

ORIGINAL

Decision No. 69698

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

William M. and Collette S. Van Fleet,)
 Irene and Humboldt B. Gates, Clara J.)
 and Leslie B. Anderson, Mary L. and)
 Donald L. Hurst, Barbara J. and)
 John M. Arnett, Jean and Arnold L.)
 Maahs, Marie F. and Roland P.)
 Giampaolo,)

Complainants,)

vs.

ERNEST and LOUISE PIERSON,

Defendants.)

Case No. 7953
 Filed July 20, 1964

Vaughan, Paul & Lyons, by John G. Lyons;
 Falk, Dunn & Buxton, by Donald J. Falk,
 for defendants.
Leslie B. Anderson, for complainants.
John D. Reader, for the Commission staff.

O P I N I O N

By their complaint, 14 complainants assert that water for domestic use supplied to them by defendants is inadequate in quality and quantity and request this Commission to issue its order declaring that defendants have been furnishing water as a public utility subject to the jurisdiction of this Commission. After the filing of the complaint, two of the 14 complainants withdrew as complainants, having moved from the area. The 12 remaining complainants (hereinafter called complainants) are all either purchasers of lots from defendants in an area known as Freshwater Valley Estates near Eureka, California, or subsequent purchasers from parties to whom defendants had previously sold lots in that area.

Public hearing was held before Examiner Gillanders on April 7, 1965, at Eureka. The matter was submitted subject to the filing of concurrent briefs. Defendants' brief having been received, the matter was submitted for decision on June 3, 1965.

Defendants assert that this Commission lacks jurisdiction to entertain the complaint herein for the reason that there has been no dedication by defendants of any property to the public use. Defendants allege that they have furnished water only to those persons who have purchased lots belonging to defendants; that a contract for water service by defendants to the purchaser or his successor was entered into at the time the purchaser bought his lot; and that the contract provides for the formation of a mutual water company from which purchaser will receive water.

The record shows that defendants commenced furnishing water service to residents of Freshwater Valley Estates in the year 1955 and presently are furnishing service to the complainants through six services. Exhibit 2 shows that originally Freshwater Valley Estates consisted of 31 parcels but subsequently parcels 13 and 21 were split in two. Defendant Ernest Pierson testified that he would like to divide three more lots, at least in half.

Exhibit 1 is a copy of a typical contract entered into between defendants and purchasers of lots. It states, in part:

"WHEREAS, it is the intention of first party to form a mutual water company for the purpose of providing a source of supply of water to second party and to other purchasers of parcels of land to whom first party may sell in the future, and upon the formation of such mutual water company, and filing of the articles of incorporation with the County Clerk of Humboldt County, it is the intention of first party to issue and transfer to second party a share or shares of stock in said mutual water company, as well as to issue and transfer similar shares of stock to other purchasers of parcels of land within the area intended to be served by such a mutual water company; that until the formation of such mutual water company, it

is the intent of first party to furnish to second party, sufficient water for domestic purposes and to guarantee a sufficient supply for that purpose until the formation of the mutual water company is completed, at which time it is the further intent of the parties hereto, that the obligations of first party shall cease and any easements acquired or rights to existing pipe lines by second party shall terminate and that title to any easements hereby conveyed or rights hereby conveyed, shall revert to first party automatically upon the filing of the articles of incorporation in the office of the County Clerk of Humboldt County of said mutual water company."

Exhibit 3 is a list of restrictions recorded against the parcels in Freshwater Valley Estates on October 15, 1954.

Paragraph 10 states:

"Each owner has an interest in the mutual water co. and must pay his fair share of the expense of running same."

Exhibit 6 shows that on January 2, 1957, articles of incorporation of Freshwater Valley Estates Water Company were filed with the Secretary of State and that they were filed with the County Clerk on January 24, 1957. Exhibit 5 shows that on December 11, 1964, articles of incorporation of Freshwater Valley Estates Water Company were filed with the Secretary of State. Defendants were named as directors of each corporation. Each corporation was organized as a general nonprofit corporation for the purpose of "...the development, distribution, supply and delivery of water for domestic use by its members, at actual cost, plus necessary expenses."

Purchasers of lots were never notified of the filing of either of the articles of incorporation.

Defendant Ernest Pierson testified that commencing with the first lot sale in 1955 defendants planned on a mutual water system and that until there would be enough people there to be able to have them absorb the cost, they were furnishing water as an interim or temporary measure until the mutual water system was

formed. Exhibit 6 clearly shows that the mutual water company referred to in Exhibit 1 was formed as of January 24, 1957. Accordingly, defendants' written commitment to furnish service ceased as of that date. Since then, however, defendants have supplied water to Freshwater Valley Estates in the same manner as before.

The record shows that four of the complainants have never paid anything for water; six have paid \$7.50 per month; and two have paid \$3.50 per month. The record also shows that although defendants refused service to an individual whose property lies outside the boundaries of Freshwater Valley Estates, they have supplied water on a commercial basis to property owned by themselves which lies beyond the boundaries of Freshwater Valley Estates.

Counsel for defendants agreed that if a mutual water company had been completely organized, with membership limited to existing users, defendants might not have been able to receive water service for the remaining lots in the area. Counsel for defendants also agreed that their use of the word "accommodation" in describing water service supplied had no reference to any specific section of the Public Utilities Code.

The principal issue before us is whether or not defendants are in fact a public utility subject to the jurisdiction of the Commission.

The Public Utilities Code defines a public utility in Section 216(a) as follows:

"216(a) 'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof."

Section 241 of the Public Utilities Code defines a water corporation as follows:

"241. 'Water corporation' includes every corporation or person owning, controlling, operating, or managing any water system for compensation within this State."

Defendants contend that they are not a public utility because they have not intended and do not now intend to furnish water to the public as a public utility water corporation. They maintain they have not dedicated their property to the public use.

It appears from the record that defendants believe that by their actions they are shielded from regulation by the provisions of Section 2705 of the Public Utilities Code, which states:

"2705. Any corporation or association which is organized for the purpose of delivering water to its stockholders or members at cost, and which delivers water to no one except its stockholders or members, or to the State or any agency or department thereof, to any city, county, school district, or other public district, or to any other mutual water company, at cost, is not a public utility, and is not subject to the jurisdiction, control or regulation of the commission; provided, however, that a mutual water company may perform the following acts without becoming a public utility and becoming subject to the jurisdiction, control or regulation of the commission:

"(a) May deliver water at cost to any lessee of its stock or shares or other evidence of membership where such lease is in writing signed by the owner of such stock or shares or other evidence of membership and the lessee thereof and approved by such mutual water company.

"(b) May deliver water at cost to any land leased by a stockholder, shareholder or member of such mutual water company to a person not a stockholder, shareholder or member thereof, provided such lease is in writing signed by such stockholder, shareholder or member and such lessee of such land and approved by such mutual water company.

"(c) In a bona fide water emergency, but for no longer than the existence of such emergency, may deliver water at cost to any person owning or leasing real property located within or adjacent to the service area of such mutual water company, provided that such water is delivered pursuant to a written contract signed by such mutual water company and the person to whom such water is delivered.

"(d) May deliver water pursuant to any contract for water service made prior to October 1, 1961, (1) in settlement of litigation involving disputed water rights or any judgment in such litigation or (2) in consideration of the conveyance of a well, water right, or easement for water distribution purposes.

"All such leases and contracts shall be preserved for a period of 10 years by a mutual water company and shall be subject to inspection by the commission.

"The term 'cost' as used in this section shall be construed to mean without profit."

The Commission is not unmindful that parties, without meaning to do so, may become subject to regulation because of the acts which they commit. It may well be that defendants were of the opinion that they were avoiding regulatory status, but such would not be a defense against regulation if the acts actually committed have brought them within the ambit of the regulatory statute. The Commission must proceed upon the law and the facts, whatever may have been the specific intent of the defendants.

Clearly defendants were and are operating a water system for compensation; and clearly they do not qualify for the regulatory exemption provided in Section 2705. We find that the activities of Ernest and Louise Pierson in operating their water system in Freshwater Valley Estates have constituted and do constitute a dedication to the public use; that Ernest and Louise Pierson are operating a public utility water system; and that they are a public utility "water corporation" within the meaning of Section 241 of the Public Utilities Act.

The intent of defendants was that this property would be perpetually devoted to water service for residents of the subdivision. Although only seven families were being served at the time of the hearing, more were expected; indeed, defendants deferred implementation of the mutual water company plan for the claimed reason

that there were not yet sufficient customers to make it economic. We find that the persons served and intended to be served by means of this system constitute "the public" in the area in question and that defendants dedicated - that is, committed - this property to permanent service of that public.

The plan to substitute a mutual water company at a later date was not inconsistent with dedication of the water system to the public use. The property of a mutual water company may or may not be dedicated to the public. The property here clearly has been dedicated; possible exemption of the planned mutual from Commission jurisdiction would depend upon the altogether different question of whether or not the operations complied with the standards set forth in Section 2705. (See Yucaipa Water Co. No. 1 v. Pub. Util. Comm., 54 Cal.2d 823; Corona City Water Co. v. Pub. Util. Comm., 54 Cal.2d 834.)

In any event, whatever their original intent, defendants continued service for many years after the time initially planned for conversion to mutual operation. They cannot escape regulation during this extended nonmutual period merely by "intending" at some indefinite future time to transfer the system to a mutual company.

It would be premature to determine whether or not defendants may at some future time convert their utility into a mutual operation exempt from Commission regulation. We may observe, however, that if defendants decide upon such a conversion, they must comply not only with Section 2705 but also with Section 851 of the Public Utilities Code.

Defendants argue that, since their operation is too small to be economic, we should not rule that it is a regulated public

utility. Such a consideration would have been relevant in a proceeding to determine whether or not public convenience and necessity required construction of the system in the first place, but it has no bearing on the legal status of utility property constructed without a certificate of public convenience and necessity. Moreover, small water companies often are not profitable in the developmental stages and it is not uncommon for the owners to accept such losses during the initial period of operation; this is especially true where, as here, the owners of the utility are also the owners or developers of the land served by the utility.

The potability and level of purity of defendant's water supply is, in the first instance, within the jurisdiction of the appropriate health authorities. We have been advised by the County Health Department that this water supply is under investigation and that a program for improvement of water quality in the area is in progress. Accordingly, specific action on that issue by this Commission does not appear appropriate at this time.

O R D E R

IT IS ORDERED that:

1. Ernest and Louise Pierson, within thirty days from and after the effective date of this order, shall prepare and file with this Commission, in quadruplicate and in conformity with the Commission's General Order No. 96-A, rates and rules for water service, which rates shall not be higher than \$7.50 per month.
2. Within forty-five days after the effective date of this order, Ernest and Louise Pierson shall file a tariff service area map and sample copies of printed forms that are normally used in connection with customers' services.

3. Ernest and Louise Pierson shall prepare and keep current the system map required by paragraph I.10.a of General Order No. 103. Within ninety days after the effective date of this order, they shall file with the Commission two copies of this map.

4. Ernest and Louise Pierson shall file with this Commission, within one hundred twenty days after the effective date of this order, a report setting forth in detail a determination of the original cost, estimated if not known (historical cost appraisal), of the properties used and useful in providing water service, and also the depreciation reserve requirement applicable to such properties. The report shall designate which items are supported by vouchers or other like documentary evidence and which items are estimated, and it shall show the basis of any such estimates.

5. For the year 1965, Ernest and Louise Pierson shall apply a depreciation rate of 2 percent to the original cost of depreciable plant. Until review indicates otherwise, this rate shall be used. This rate shall be reviewed at intervals of five years and whenever a major change in depreciable plant occurs. Any revised depreciation rate shall be determined by: (1) subtracting the estimated future net salvage and the depreciation reserve from the original cost of plant; (2) dividing the remainder by the estimated remaining life of the plant; and (3) dividing the quotient by the original cost of plant. The results of each review shall be submitted promptly to the Commission.

6. Ernest and Louise Pierson shall not, without further order of this Commission, extend their water system.

7. Ernest and Louise Pierson shall apply to the health authority having jurisdiction for a water supply permit for their system, and shall report to the Commission in writing, within

thirty days after the effective date of this order, that application has been made for such permit.

The Secretary of the Commission is directed to cause personal service of this order to be made upon defendant. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 21st day of SEPTEMBER, 1965.

Frederick P. Hallock
President

John E. [unclear]

George L. Crow

George [unclear]

St. [unclear]
Commissioners