

Decision No. 77654

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ROGER G. ELLIS, )  
Complainant, )

vs.

HARRY V. SLACK DOMESTIC WATER SUPPLY )  
(A Public Utility); HARRY V. SLACK )  
and GEORGE GARDNER, )  
Defendants. )

Case No. 8757  
(Filed January 26, 1968)

Roger G. Ellis, in propria persona, complainant.  
Clayson, Stark, Rothrock & Mann, by George G. Grover, for Harry V. Slack; Surr & Hellyer, by John B. Surr, for George Gardner, Jr., defendants.  
Jerry J. Levander, for the Commission staff.

O P I N I O N

The Commission issued a temporary restraining order herein and directed defendants to answer the complaint by March 5, 1968.<sup>1/</sup> Complainant, in 1968 a non-resident property owner in defendant Slack's public utility water system service area at Calimesa, alleged that defendant Gardner had agreed to sell certain wells to others who might not continue to supply Slack with water from those wells as had been previously agreed between Slack and Gardner. Complainant also alleged that the wells had been dedicated to public use and should be subjected to regulation by this Commission.

1/ Decision No. 73788, dated February 27, 1968. The restraining order, by stipulation of the parties, has been continued in effect pending further order of the Commission. Defendants filed timely answers.

Defendant Slack has admitted entering into an agreement with Gardner whereby, following deterioration of Slack's own wells, Slack's system had received substantially all its supply of "good" water from Gardner's wells since about July 1, 1965. Slack further alleged that Gardner had sold water to the public for compensation prior to and continuously since July 1, 1965; that Gardner's water system properties had been dedicated to public use and he is, therefore, a public utility subject to the regulatory jurisdiction of this Commission.

Defendant Gardner has admitted having agreed with Slack, in 1958, for delivery of water, subject to certain conditions, from one of the wells (see Exhibit 1 of Gardner's Answer). He has also admitted that he had provided Slack with water from those wells under the terms of that agreement and that he had sold water to others for compensation. He alleged that Calimesa Water District, a public district, since 1967 had operated and now operates "said wells, pipelines and appurtenances". Gardner also alleged that any sale by him of the wells mentioned in the complaint would be made expressly subject to his agreement with Slack. Gardner, by failing to deny certain of Slack's allegations (Slack's Answer, par. 8), has also admitted that he did not obtain a certificate of public convenience and necessity from this Commission before or since constructing his "wells, appurtenant pipelines and facilities", and that he has never filed tariffs "for his said water service to the public".

A hearing held March 14, 1968 at Calimesa before Examiner Gregory, at which evidence was received concerning the background of the controversy - including the fact that the Slack-Gardner contract dated September 29, 1958 had not been executed - resulted in an

agreement by counsel, with complainant's consent, to attempt a settlement of Slack's water supply problem. The case was continued, from time to time, to July 9, 1968 to afford the parties an opportunity to negotiate an appropriate agreement.<sup>2/</sup>

Counsel for defendants, after extensive negotiations, have submitted an agreement, dated December 31, 1969, for the Commission's authorization. The agreement is designed to assure Slack of certain quantities of water from Gardner's wells, and to provide for continuance of water deliveries from those wells in the event of a contemplated sale by Gardner of his water production and other water system facilities to Calimesa Water District, a California Water District formed in 1963. The agreement recites that substantially all of the area heretofore served with water by Gardner (not including the Slack land) lies within the boundaries of the District. The record discloses that Slack's customers, numbering about 170 in 1968, do not desire to receive water service from the District.

The agreement, included in this record as Exhibit 2, appears to meet Slack's requirements for a potable water supply. It provides, in substance, for deliveries of a continuous flow of not more than 25 day-inches per day, subject to Gardner's prior grant,

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<sup>2/</sup> The Commission was advised the day before the July 9th hearing that complainant (a resident of Marin County) would be unable to appear because of hospitalization for accidental injuries. Due to insufficient time for notice of a continuance, a brief hearing was held on July 9, 1968 at Calimesa before Examiner Warner, of the Commission's Los Angeles office. After non-controversial discussions and a report by counsel on the progress of their settlement negotiations, the case was temporarily removed from the calendar. Complainant, by advice dated February 18, 1969, informed the Commission he was no longer a property owner in Slack's service area (Exh. 3). The record shows no substitution of parties complainant.

pursuant to a recorded contract dated December 22, 1958, of a right to Garden-Air Golf Association to receive the first 50 inches of water produced by one of the two wells in Gardner's production system. The agreement recites a rate of 81 cents per 1000 cubic feet of water - the rate originally charged by Gardner under his former arrangements with Slack - with determination of any change in the rate to be by mutual agreement or arbitration.

The agreement expressly provides for mutuality of covenants relating to benefits and burdens applicable to the respective properties, and also recites that it is for the further benefit of and is binding upon the parties thereto, their successors and assigns and other successors in interest with respect to Slack's water system and Gardner's production system.

The agreement further provides that it is to continue in effect so long as Gardner's production system is capable of producing water in commercial quantities; i.e., not less than a continuous flow of 50 inches, unless Slack shall in any period of three consecutive years accept from Gardner and pay for in the aggregate less than 1500 day-inches of water, in which case it shall terminate.

No further public hearings appear to be necessary. Accordingly, we now take this case under submission for decision.

It is clear, from the pleadings and evidence, that the primary issue in this case concerns the threatened deprivation of Slack's major supply of potable water. That issue, in our opinion, has been amicably settled by the two parties directly concerned - Slack and Gardner. No obstacle to authorization of their agreement is presented by the change in complainant's status from that of a concerned property owner in Slack's service area to that of only a

nominal party to the action. Nor is it necessary, on this record, to determine Gardner's public utility status in order to permit the parties to implement their agreement.

The Commission finds that:

1. Continuance of the temporary restraining order heretofore issued herein by Decision No. 73788 is unnecessary.
2. The agreement between defendants Slack and Gardner, dated December 31, 1969 (Exhibit 2 herein), provides for a reasonably adequate supply of potable water for Slack's public utility water system at Calimesa, California.
3. There is no issue of fact or law material to the order or decision herein other than as set forth in paragraphs numbered 1 and 2, above, of these findings.

The Commission, therefore, concludes that:

1. The temporary restraining order heretofore issued herein should be dissolved.
2. Defendants Slack and Gardner should be authorized to carry out the terms and conditions of their agreement, Exhibit 2 herein.

O R D E R

IT IS ORDERED that:

1. The temporary restraining order heretofore issued in this proceeding by Decision No. 73788 is dissolved.
2. Defendants Harry V. Slack and George Gardner, Jr., after the effective date of this decision, are authorized to carry out the terms and conditions of that certain agreement between said parties, dated December 31, 1969, Exhibit 2 herein.

3. Defendant Slack, within thirty days after the effective date of this decision, shall transmit to the Commission one fully conformed copy of said agreement, as executed.

4. If defendant Slack, during any one-year period after the agreement herein authorized takes effect, shall accept from defendant Gardner or any successor in interest to Gardner's "production system" as defined in said agreement, and pay for in the aggregate less than 1500 day-inches of water, said Slack shall notify the Commission, in writing, of that fact within thirty days after the end of any such one-year period.

5. Except as provided by the order herein, the relief requested by complainant is denied.

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

Dated at San Francisco, California, this 25<sup>th</sup> day of AUGUST, 1970.

[Signature]  
Chairman

[Signature]

William [Signature]

[Signature]

[Signature]  
Commissioners