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ORIGINAL

Decision No. 78852

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of ANGORA WATER CO. and TAHOE PARADISE WATER AND GAS CO. for an order establishing a modified boundary line separating the territories into which they may extend their respective services, pursuant to agreement between said applicants; and an order authorizing Angora Water Co. to carry out the terms of a contract with the County of El Dorado deviating from the main extension rule.

Application No. 51517
(Filed November 28, 1969;
Amended August 18, 1970.)

Scott Elder, Attorney at Law, for Angora Water Co., applicant.
McCutchen, Doyle, Brown & Enersen, by J. Thomas Rosch, Attorney at Law, for Tahoe Paradise Water and Gas Co., applicant.
Noble Sprunger, Attorney at Law, County Counsel, El Dorado County, for County of El Dorado, interested party.
B. A. Peeters, Attorney at Law, for the Commission staff.

O P I N I O N

The Commission, following their voluntary withdrawal, dismissed cross-applications by Angora Water Co. and Tahoe Paradise Water and Gas Co., filed in 1968, for authority to extend water facilities and service to Tahoe Paradise Addition, Units 4 and 5, near South Lake Tahoe, El Dorado County.[1]

The current joint application of the two utilities seeks authority to readjust an agreed line of demarcation between areas

1 Decision No. 76705, dated January 27, 1970, in Applications Nos. 41414, 41868 and 42036 (Angora) and Application No. 50020 (Tahoe Paradise).

reserved for the expansion of each utility's operative rights. The matter was considered by the Commission in Applications Nos. 41414, 41868 and 42036 and the line was fixed by the Commission in its Decision No. 60328, dated June 28, 1960. The requested adjustment will enable Angora to extend contiguously, upon the filing of a tariff map, to serve Tahoe Paradise Addition Units 4 and 5 comprising 526 lots now completely developed. The requested adjustment would also enable Tahoe Paradise Water and Gas Co. to extend contiguously by the filing of a tariff map for Tahoe Paradise Unit 48.

Angora also requests retroactive authority to carry out a contract with the County of El Dorado and Tahoe Paradise Water and Gas Co., dated June 10, 1968 (Application, Exhibit C). The contract provides for contribution, by the County, to whichever of the two utilities that shall be authorized to serve Units 4 and 5, of the water system facilities in those units, and the sum of $94,680 cash for construction of unidentified backup facilities at some indefinite future time. The contributed plant and cash have been obtained from special assessment bond proceeds.

The application was submitted following a hearing at Placerville on October 14, 1970 before Examiner Gregory. Angora, on November 18, 1970, filed a petition to reopen the record for the limited purpose of receiving certain stipulations with the Commission staff in correction of the record. The record will be reopened to admit the stipulations, which will be received as Exhibit 5 herein. They relate to an erroneous identification in the staff report (Exhibit 2) of certain sums as contributions received from proceeds of assessment bond financing in connection with water plant for Angora Highlands No. 1, and an erroneous designation of a member of the Martin family as owner of certain stock of Gardner

Mountain Water Company, an associated and interconnected utility that purchases a portion of its water supply from Angora.[2]

The evidence discloses that Angora presently has adequate supply and storage facilities to serve its present customers, but will need additional sources to supply all active and inactive services when all lots in its present service area are occupied and all services are active. Angora may also need two more wells with a total capacity of 716 gpm to serve Tahoe Paradise Units 4 and 5 at such time as all lots in those developments are occupied.

Under criteria developed by the staff (Exhibit 2, p. 5, Table I), Angora's existing storage capacity appears to be adequate for its existing system and for Units 4 and 5 for a considerable time in the future. The utility has planned additional storage capacity of 420,000 gallons if required for ultimate demands.

The staff recommends that the proposed boundary adjustments be authorized as the logical and practical solution for water service to the areas involved. That recommendation can be implemented by modifying Decision No. 60328, supra.

The staff has also recommended that the backup fees of $94,680, to be paid by El Dorado County to Angora if authorized by this decision, be used by that utility for whatever "backup plant"[3]

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2 The staff report, though identified as Exhibit 2 in the record and treated throughout as having been received in evidence, inadvertently was not expressly offered in evidence at the conclusion of the staff's showing. This is not necessarily fatal. The report will be considered as having been received in evidence as Exhibit 2. (Cf. Walsh v. Walsh, 108 C.A. 2d 575, 578.)

The Commission has authorized merger of Angora Water Co. and Gardner Mountain Water Co., Decision No. 78036, dated December 8, 1970, in Application No. 52280.

3 "Backup" or "backbone" plant refers to the utility's basic production, storage and transmission facilities, as distinguished from intract or other distribution lines and services. Backup plant is normally financed by the utility with its own funds.

may be needed for its system in the future, rather than be applied only against assessments in Units 4 and 5 as a condition for permitting Angora to serve those two tracts. (See discussion in E Exhibit 2, par.31.) We adopt that recommendation.

Controversial aspects of this application and of certain staff recommendations (Exhibit 2, par. 34, subpars. 3-7) derive from the staff's accounting analysis of applicants' activities in the area of assessment bond financing for main extensions or backup plant.

From about 1963, assessment bonds have been used by some developers in El Dorado County, as a departure from refundable water main extension rule contracts, to finance intract facilities. More recently, special assessment bonds have been used to finance backup plant for Angora and Tahoe Paradise. Neither Angora nor Tahoe Paradise sought the required authorization to depart from their main extension rules to finance backup plant with special assessment bonds. The evidence discloses that Tahoe Paradise has received a total of $237,468 in assessment bond funds since 1963 and that it has disbursed $102,668, leaving an unexpended balance on hand (as of April 7, 1970) of $134,800. Tahoe Paradise deposits assessment bond receipts in separate bank accounts, and its records are accurately maintained in readily identifiable form for all disbursements from the special accounts. The staff had no criticism of the accounting procedures maintained by Tahoe Paradise, except to recommend that interest earned on assessment bond funds should remain in the bond fund accounts and be used for the same purposes as principal sums in those accounts.

Angora's use of and accounting for special assessment bond proceeds has been a matter of concern to this Commission for

several years. It was not until 1969 that the accounting treatment of special assessment bond proceeds received by Angora prior to 1965 was resolved after extensive hearings, and Angora was directed to account for certain of such proceeds as contributions in aid of construction (Decision No. 75043, dated March 11, 1969, in Application No. 48114 and Case No. 8581).

This record shows that Angora, since October 1965, has received an additional $157,951 in assessment bond funds of which it has disbursed approximately $106,811 on utility plant improvements, leaving an unexpended difference, as of the date of the staff's report (September 15, 1970) of $51,140.[4]

The staff's report also notes that because of Angora's failure to maintain a separate bank account for special assessment bond receipts, it was unable to trace the difference in bond receipts and disbursements in the books of account, as the funds were commingled with other cash receipts and so lost their identity. The staff's examination disclosed, however, that a substantial portion ($19,760) of the difference resulted from a certificate of deposit in a Nevada bank that had been pledged as security for borrowings for a nonutility linen service business operated by the Martin brothers, owners of Angora Water Co. The certificate of deposit was redeemed following repayment of the loan.

The net result of the staff's review of Angora's books was that the review was frustrated by that utility's failure to maintain a separate bank account for assessment bond receipts, and by its disbursements of commingled funds for nonutility, or other, purposes in ways that could not readily be traced by independent

4 Adjustments to Exhibit 2, pars. 26 and 27, from Stipulation, Exhibit 5.

examination of its records. Such practices by a regulated public utility are indefensible, as they may result either in bond funds and interest which reasonably can be expected to be earned thereon being unavailable when required for plant construction, or that disbursements from such funds may be at variance with the purpose for which the assessments originally were levied.

The staff report notes, and the evidence otherwise discloses, that Angora has been using the facilities in Units 4 and 5 to provide free water service to a growing number of customers in those tracts, in violation of Decision No.60328, supra, which limited the area in which Angora could extend its service, and also in apparent violation of discriminatory practices proscribed by Section 453 of the Public Utilities Code. In view of the time consumed by the parties and the staff in these and prior proceedings involving Angora's accounting problems and the previous conflicting requests by the two utilities to extend service to Units 4 and 5, we are not disposed to initiate sanctions for Angora's past unauthorized extensions of service to those tracts in the circumstances disclosed by this record.

We are of the opinion that while Angora should be authorized to include Units 4 and 5 of Tahoe Paradise Addition on its side of the line of demarcation, some controls over the acquisition of and accounting for plant and backup fees financed by special assessment bonds should be imposed on both Angora and Tahoe Paradise. Such plant and backup fees represent contributed assets financed by a method for which special authority is required, prior to construction, as a departure from the utilities' water main extension rules. This record, as noted above, discloses that prior to construction neither utility sought or obtained such authority. Moreover, this record also shows that Angora's accounting procedures

for receipt and disbursement of bond funds and any interest earned thereon are not sufficient for identification of transactions involving the use of such funds.

The staff, as has been noted previously, has recommended certain procedural and accounting controls for bond-financed plant acquisitions by the two applicants (Exhibit 2, par. 34, subpars. 3-7). The only substantial objection to the staff's proposals was directed to one which would require, as a condition to authorizing the requested boundary line change and Angora's request to depart, retroactively, from its main extension rule, that if bond-financed facilities of Angora and Tahoe Paradise are ever purchased, or are taken by eminent domain, by any public entity:

> "the proceeds from the disposition of such facilities together with all unexpended assessment bond proceeds shall be held in trust for the benefit of the owners of the land assessed, to be disposed of as a court of competent jurisdiction shall direct. This condition shall be void 60 years from the date this utility originally acquired these facilities." (Exhibit 2, par. 34, subpar. 7.)

As previously indicated, the staff has recommended that the $94,680 in backup fees assessed against Units 4 and 5 be paid by the County to Angora, to be used together with earned interest for whatever backup plant may be needed for Angora's system in the future. In proposing stringent requirements for use and eventual disposition of assessment bond funds by the two utilities, the staff, on the basis of opinions of the County's bond counsel and a letter from Angora Water Co. (Exhibit 2, Appendices A and B), asserts that as the utilities themselves determine the dollar amounts of backup fees that are assessed and that no requirements of the county prevent a utility from using such fees in any manner it desires, it is evident that positive action by this Commission is

required (Exhibit 2, par. 30). The staff has also referred, as justification for its proposed recommendation, to recent action by the Commission by which similar controls on the disposition of bond-financed plant were imposed (Grizzly Park Water Co., Decision No. 77035, dated April 7, 1970, in Application No. 51439, and Resolution No. FA-496, dated July 14, 1970; Tahoe Southside Water Utility, Resolution No. FA-492, dated June 10, 1970).

Applicants, at the hearing, vigorously objected to the above-quoted recommendation as a condition of the authorities they request. They assert that relevant facts are not before the Commission in this application, and that to impose such a condition on these two applicants in the absence of an investigation of assessment bond financing practices generally would be manifestly unjust. In addition, applicants assert that imposition of such a condition would, in effect, not only be a determination of legal title to property which the Commission has no jurisdiction to make, but also would operate to divest the utilities of their bond-financed property or the proceeds thereof upon sale or condemnation of that property, in violation of constitutional guarantees of due process.

We observe that applicants' utility properties, whether financed by special assessment bonds or otherwise, may lawfully be acquired by a public agency as the result of a voluntary transfer pursuant to Section 851 of the Public Utilities Code, by condemnation pursuant to Title VII of the Code of Civil Procedure, or by condemnation following special statutory just compensation proceedings provided by Sections 1401-1421 and 1501-1505 of the Public Utilities Code.

An important issue raised by the staff's proposed condition is whether we have discretionary power (Public Utilities Code, Section 701) to require that if applicants accept the authorities

they have requested, they must do so only at the risk of having to declare themselves trustees of the proceeds of any bond-financed intract or backup plant and unexpended bond receipts and earned interest thereon acquired under such an arrangement, if and when their respective utility systems are later acquired by a public agency in proceedings before this Commission or in the Courts, subject to whatever disposition of such proceeds may properly be ordered by the tribunal in which the acquisition is sought.

A more fundamental issue, however, is whether such a trust requirement, stated by the staff to be for the purpose of protecting lot owners, in tracts serviced by either utility, from double taxation for bond-financed water facilities (i.e., special assessment bond taxes by the County and acquisition bond taxes by the acquiring public agency), is so inherently alien to our regulatory cognizance as to suggest that we may be treading dangerously close to, if not in fact trespassing upon, strictly judicial territory. It bears emphasis that we are not dealing here with refundable advances for main extensions, as to which the Commission has unquestioned authority, in voluntary transfer proceedings, to require payment of unrefunded construction advances due under valid main extension contracts, but with contributions of utility plant and cash to which the utility, though not by investment of its own funds, now has, or by authorized contract can claim, legal title.

Although the present record, in our opinion, does not fully explore the evidentiary or legal justification for imposition of the trustee condition, it is still sufficient, we think, to present that issue for our determination now, even though the proper resolution of the question may not, without further light, be free from doubt. It may be said, in passing, that previous similar

action by the Commission in imposing a trustee condition for the proceeds of bond-financed plant, cited earlier, has not been challenged by the affected utilities, as it has been here. It has seemed reasonable to impose such a condition, for the purpose stated above, not only as a protective measure for landowners who must eventually pay for water facilities for their properties, but also as a preventive measure against what we think would be inequitable financial gain to a utility which has acquired substantial donations of plant and cash.

Accordingly, the staff's recommended trustee condition, as hereinafter modified will be incorporated in the ensuing order as a condition precedent to the exercise by applicants of the permissive authorities granted therein. As the utilities were not placed on notice, prior to or during the hearing, that the trustee condition would be sought to be applied to all their bond-financed plant, such condition will be limited to apply only to Units 4 and 5 of Tahoe Paradise Addition.

The only other staff recommendation that evoked controversy was that assessment bond proceeds and interest earned thereon, which the staff has recommended be placed by applicants in a separate bank account, be disbursed only upon written authorization of the Commission (Exhibit 2, par. 34, subpar. 3). The staff urged that prior authorization be obtained for such disbursements. The utilities objected. They asserted that emergencies could occur which would require disbursements to be made before the Commission could issue the necessary authority.

We see no objection to a requirement for authorization of disbursements of principal or interest from bond proceeds maintained in separate bank accounts. The problem here, particularly with

regard to Angora as we have previously pointed out, has been that commingling of bond receipts with other utility funds has prevented ready identification, in the utility's books of account, of transactions involving the use of bond proceeds. The staff's recommendation that disbursement of bond receipts and interest be subject to prior authorization is only an extension, which we consider reasonable on this record, of the antecedent recommendation that such funds be maintained in separate bank accounts. A letter or telegram from the utility to the Secretary of the Commission, requesting permission for any specific disbursement from the separate bond fund account, together with the Secretary's written consent, should be sufficient as authorization for any disbursement.

We specifically adopt the following staff proposals shown in paragraph 34 of Exhibit 2, stated here in brief form:

> Subparagraph 1. Proposed changes in boundary lines, as shown in Amended Exhibit A to the application herein, filed August 18, 1970.
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> Subparagraph 2. Restriction of Angora against further expansion to serve new tracts except as authorized by further order of the Commission.
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> Subparagraph 3. Separate bank accounts for bond proceeds and interest, with authorized disbursements as discussed hereinabove.
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> Subparagraph 4. Requirement that Angora account for all special assessment funds received since October 1, 1965, and take immediate steps to recover any such funds which have been expended improperly, as discussed in paragraphs 27 and 28 of Exhibit 2.
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> Subparagraph 5. Requirement that Angora and Tahoe Paradise obtain Commission's authorization before entering into any future agreements with the County of El Dorado to acquire water plant or backup fees financed by special assessment bonds.

Subparagraph 6. Notify El Dorado County that water utilities are not permitted to finance water plant by special assessment bonds except when specifically authorized by this Commission, and that in the future, absent such advance authorization, the utility may not be permitted to accept from the county the water plant thus constructed.

Subparagraph 7. Condition that proceeds of sale or condemnation of assessment bond - financed plant and unexpended assessment bond receipts be held in trust for benefit of lot owners, upon acquisition of applicants' utility properties by a public agency, to be disposed of as a tribunal of competent jurisdiction may order.

We find, on this record, that:

1. Water plant facilities financed by special assessment bonds have been installed in Tahoe Paradise Addition, Units 4 and 5, El Dorado County.

2. Angora Water Co., since approximately 1968, has used and is using water plant facilities in said Units 4 and 5 to provide free water service in violation of its tariffs on file with this Commission and in effect during said time, and in violation of Section 453 of the Public Utilities Code.

3. Angora Water Co. has extended water service from its existing system by means of water facilities installed in said Units 4 and 5 in violation of restrictions against unauthorized extensions of its service area contained in Decision No. 60328, supra, of this Commission.

4. Angora Water Co. has an excess of water production and storage plant over that required for present demands of its existing system and potential demands in said Units 4 and 5.

5. Angora Water Co. has no present need for additional backup facilities to provide adequate water service to said Units 4 and 5, except for a booster pumping station to increase water pressure in higher areas in said tracts.

6. Angora Water Co. has failed properly to account for special assessment bond proceeds received by it since October 1, 1965 and has used such funds for the private benefit of the utility's stockholders.

7. The agreement filed as Exhibit C of the application herein provides for payment of $94,680 of backup fees by the County of El Dorado to whichever of Angora Water Co. or Tahoe Paradise Water and Gas Co. may be authorized by this Commission to extend water service to said Units 4 and 5.

8. The staff recommendations set forth in subparagraphs 1 through 7 of paragraph 34 of Exhibit 2 herein, as modified by the following order with respect to subparagraph 7, are reasonable.

The Commission, therefore, concludes that the application herein should be granted in accordance with the provisions of the ensuing order.

The County of El Dorado and all persons and entities having notice or knowledge of this decision are hereby placed on notice that public utility water companies are not permitted to finance the construction of water plant in El Dorado County by special assessment bonds except when specifically authorized by this Commission, and that henceforth if such authorization has not been obtained by the utility prior to commencement of any such construction, the utility may not be permitted to accept from the County of El Dorado the water plant thus constructed.

O R D E R

IT IS HEREBY ORDERED that:

1. Decision No. 60328, dated June 28, 1960, in Applications Nos. 41414 (First Amdt.), 41868 (First Amdt.) and 42036 is amended,

with respect only to the line of demarcation of the areas reserved for expansion of operative rights of Tahoe Paradise Water and Gas Co. (successor to Myers Water Co.) and of Angora Water Co., in the manner and to the extent delineated on a map attached to and marked "Amended Exhibit A", and a description attached to and marked "Amended Exhibit B" of an amendment, filed August 18, 1970, to the joint application herein. Except as amended hereby, said Decision No. 60328 in all other respects shall be and remain in full force and effect.

2. Angora Water Co. shall not, except as herein authorized, further extend its water system or water facilities to serve new or additional tracts, unless and until authorization for any such extension first shall have been obtained from this Commission.

3. Angora Water Co. and Tahoe Paradise Water and Gas Co. shall each henceforth deposit and maintain in separate interest-bearing bank accounts within the State of California all special assessment bond proceeds, together with interest earned thereon, and shall not disburse any funds from said bank accounts unless and until authorization therefor first shall have been obtained in writing from this Commission.

4. Angora Water Co., within sixty days after the effective date of this order, shall account for all special assessment bond funds it has received since October 1, 1965 and, within said sixty-day period, shall advise the Commission, in writing, of the date, amount and specific purpose of the expenditure of funds totaling $51,140, representing the difference between special assessment bond receipts totaling $157,951 since October 1, 1965 and amounts expended, totaling $106,811, as shown by the tabulations following paragraphs 26 and 27 of Exhibit 2 herein, as adjusted in accordance with the stipulation of the parties, Exhibit 5 herein.

5. Angora Water Co. and Tahoe Paradise Water and Gas Co., after the effective date of this order, shall not enter into any agreement with the County of El Dorado to acquire water plant or backup fees financed with special assessment bonds, without first having obtained appropriate authority therefor from this Commission.

6. Angora Water Co is authorized, as a departure from its water main extension rule, to carry out the terms and conditions of an agreement with the County of El Dorado, dated June 10, 1968 (Exhibit C attached to the joint application herein), and to accept from said County certain intract water facilities in Tahoe Paradise Addition, Units 4 and 5 and the cash sum of $94,680 for backup fees, as provided by said agreement. Angora Water Co. shall account for said intract facilities and said cash sum as Contributions in Aid of Construction, Account 265 of the Commission's Uniform System of Accounts for Water Utilities, and shall, immediately upon receipt thereof, deposit said cash sum in separate interest-bearing bank accounts within the State of California, subject to all provisions of ordering paragraph 3, hereinabove. The action taken herein is for the authorization of said agreement and is not to be considered as indicative of amounts to be included in proceedings for the purpose of determining just and reasonable rates.

7. Angora Water Co. after the effective date of this order is authorized and directed to file revised tariff sheets, including tariff service area maps, to provide for the application of its present tariff schedules to the areas Tahoe Paradise Addition Units 4 and 5. Such filings shall comply with General Order No. 96-A. The effective date of the revised tariff sheets shall be four days after the date of filing.

8. The authorities granted by ordering paragraphs 1, 6 and 7, hereinabove, are hereby made subject to the express condition that if the assessment bond-financed water facilities in Tahoe Paradise Units 4 and 5 and related backup fees to be conveyed to Angora Water Co., or subsequently to any regulated public utility successor of Angora Water Co., are ever acquired by any public entity by purchase or by eminent domcin, the proceeds from the disposition of such facilities, together with all unexpended assessment bond proceeds and accumulated interest thereon, shall be held in trust by said utility or any utility successor for the benefit of the owners of the land assessed, and shall be disposed of only as may be directed by this Commission or by a Court in the exercise of their respective jurisdictions over the acquisition of such facilities by such public entity. The foregoing condition shall be void sixty years from and after the dates upon which Angora Water Co. shall have originally acquired the assessment bond-financed facilities or assessment bond proceeds.

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

Dated at San Francisco, California, this 22nd day of JUNE, 1971.

Chairman

Commissioners

D. W. HOLMES, COMMISSIONER, Concurring:

The trust fund of unexpended assessment bond proceeds and accumulated interest thereon established by ordering paragraph 8 for the benefit of the owners of the property assessed does not properly deal with the disposition of these surplus funds. Ordinarily surpluses should accrue to the benefit of the bond holder. However, information received from members of the Commission staff indicates that county officials could not be expected to cooperate in the proper disposition of surplus assessment bond proceeds. I, therefore, concur in the establishment of the trust fund.

Commissioner

Dated at San Francisco, California,
June 22, 1971.