regard to the remedy requested by complainant involving extension of the utility's service to Tracts 2323 and 2324 in accordance with its main extension rule, conditioned on deposit by complainant of the estimated cost of in-tract improvements only, we find that on or about January 11, 1961, complainant applied to defendant for such extension of service; that defendant then had sufficient source of supply, storage and transmission capacity and the financial ability to serve both its then existing consumers and the additional consumers estimated to require service in said two tracts; that defendant then refused to extend service to said two tracts in accordance with its main extension rule; and that said refusal was and is both unreasonable and unduly discriminatory.

O R D E R

Public hearing having been held herein, evidence and argument having been received and considered, the matter having been submitted for decision, the Commission now being fully advised and basing its order upon the findings and conclusions set forth in the foregoing opinion,

IT IS HEREBY ORDERED that:

1. S. & G. Properties, Inc., a corporation, complainant herein, do have and recover from Crest Water Company, a corporation, defendant herein, by way of reparation, the sum of $43,809.81, without interest.

2. Crest Water Company be and it hereby is directed, within ten days after the effective date of this order, to extend its water facilities and water service to and within Tracts 2323 and 2324, located in the SE¼ of Section 15, Township 29 South, Range 28 East, M.D.B.&M., within defendant's service territory in the County of

Kern, State of California, upon deposit by S. & G. Properties, Inc., subject to and in accordance with the utility's applicable rules and regulations, of the sum of $46,182.49, or such other sum as the parties may agree to be necessary therefor, as and for the estimated cost of installation of water facilities to be located within said tracts only.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 7th day of NOVEMBER, 1961.

Everett C. McKeage
President

Peter E. Mitchell

C. Lyn Fox

George G. Grover

Commissioners

Commissioner Frederick B. Holoboff, being necessarily absent, did not participate in the disposition of this proceeding.