

ORIGINALDecision No. 69843

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of GOLCONDA UTILITIES COMPANY, a California corporation, for approval of the acquisition of the assets of Kentwood in the Pines Community Association; and to issue securities.

Application No. 46719
(Petition for Modification
filed June 4, 1965)

Investigation on the Commission's own motion into the operations, rates, rules, tariffs, contracts, practices, equipment, facilities and service of GOLCONDA UTILITIES COMPANY, a corporation.

Case No. 8166
(Filed April 28, 1965)

Investigation on the Commission's own motion into the operations, rates, rules, tariffs, contracts, practices, equipment, facilities and service of KENTWOOD IN THE PINES COMMUNITY ASSOCIATION, a corporation.

Case No. 8177
(Filed May 11, 1965)

W. Paul Payne, for Golconda Utilities Company, applicant in Application No. 46719, respondent in Case No. 8166, and interested party in Case No. 8177.

Irwin Gostin, for Kentwood in the Pines Community Association, protestant in Application No. 46719, interested party in Case No. 8166, and respondent in Case No. 8177.

Leland Featherman, for San Diego County Counsel; Harry Hargreaves and Margaret McNichols, for Whispering Pines Municipal Water District; interested parties.

Hector Aminon, for the Commission staff.

O P I N I O N

In its petition for modification of Decision No. 69054 (issued May 11, 1965, in Application No. 46719), Golconda Utilities Company (GUC) seeks an order requiring, rather than permitting, it

to manage and operate the water utility properties of Kentwood in the Pines Community Association (KPCA) near Julian in San Diego County, under the terms of the agreement referred to in Decision No. 69054. On June 29, 1965, the Commission issued an order granting rehearing in Application No. 46719, limited to the issues of ownership and present management and operation of the water systems of KPCA. Concurrently, the rehearing was consolidated with Cases Nos. 8166 and 8177, investigations instituted on the Commission's own motion into the operations of GUC and KPCA, respectively.

Public hearing on the three proceedings was held before Examiner Catey at Julian on August 5 and 6, 1965. Copies of the order granting rehearing and of the notice of hearing had been served in accordance with this Commission's rules of procedure. GUC presented testimony in its behalf by its president, by two former directors of KPCA, and by a former secretary-treasurer and manager of KPCA. Testimony on behalf of KPCA was presented by a recent secretary-treasurer, by KPCA's attorney, and by two members of KPCA. Results of a Commission staff investigation were presented by a staff engineer. The rehearing in Application No. 46719 was submitted on August 6, 1965. The two investigation proceedings will be the subject of adjourned hearings to be held at a time and place to be set.

GUP and KPCA

Decision No. 69054 discussed both GUC and KPCA, at some length, so that a detailed description need not be repeated here. Briefly, GUC is a California corporation owning and/or operating several small water systems in Southern California; KPCA is a nonprofit California corporation owning the public utility water systems in two separate areas known generally as Whispering Pines and Kentwood in the Pines, located near Julian in San Diego County.

History

Details of the history of the water systems owned by KPCA were also presented in Decision No. 69054, and only those portions pertinent to this decision will be repeated here, in summary form.

In 1958, KPCA was authorized by the Commission to acquire the Whispering Pines water system. Instead of paying for the system with \$15,000 in cash and \$15,000 in short-term notes, as represented to the Commission, KPCA issued various notes and bonds without Commission authorization. The notes and bonds, if authorized, would have resulted in a capital structure with essentially no equity and all debt. KPCA then installed a separate noncontiguous unauthorized water system to serve Kentwood in the Pines. It exacted unauthorized contributions from new customers and generally operated in violation of its tariffs, the law, and good accounting practice. It could not even account for over \$21,000 of its funds which apparently had not been spent for utility purposes.

Understandably, by March of 1964 KPCA was without funds to continue the utility operation. KPCA and GUC then entered into an agreement providing that GUC operate and manage KPCA's water systems. On May 23, 1964, the Board of Directors of KPCA recommended sale of the water systems to GUC and then all of the directors resigned. A purported bill of sale for the transfer of the utility systems from KPCA to GUC is dated May 23, 1964. (Such sale was later held, by Decision No. 69054, to be void.) Among the directors who resigned were the then president and vice president of KPCA. The secretary-treasurer of KPCA, who also was an employee of GUC, considered KPCA defunct. After May 23, 1964, there was no effective management of KPCA. All that remained was the nebulous but significant corporate shell. Even the evidence of ownership of the corporation is somewhat circumstantial. Such ownership is not represented by shares of stock, as in a conventional corporation, but is represented by memberships in the association. Membership certificates were issued only upon request and apparently no member ever requested one.

In June of 1964, GUC filed its application to acquire KPCA's water systems. KPCA did not join in the application nor did it appear at the hearing. Aside from the fact that the seller was not a party to the proceeding, there were questionable circumstances surrounding the purported sale that came to light at the hearing on December 16, 1964, and which made it inappropriate to authorize a sale on the same terms as the earlier void transaction. One

significant circumstance was the purported payment of \$79,759.29 to KPCA in the form of promissory notes of GUC and the subsequent sale of those notes by KPCA to GUC's parent corporation, Golconda International Corporation (GIC), for \$10 in cash. Another significant aspect was an agreement whereby GUC and GIC would have indemnified certain directors, officers and members of KPCA from consequences of the proposed sale.

The sale was not authorized by the Commission, but it was apparent that, with KPCA in limbo, GUC was the only entity in a position to maintain service to the public. Decision No. 69054 authorized GUC to manage and operate KPCA's water systems in accordance with the agreement, which the two utilities had entered into in March 1964.

Some of the members of KPCA meanwhile had become dissatisfied with GUC's operation of the water systems and decided to reactivate KPCA. To that end, they called a meeting of the members on February 27, 1965, collected dues, elected directors and officers, and attempted to regain control of the water systems. In furtherance of that objective, the new directors of KPCA caused a letter to be sent to all water users on the KPCA systems stating that the yearly minimum water rate should be paid to KPCA and to no other company. The directors also attempted to terminate the management agreement.

GUC, as operator of the KPCA systems pursuant to the management agreement, challenged the legitimacy of the present

directors of KPCA and, in its petition for modification of Decision No. 69054, GUC has asked that the Commission prevent interference by unauthorized persons with the management and operation of the systems.

Legality of KPCA Election of Directors

Ordinarily it would not be within the province of this Commission to settle a dispute over control of a corporation. In this instance, however, it is necessary, in the Commission's exercise of its power and jurisdiction, to determine the entity or entities to be regulated.

A corporation has an existence apart from its directors, officers, stockholders or members. It exists even if it has no directors or officers. Hence, KPCA continued to exist as an independent entity, notwithstanding the resignation of its directors.

The stockholders or members of a dormant corporation may call a meeting and elect new directors who may then appoint officers to operate the revived corporation. A primary issue to be determined herein is whether or not the election of directors at the February 27, 1965 meeting of KPCA members was substantially in accordance with KPCA's bylaws, appropriate excerpts of which are set forth in Appendix A to this decision.

The validity of the February 27, 1965 meeting depends, first of all, upon whether or not it was properly called. The KPCA bylaws provide, among other things, that a special meeting may be called by one or more persons holding not less than one-fifth of

the voting power of the corporation. (Art. V, Sec. 3.) The bylaws also make a distinction between membership rights and voting rights. To be a member, one must own property in Kentwood in the Pines and must have paid a \$10 membership fee. To be eligible to vote, a member must also have paid his \$5 annual dues. Thus, for KPCA, voting "rights" and voting "power" are separate: one need only be a member to have the "power" to vote, even though he must meet the additional requirement as to payment of dues to have the "right" to vote. If the reference in the bylaws to "voting power" is not thus interpreted, there would be no way for the members to call a special meeting in the event none of them paid the annual dues. Where the directors and officers have resigned, a special meeting called by the members is the only way to revive the dormant corporation; the bylaws, therefore, should not be construed in a way which might make such a meeting impossible.

Appendix B to this decision is the most current available official list of members of KPCA. This list is based upon Exhibit 47 and shows the names of thirty-nine individuals. The president of KPCA, whose name does not appear on Exhibit 47, testified that he also had paid his \$10 membership fee and owned requisite property. We find that the membership of KPCA immediately prior to February 27, 1965 consisted of the thirty-nine persons named in Exhibit 47, plus KPCA's present president, Earl Rasmussen, and that these forty persons then held the voting power of the corporation.

KPCA's president also testified that he was one of the members who requested that the February 27, 1965 meeting be called and that eleven other persons, whose names are listed in Exhibit 47, joined in this request. Each of said persons had the power to cast one vote. We find that KPCA members holding not less than one-fifth (eight votes) of the voting power of the corporation called the meeting of February 27, 1965.

Notice of the meeting was sent to 205 property owners in the Kentwood in the Pines area (Whispering Pines property owners are not qualified to be members of KPCA). The list of names, Exhibit 31, used for notification of the meeting was compiled from assessor's office records as of September 3, 1964. Of the thirty-nine members shown on Exhibit 47, there were thirty-six who were also on the assessor's records and were sent notice. Because there were no officers or directors of KPCA from whom a member could obtain an accurate, up-to-date membership list, the method used to serve notice of the February 27, 1965 meeting was reasonable. The notice specified the place, day and hour of such meeting and stated the general nature of the business to be transacted. We find that there was substantial compliance with the notice provisions of KPCA bylaws.

At the February 27, 1965 meeting, twenty persons paid \$5 annual dues and participated. Of these twenty persons, only four had voting power in KPCA by virtue of payment by them or their spouses of the requisite \$10 membership fee. Article V, Section 6

of the bylaws provides that ten percent (in this instance, four votes) of the voting power shall constitute a quorum for the transaction of business. We find that there was a quorum at the February 27, 1965 meeting. Inasmuch as the votes on all matters coming before the meeting were unanimous, the voting by other, unauthorized persons does not invalidate the votes of the four qualified members. We find that the directors elected at the meeting and the officers appointed by said directors are the duly constituted board of directors and officers of KPCA.

KPCA contends that it terminated the March 10, 1964 management agreement with GUC on June 2, 1965. Exhibit 36 is a copy of a letter from the attorney for KPCA to GUC, purporting to terminate the agreement. That agreement itself makes provision ^{1/} for notice of termination. Neither the method of mailing nor the mailing address specified in the agreement were used by KPCA. Personal service of notice of termination was not made. The president of GUC testified that GUC did not receive the letter. We find that the agreement has not been terminated.

1/ "NOTICES. All notices, demands, requests, approvals and designations under this agreement by either party to the other shall be in writing and shall be sufficiently given and served upon the other parties, if sent by certified mail, return receipt requested, postage prepaid, and addressed as follows:

To Association: Kentwood in the Pines Community Association, Inc. (sic), P.O. Box 555 Julian, California

To Company: P.O. Box 9706, North Hollywood, California.

Either party may from time to time change its designated address by giving written notice to the other party.

Any notice shall be sufficiently given and served upon the other party if service thereof shall be made in person upon an officer of the party to be served."

Unless and until the agreement is terminated, GUC has the responsibility for providing water service to the public in Whispering Pines and Kentwood in the Pines. The collection by KPCA of payments for water service was not proper. The order herein requires KPCA to refund all such payments to the customers. The order requires GUC to grant a grace period before discontinuing service to any customer for nonpayment of bills where such customer claims to have paid to KPCA the amount due.

Findings and Conclusions

The Commission also finds that:

1. a. KPCA and GUC are public utilities under this Commission's jurisdiction.
 - b. KPCA owns public utility water systems in and adjacent to Whispering Pines and Kentwood in the Pines, near Julian, San Diego County.
 - c. GUC is operating and managing the KPCA systems pursuant to an agreement with KPCA, as authorized by Decision No. 69054 in Application No. 46719.
 - d. The aforementioned agreement has not been terminated.
 - e. Until the agreement is terminated, GUC is obligated to manage and operate KPCA's water systems.
2. It is essential in the public interest that, at any one time, KPCA or GUC, but not both, have the responsibility for management and operation of KPCA's system, and that this Commission promptly be made aware of any transfer of that responsibility.

3. KPCA has improperly collected moneys from customers of its systems while responsibility for operation and management of the systems rested with GUC.

4. Customers who erroneously paid water bills to KPCA instead of GUC will require a reasonable grace period in which to receive a refund from KPCA and to pay GUC.

The Commission concludes that Decision No. 69054 should be supplemented by requiring, as well as authorizing, GUC to operate KPCA's water systems, pursuant to the management agreement, and that KPCA and GUC should be subject to the other requirements and restrictions set forth in the order which follows.

O R D E R

IT IS ORDERED that:

1. Unless and until the management agreement referred to herein is terminated, Golconda Utilities Company (GUC) shall continue to carry out the terms thereof, as authorized by Decision No. 69054 in Application No. 46719, providing for the management and operation by GUC of the water systems owned by Kentwood in the Pines Community Association (KPCA) in and about Whispering Pines and Kentwood in the Pines, near Julian, San Diego County.

2. a. Unless and until the aforementioned management agreement is terminated, KPCA shall do nothing to interfere with operation and management of its water systems by GUC.

b. If either party terminates the management agreement, that party shall file in this proceeding a copy of the notice of termination, concurrently with service of such notice on the other party.

3. Within ten days after the effective date of this order, KPCA shall:

a. Refund to customers of its water systems any moneys it has collected from them since February 26, 1965 for water service.

b. Advise those customers by letter that, until further notice, the water bills are payable to GUC.

c. File in this proceeding a list of such customers, showing the amount refunded to each, together with a copy of the letter required by the foregoing subparagraph b.

4. Until thirty days after the effective date of this order, GUC shall not discontinue service to any customer of the KPCA systems for nonpayment of bills where such customer claims to have paid to KPCA the amount due.

The effective date of paragraphs 1 and 2 of this order shall be the date hereof; the effective date of all of the other ordering paragraphs shall be twenty days after the date hereof.

Dated at San Francisco, California, this 26th day of OCTOBER, 1965.

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.

Frederick B. Hallock
President
George T. Trover
Quigley
Commissioners

EXCERPTS FROM BYLAWS OF
KENTWOOD IN THE PINES
COMMUNITY ASSOCIATION

Article II, Sec. 1: Qualification of Members

There shall be only one class of membership in the corporation. Each and every person who is the owner of any lot in property subject to the jurisdiction of the corporation shall be entitled to membership therein, and upon acceptance of membership shall become a member thereof; provided, however, that any person who is the owner of any lot or lots in property subject to the jurisdiction of the corporation at the time that power and authority to enforce all or any part of the protective provisions, covenants, conditions, restrictions, liens and charges applicable thereto are conveyed to the corporation upon payment of a membership fee in the association of \$10, which shall not be transferable, shall automatically and without formal application for membership be and become a member of the corporation and have and be entitled to exercise all voting, property and other rights of membership therein.

Article II, Sec. 4: Termination and Transfer of Membership

Membership in the corporation shall be nontransferable, and the membership of any member shall terminate at such time as he shall cease to own any lot in property subject to the jurisdiction of the corporation; provided, however, that any succeeding owner or owners of such lot shall be entitled to membership in the corporation; upon payment of a membership fee in the association of \$10, and upon acceptance of membership shall be and become a member thereof.

Article V, Sec. 2: Annual Meetings

...Written notice of each annual meeting shall be given to each member entitled to vote, either personally or by sending a copy of the notice through the mail or by telegraph, charges prepaid, to his address appearing on the books of the corporation....

Article V, Sec. 3: Special Meetings

Special meetings of members for any purpose or purposes whatsoever may be called at any time by the President or by the Board of Directors, or by any two or more members thereof, or by one or more members holding not less than one-fifth of the voting power of the corporation. Except in special cases where other express provision is made by statute, notice of such special meetings shall be given in the same manner as for annual meetings of members. Notice of any special meeting shall specify in addition to the place, the day and hour of such meeting the general nature of the business to be transacted.

Article V. Sec. 6: Quorum

The presence in person or by proxy of members entitled to exercise ten percent of the voting power of the corporation shall constitute a quorum for the transaction of business. The members present at a duly called or held meeting at which a quorum is present may continue to do business until adjourned, notwithstanding the withdrawal of enough members to leave less than a quorum.

Amendment to Bylaws

Any property owner with a paid up membership fee of \$10 and paid up annual dues of \$5 shall be entitled to cast one vote. ...Where property is held in joint tenancy or by more than one person, the owners, collectively or as a group, shall be entitled to one vote only for the property, provided membership fee and dues requirements are complied with by at least one record owner.

APPENDIX B

MEMBERSHIP LIST AS OF OCTOBER 1964
KENTWOOD IN THE PINES COMMUNITY ASSOCIATION

- * Bachman, Herman C.
- * Baker, Lee Ota
- #* Bishop, Ashley L.
- Bishop, George A.
- Blankenship, Beryl
- Brodhag, Donald J.
- * Changnon, Robert P.
- Crosby, Marguerite A.
- Dam, Joseph C.
- Effron, Annie
- * Elstermeyer, Wilbert
- Ferris, Claire E.
- #* Fiala, Russell E.
- * Fleetwood, Louis C.
- Flouds, Donald C.
- * Gibbs, Homer
- Gibson, William L.
- Gildred, George L.
- Head, Robert F.
- Holly, John H.
- Jewell, Beatrice
- Kinyon, Gilbert E.
- Kratz, Ruby E.
- Krotz, Irene V.
- #* Lund, Myrrel C.
- Mann, N. H.
- Margolis, B. B.
- Nichols, Anabelle
- Olson, Conrad P.
- Page, Mary H.
- Patterson, Margaret E.
- Pierson, Frederick K.
- Povey, Francis R.
- Savage, Edward F.
- * Shelstead, Winfred A.
- Smith, Roger B.
- * Switzler, R. M.
- Tompkins, M. E.
- Williams, Paul G.

* Requested meeting held on February 27, 1965.

Valid votes at February 27, 1965 meeting, in addition to the valid vote of KPCA President Earl Rasmussen.