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ORIGINAL

Decision No. 78732

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

JOHN C. McDANIEL, ET AL,  
Complainants,

vs.

PARK-WOODS MUTUAL WATER  
COMPANY,  
Defendant.

Case No. 9133  
(Filed October 14, 1970)

Timothy Birnie, Attorney at Law, for complainants.  
John D. Dillingham and Paul Lewis, for defendant.  
Leslie D. Hay, for the Commission staff.

O P I N I O N

After due notice, hearing in this complaint was held before Examiner Gillanders at Clearlake Park on April 2, 1971 and the matter submitted.

Complaint

This complaint, signed by individuals representing 56 separate premises served by defendant Park-Woods Mutual Water Company alleges that:

1. The petitioners are owners of properties served by the Park-Woods Mutual Water Company but have never received stock certificates, have never had an election of officers, nor had any voice in the operation of this Company as required in the by-laws submitted to and approved by the State of California, Department of Corporations.

2. Owners have been charged exorbitant connection fees on properties adjacent to the water lines of said Company who are not stockholders or members per Section 2702 and Section 2703 of the Public Utilities Code.

3. The system controlled by Park-Woods Mutual Water Company is poorly maintained, shows numerous ruptures, and the water delivered is unpalatable.

Complainants request that under the provisions of the Public Utilities Code, Sections 2702 and 2703, this Commission declare the Park-Woods Mutual Water Company to be a public utility.

Defendant in its answer admits that complainants are the owners of property served by the Park-Woods Mutual Water Company and denies all of the other allegations.

#### History of System

Mr. Paul Lewis testified that he and others purchased approximately 1000 lots in an old abandoned subdivision at tax sales or from private parties.

In order to sell their lots he and others incorporated Park-Woods Mutual Water Company for the purpose of supplying water to the purchasers of their lots.

Water users of Park-Woods Mutual Water Company are served through meters from a grid distribution system of 2-inch and 4-inch steel, asbestos-cement and plastic mains. There is only one non-circulating main and there are approximately 31,500 feet of mains within the distribution system.

Park-Woods Mutual Water Company purchases its water from the Clearlake Park service area of California Consolidated Water Company, Inc. The water is purchased at the rates set forth in Consolidated's Schedule No. C-1A, Annual Metered Service, the schedule under which water is provided to most of the customers in Consolidated's Clearlake Park service area.

Service is provided to Park-Woods under the terms of a contract dated August 31, 1959 which was executed between Park-Woods and Clearlake Park Water Company, predecessor of Consolidated. The contract requires Park-Woods to purchase its entire supply of water from Clearlake Park and to deliver it at cost to members and stockholders exclusively.

The contract further requires Park-Woods to charge its users rates not less than those which are applied to the regular customers of Consolidated. The users of Park-Woods are currently being charged on the same basis as the Consolidated customers. Whenever rates have been increased for Consolidated's customers, the Park-Woods' users have also received a rate increase. The water system serves approximately 84 water users.

Complainant's Presentation

Twelve witnesses testified on behalf of complainants. Nine testified only regarding water company stock. One testified as to both stock and service and two testified only as to service.

One witness testified that she purchased a lot from Mr. Lewis in May 1965. She was told by Mr. Lewis that she was automatically a holder of a \$10 share in the Park-Woods Mutual Water Company. She received the share on November 25, 1965. She has never received notice of any stockholders meeting. She and her husband own four lots supplied by one service.

One witness testified she never received any stock certificate nor had she ever received a notice of stockholders meeting.

One witness testified that three years ago she purchased an existing house. The previous owner stated that a share in the

Mutual Water Company went with the property. She has never seen a share of stock. She has never asked for a share of stock. A meter was installed on her service after she moved in.

One witness testified that he rented for a year with the water service billed in his name. When he purchased the house three years ago, he had the service hooked up in his name at no charge. There was no mention of shares and he has never seen a share certificate.

One witness testified that he is a renter and that he pays the water bill in his name. He made application for service at Paul Lewis' office for turn on. No mention was made that service was supplied by a mutual water company.

One witness testified that in 1962 she paid an installation charge for water service of over \$50. She asked once or twice for her share in the Mutual Water Company. She has not received a share nor has she received any notice of a shareholders meeting.

One witness testified that in 1966 the account was transferred to her name. No mention was made by company of stock. She paid no charge for the transfer - just continued charges for water. She did not know about stock until about one year ago.

One witness testified that in March, 1968, she moved into her house. The previous service was flat rate. On the day she moved in, a meter was installed at no charge. The first she heard of any stock issue was at the hearing.

One witness testified that she bought a lot with a house and service and has since bought two adjoining lots. She has never paid for a hookup. She has never received any stock nor has she ever

received a notice of a stockholders meeting. There has been a leak near her property for the last five years and the company fixes other leaks once a week.

One witness testified that he had worked in Mr. Lewis' office during 1962-1964. Lot owners were charged \$55 for water hookup if they had purchased the lots from Mr. Lewis. Other charges were made if they had purchased lots from others.

Defendant's Presentation

Defendant was willing to stand on the staff report distributed prior to the hearing.<sup>1/</sup>

Mr. Lewis having been called by the Examiner as his witness under Section 775 of the Evidence Code, testified that he charged \$265 for a water hookup to people to whom he did not sell the original lot. He is only interested in receiving payment for water used. He does not know to whom shares have been issued nor does he know how many shares have been issued.

The operations of the water company show a loss. He has had to put money out of his own pocket. He does not charge for meter reading, billing or collecting. He has never made an assessment.

He lives in the subdivision and receives water service at no charge.

Mr. Dillingham stated he receives no salary from the water company. The water company serves Clearlake Park and Clearlake Park #4 subdivisions.

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<sup>1/</sup> This report, which became Exhibit 7, contained the recommendation that "The complaint should be dismissed." The staff witness withdrew the recommendation during his testimony, thus Exhibit 7 contains no recommendation.

Staff's Presentation

A staff engineer presented testimony and four exhibits. The testimony and exhibits show the following:

Park-Woods Mutual Water Company is incorporated under the laws of the State of California. The water company is operated by Paul Lewis, its secretary. Mr. Lewis is also a real estate broker and maintains a real estate office at Clearlake Highlands, California. He also owns the Wiseda Motel in Clearlake Highlands.

Many of the lots which lie within the service area of Park-Woods Mutual Water Company are owned by Mr. Lewis in partnership with J. Douglas Dillingham. Mr. Dillingham is no longer actively engaged in the sale of real estate. He now maintains a business office in Ukiah and also operates out of his home at Lakeport. He is engaged in the investment business.

There was formerly a third partner, R. O. Hodges, but Mr. Hodges apparently is no longer connected with Lewis or Dillingham except in isolated business transactions.

The Articles of Incorporation of Park-Woods Mutual Water Company were filed on May 15, 1959 with the Division of Corporations. They show that the company was authorized to issue 2,000 shares of \$10 par value stock and that the corporation is a nonprofit corporation organized for the benefit of its shareholders. The first directors of the corporation were R. O. Hodges, Paul Lewis and J. D. Dillingham.

The area served can be generally described as bounded on the east by 8th Street, both sides of which are served by Park-Woods; on the north and west sides by Country Club Drive, on which the company

serves only one side of the street; and on the south by Country Club Drive, Golf Club Road, and Sonoma Avenue, on each of which the company serves only one side. Exceptions to the above description include a number of the lots served by Consolidated at the southern end of the described area, and also a number of lots at the northern end of the described area between 8th and 11th Streets in front of which there are currently no existing mains. There are approximately 867 lots within the above-described area. Of this number, 147 lots or 16.9 percent are currently owned partially or wholly by Lewis or Dillingham or both.

He investigated stock issuance procedures. Of a total of 161 applications for service provided for his inspection by company management, property owners' requests numbered 88. The remaining forms had been completed either by renters or could not be differentiated.

Only 51 applications indicate that monetary transactions actually occurred. Amounts of transactions were: one at \$30; 42 at \$55; two at \$65; two at \$165; three at \$265; and one at \$280. On 39 applications, notations were found to the effect that \$10 of the amount received was for stock with the remainder for "installation". There are only a few service applications which contain indication of the stock certificate number issued. Numbers 1-29 and 126 were issued to individuals. Numbers 30-125 and 127-325 were issued to either Lewis or Dillingham.

At least one of the users who was charged in excess of \$65 was charged extra as a result of purchasing property from an agency other than Paul Lewis and Associates. While only six service

applications indicate charges greater than \$65, there was additional available information indicating that there were other applicants for service who were charged similarly greater amounts.

The majority of the service applications on which no monetary transaction is indicated, concern connections to properties wherein either the service and meter had previously been installed, or a renter was merely signing the application to acknowledge responsibility for payment of service. With regard to previous installations, defendant evidently neglected to cancel previous stock issues upon the sale or transfer of properties and usually did not issue new stock certificates to the new lot owners of record.

In at least two instances, however, the prior and successor owners were both issued stock. The staff could not substantiate that the two original shares had been cancelled and new shares issued to the new owners, or that the original shares were recalled for reissuance to the new owners.

A review of the defendant's deposit slip carbon copies indicated additional cases of the type of transactions mentioned above. However, not all entries on the copies were represented by service applications. According to the copies, during 1959, one user received service for \$55, one for \$145 and two for \$50 each. Again, in 1960, while most users were charged \$55, one was charged \$140 and a second \$165.

In at least one instance, a notation on the application for service indicates a user was issued a share of stock while county records indicate that he owns only one half of one of the original lots. In other cases, a user might have received service to one lot, and vested ownership in more than one. No evidence was found to indicate that multiple shares of stock were issued to one customer for more than a single lot.

Some of the steel pipe which had been removed from the system is now stored near Mr. Lewis' residence and was inspected by the staff engineer. The pipe is black steel. In one location where some of this type pipe is still in use it is visible above ground. At another location where the pipe was found to be not buried it was covered by water from leaks. There were four leak repair clamps within a 2-foot length and a fifth one only a few feet away from these four. There was evidence of an additional unrepaired leak a few feet farther away.

By checking the valves at each of the street intersections, it was possible to determine that many of the pipes within the distribution system are buried at too shallow a depth to satisfy the requirements of the Commission's General Order No. 103, Rules Governing Water Service Including Minimum Standards for Design and Construction. This General Order was adopted June 12, 1956 and made effective July 1, 1956. There were no mains installed within the Park-Woods Mutual Water Company service area prior to 1959.

Many of the valves located on mains within the older portion of the system (between 8th and 13th Streets) are encased in concrete valve boxes of larger than normal size. These boxes are generally of two different shapes. Some are round and have an inside diameter of approximately 15 inches. The others are square and have inside measurements of approximately 18 inches across. Covers for most of the boxes have been removed and lost, and the boxes now represent a traffic hazard. There are also approximately 13 fire hydrants located at street intersections throughout the system.

The area served by Park-Woods Mutual Water Company is predominantly flat. The static pressure as provided to Park-Woods by

Consolidated at its point of delivery is approximately 80 p.s.i. The pressure provided by Park-Woods to its users varies between 45 and 65 p.s.i.

Park-Woods is charged for all water delivered to it through Consolidated's meter. This means that Park-Woods pays for water which: (a) is distributed to and consumed by the users of metered services; (b) leaks from the mains within the distribution system; (c) is obtained from hydrants for construction purposes; (d) would be obtained from hydrants in the event of fire; (e) is used for purposes of flushing or blowing-off mains; and (f) is distributed to and consumed by the users of unmetered services.

During the year 1969, Park-Woods purchased 1,567,900 cubic feet and delivered to its users 559,764 cubic feet of water. This means unaccounted for water is 1.82 times greater than (or 182% of) water actually sold to meter rate customers. The record clearly shows that the distribution system has been improperly installed and poorly maintained. It is incumbent upon defendant to improve the existing facilities before further extensions are made.

The main issue in this proceeding is: Is Park-Woods Mutual Water Company a bona fide mutual water company, or is it a public utility masquerading as one?

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, sewer system 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."

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 purposes of delivering water to its stockholders or members at cost, including use of works for conserving, treating and reclaiming water, 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 defendant was and still is of the opinion that it is avoiding regulatory status, but such would not be a defense against regulation if the acts actually committed have brought it within the ambit of the regulatory statute. The Commission must proceed upon the law and the facts, whatever may be the specific intent of the defendant.

The California Supreme Court, in discussing when a mutual water company is entitled to an exemption from regulation as a public utility under Section 2705, stated:

"In Yucaipa Water Company No. 1 v. Public Utilities Com., ante, pp. 823, 830 [9 Cal. Rptr. 239, 357 P.2d 295], we pointed out that 'The exemption created by Section 2705 indicates a legislative determination that when a mutual water corporation is substantially customer-controlled and delivers water at cost, the usual judicial contract remedies available to those who deal with it are an adequate substitute for public utility regulation.' (Corona City Water Co. v. Public Utilities Com., 54 Cal. 2d 834, 838-39.)"

The record shows that Mr. Paul Lewis, a director and the secretary of defendant, and others - including another director of defendant - purchased approximately 1,000 lots. In order to sell these lots, they formed defendant for the purpose of supplying water to the lots. Defendant is authorized to issue 2,000 shares of \$10 par value stock. Defendant supposedly issued one share of stock to the owners of each lot, such share to be appurtenant to the lot.

There are now 84 water users. Shares numbered 1-29 and 126 were issued to individuals. Shares numbered 30-125 and 127-325 were issued to either Lewis or Dillingham. The record does not reveal whether or not remaining authorized shares were ever issued. The record does reveal that only one customer actually has a share of stock in his possession.

Of the 325 shares definitely issued, the directors of the water company control all but 30.

Findings of Fact

Based upon the above, we find that Park-Woods Mutual Water Company has not restricted itself to delivery of water to its shareholders or lessees thereof. We further find that the holders of shares numbered 1-29 and 126 are captive stockholders in no position to effectively enforce any of their rights as stockholders. We also find that if all owners of lots encompassed by the 84 users of water had in fact been issued one share each, Lewis and Dillingham would still hold a controlling stock interest in the mutual water company.

Conclusion of Law

We conclude that Park-Woods Mutual Water Company is not entitled to an exemption from public utility regulation under Section 2705 and therefore has been and is a "water corporation" as defined in Section 241 of the Public Utilities Code, and a "public utility" within the meaning of Section 216 of that Code.

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

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 most of the stock of the utility are also the owners or developers of the land served by the utility. We will therefore order that the existing rate level be maintained until such time as the utility can justify higher rates.

The potability and level of purity of defendant's water supply is within the jurisdiction of the appropriate health authorities.

Park-Woods Mutual Water Company should develop a plan to reduce its extremely high percentage of unaccounted for water. Such plan should call for the repair and/or replacement of leaky mains.

O R D E R

IT IS ORDERED that:

1. Park-Woods Mutual Water Company, 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 its present charges.
2. Within forty-five days after the effective date of this order, Park-Woods Mutual Water Company shall file a tariff service area map and sample copies of printed forms that are normally used in connection with customers' services.

3. Park-Woods Mutual Water Company 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, it shall file with the Commission two copies of this map.

4. Park-Woods Mutual Water Company 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 1971, Park-Woods Mutual Water Company 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. Park-Woods Mutual Water Company shall not, without further order of this Commission, extend its water system.

7. Park-Woods Mutual Water Company 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.

8. Park-Woods Mutual Water Company shall file with this Commission, within ninety days after the effective date of this order, a detailed plan designed to reduce its extremely high percentage of unaccounted for water. Such plan should show what repairs and/or replacements are necessary to reduce such high percentage.

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 25th day of MAY, 1971.

*[Signature]*  
 Chairman

*William J. ...*

*[Signature]*

*Vernon L. Sturgeon*

*[Signature]*  
 Commissioners