

Decision No. 69806**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

HENRY H. CHRISTENSEN and
H. DOUGLAS HARPOLD,

Complainants,

vs.

PHILLIP BRANGER and
BRANGER MUTUAL WATER COMPANY,

Defendants.

Case No. 8136
(Filed March 3, 1965)George E. Dilley, for complainants and
for Branger Mutual Water Company,
defendant.Swartfager and Allen, by Bryce Swartfager
Dwight Allen, for Phillip Branger,
defendant.O P I N I O N

Henry H. Christensen and H. Douglas Harpold (complainants) seek an order declaring Phillip Branger (Branger) and Branger Mutual Water Company (Mutual) to be a public utility. Complainants also ask that the alleged public utility be ordered to fix reasonable rates and to provide an adequate supply of water.

Public hearing on this complaint was held before Examiner Catey at Santa Rosa on May 18 and June 29, 1965. Copies of the complaint, defendants' answers and a notice of hearing had been served in accordance with this Commission's rules of procedure. Testimony on behalf of complainants was presented by both complainants, by four members of Mutual who were or are officers thereof, by an applicant for membership in Mutual, by a well driller, and by a real estate broker. At the conclusion of complainants' presentation, a motion to dismiss the complaint was made on behalf of Branger, a reply to the

motion was made on behalf of complainants, and the parties were authorized to file in this proceeding, prior to August 1, 1965, additional arguments pertaining to the motion. None of the parties filed any written arguments.

Complainants and Defendants

Complainants are property owners in the Branger Subdivision, located adjacent to the east side of Santa Rosa, in Sonoma County. They are also members of Mutual, holding Membership Certificates Nos. 5 and 32.

Branger is the developer of the Branger Subdivision. He was instrumental in forming Mutual and was president thereof for about the first ten years of its existence. He is the owner of the property upon which one of the principal well sources of Mutual is located.

Mutual is a non-profit California corporation organized in 1950 for the purpose of supplying water to its members, in the Branger Subdivision and land adjacent thereto. Ownership of the corporation is represented by membership certificates rather than stock.

History

The minutes (Exhibit No. 6) of the meetings of Mutual's board of directors show that Branger installed Mutual's initial water system and agreed to deed it to Mutual in exchange for 128 membership certificates. In September, 1951, Branger gave Mutual a bill of sale (Exhibit No. 17) to the water system and a grant deed (Exhibit No. 18) to the tank site and well site, but the membership certificates were not issued to Branger. At that time, Branger apparently still owned many of the lots in and adjacent to Branger Subdivision. If the certificates had been issued and had been identified with specific lots and made appurtenant thereto as provided in Mutual's original by-laws

(Exhibit No. 10), the right to the certificates automatically would have passed to parties later purchasing the lots from Branger. This would have avoided much of the present controversy between Branger and Mutual.

Mutual's application (Exhibit No. 12) to the State Division of Corporations for authority to issue 128 memberships to Branger and 22 certificates to other lot owners states that Mutual did not propose to sell the certificates of membership. Mutual's original by-laws (Exhibit No. 10) and present by-laws (Exhibit No. 20) both provide that no initiation or entrance fee shall be charged any person upon becoming a member of the corporation. The Findings of Facts and Conclusions of Law (Exhibit No. 1) in a recent Superior Court proceeding involving Branger and Mutual confirm that a certificate of membership is issuable, without charge or fee, for each lot in and adjacent to Branger Subdivision. Despite the prohibition against charging members for certificates, Mutual's board minutes (Exhibit No. 6) show that Mutual charged \$250 each for the first 41 certificates issued. Mutual's present membership application form (Exhibit No. 24) shows that Mutual now charges \$425 for each membership certificate issued. A letter (part of Exhibit No. 6) dated January 24, 1958, from the State Division of Corporations, indicates that some of the certificates sold by Mutual are Branger's and that, in effect, Mutual in those instances may be collecting a charge as agent for Branger, "where none of the consideration for the membership itself moves to the company". Mutual's president testified that Branger now personally collects fees from prospective members to whom Branger assigns his rights to certificates, having collected \$425 each from two such prospective members and \$500 from another during the first half of this year. One of these prospective members presented a receipt (Exhibit No. 7) showing that he had paid Branger \$425.

On December 3, 1954, Branger and Mutual entered into a one-year lease (Exhibit No. 3) whereby Mutual could, during 1955, supplement its inadequate supply of water by using water from wells located on property owned by Branger. The consideration to be received by Branger was \$50 per year in cash and the right to water for his own use without charge. The lease was not renewed but, by its terms, tenancy continues on a year-to-year basis. On June 3, 1965, Branger sent Mutual a "Notice Terminating Tenancy" (Exhibit No. 11) but, at the hearing on June 29, 1965, Branger stipulated that he will not enforce the termination during the pendency of this proceeding. This stipulation made unnecessary the interim restraining order requested by Mutual's petition herein filed June 28, 1965.

On November 9, 1964, judgment (Exhibit No. 2) was entered in Complaint No. 48336, Branger vs. Mutual, by the Sonoma County Superior Court. The Court decreed that (1) Branger is entitled to the 91 membership certificates remaining unissued of the total 128 originally authorized for issuance to him, and (2) Mutual is indebted to Branger for an additional \$9,046.71, representing the unpaid balance of moneys received by Mutual from sale of 37 of Branger's membership certificates at \$250 each, and other unpaid loans.

Allegations

The principal allegations of complainants and supporting testimony of witnesses relative to Branger and Mutual are:

Adequacy of Mutual's System

- System built with second-hand materials.
- Pipes too small.
- Source of supply inadequate.
- Entire system results in health hazard and fire hazard.
- Leaks in mains.
- Tanks not hydraulically balanced.
- Inadequate pump controls.
- Water use restricted in 1961 due to shortage.
- Pumps throttled to keep from sucking air.
- Would cost \$50,000 to bring system up to normal.
- New well would cost \$10,000 to \$12,000, if output guaranteed.
- System extended to new members when supply inadequate.
- No long-range plans for system improvement.

Adequacy of Mutual's Records

Records inaccurate.
Records scattered.
No general ledger.
Books not balanced.
Book entries not reconciled.
Water revenues and funds from certificates commingled.
Inaccuracies in application for issue of certificates.
Inaccuracies in tax returns.

Branger's Actions

Formed Mutual for his own benefit.
Controlled Mutual while he was president.
Told lot purchasers that all moneys received from sale of certificates would be used to purchase equipment and pay operating expenses of Mutual.
Was personally responsible for raising Mutual's rates in 1958.
Will not lease well site on a long-term basis, thus controlling an important source of Mutual's water supply.
Has attached Mutual's bank account.
Collects whatever traffic will bear for membership certificates, thus making exorbitant profits.
Deprives property owners of water because he controls issuance of certificates.
Rendered Mutual insolvent and incapable of financing improvements, due to Superior Court judgment obtained.

Other Items

Uncertainty of water supply decreases property values in the Branger Subdivision.
Lending agencies prefer that properties used for collateral be served by public utilities rather than by mutuals.

There is no need for a finding as to the validity of complainants' allegations. Regardless of how disadvantageous the actions of Branger and Mutual may have been to complainants and others in the Branger Subdivision area, there is nothing in the record to indicate that those actions constitute public utility service. Further, a mutual water system is not a public utility and is specifically excluded from this Commission's jurisdiction when organized and operated in accordance with Section 2705 of the Public Utilities Code.

Finding and Conclusion

The Commission finds that neither Branger nor Mutual is a public utility subject to the jurisdiction control and regulation of

the Commission. The Commission concludes, therefore, that it should grant Branger's motion to dismiss the complaint.

O R D E R

IT IS ORDERED that Case No. 8136 is dismissed.

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

Dated at San Francisco, California, this 19th day of OCTOBER, 1965.

Fredrick B. Holdhoff
President
George A. Crow
Attorney
William L. Grund
Commissioners

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.