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Decision No. 80108

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of GADSDEN CORPORATION for a Finding and Order that certain real property is not within the service area of Antelope Valley Water Co.	Application No. 52908 (Filed October 6, 1971; Amended February 28, 1972)

Waugh & Waugh, by Sanford A. Waugh, Attorney at Law, for Gadsden Corporation, applicant.
C. M. Brewer, for Antelope Valley Water Co., protestant.

O P I N I O N

This is an application by Gadsden Corporation (hereinafter referred to as Gadsden)[1/] which seeks a finding and order that certain real property is not within the service area of Antelope Valley Water Company (hereinafter referred to as Antelope).

A duly noticed public hearing was held in this matter before Examiner Jarvis in Los Angeles on February 24, 1972, and the matter was submitted subject to the filing of an amendment which was received on February 28, 1972.

The real property here under consideration consists of approximately 10 acres in Section 28, Township 7 North, Range 12 West, S.B.B. and M. which are located near Palmdale in Los Angeles County.

1/ At the conclusion of the hearing on the application, applicant sought, and was granted, leave to amend the application to substitute Park Somerset of Lancaster as the applicant, because the real property here under consideration was transferred to it. Because the events herein considered occurred when Gadsden was the owner of the real property and the testimony in the proceeding refers to Gadsden rather than Park Somerset, the discussion herein will refer to the applicant as Gadsden.

Gadsden is a land developer. It has developed six housing subdivisions in Section 28, which presently receive water service from Antelope. The basis of the present controversy between Gadsden and Antelope is that Gadsden intends to develop the ten acres. The Los Angeles County Water Works District No. 4 (hereinafter referred to as District), which operates in an adjacent area, is willing to extend its lines and furnish water service to the ten acres. District's rates are approximately one-half of Antelope's. Gadsden desires to receive water service from the District.

Antelope's certificate of public convenience and necessity authorizes it to provide service in Section 32, Township 7 North, Range 12 West and the North 1/2 of Section 4, Township 6 North, Range 12 West S.B.B. and M. Antelope extended service to the subdivisions in Section 28 pursuant to Section 1001 of the Public Utilities Code. On August 24, 1970, Gadsden filed Application No. 52154, which sought a finding that the 10 acres here involved were not a part of Antelope's service area. On March 2, 1971, the Commission entered Decision No. 78364, which made various findings and concluded that "the application should be dismissed. There is no legal impediment to the area in question being served by either District or Antelope, and either is at liberty to extend service to Gadsden's ten-acre parcel of land referred to herein if requested. Gadsden has the opportunity to make arrangements for its water supply in its own best interests without further order from this Commission."

After Decision No. 78364 was entered, Gadsden sought to have the 10 acres annexed by District. The County Counsel of Los Angeles County, acting as counsel for District, advised District not to proceed with the requested annexation because the status of the 10 acres was not clear and litigation might ensue. The County Counsel was concerned about a possible inverse condemnation situation. He advised Gadsden that:

> "...the commission's decision declares that there is no legal impediment to the area being served by either Antelope or the District. This statement could mean several things. It could mean that the Gadsden property is not in Antelope's service area. It could mean that the property is in Antelope's service area, but the District should not fear inverse condemnation liability because Antelope has no mains actually serving the property. Finally, it could mean simply that the District has the legal authority to annex and serve the property regardless of the inverse condemnation consequences."

Thereafter, Gadsden filed the present application.

Antelope filed a petition asking that the application be dismissed on the ground that it "is in substance a thinly disguised, improper and untimely attempt by Gadsden to petition for a reopening or rehearing before the Commission of substantially the same question which was the subject matter considered and passed upon by the Commission in its Order in Decision No. 78364...." The presiding examiner correctly denied the petition.

Section 1708 of the Public Utilities Code provides that:

> "The commission may at any time, upon notice to the parties, and after opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision."

Rule 42 of the Commission's Rules of Practice and Procedure encompasses the application. It is clear that the Commission has jurisdiction to entertain the application. The Commission has some discretion to determine whether a hearing should be held in a matter on which it has recently spoken. While the subject matter of the application leading to Decision No. 78364 and the present application are similar, the presiding examiner properly proceeded to a hearing on the merits of the present application. As indicated, Decision No. 78364 did not determine whether or not the 10 acres are within

Antelope's service area. It only held that Antelope and District were legally free to serve the area. The question raised by District's counsel was not considered in Decision No. 78364. The questions presented by the present application have significance not only to the parties here involved but to utilities throughout the state.

The issue presented in this matter is: Does the filing of a tariff map, in the absence of a physical connection of facilities or the execution of a valid main extension agreement, constitute an extension within the purview of Section 1001, thereby making the area covered by the tariff map part of a utility's service territory?

Antelope's certificate of public convenience and necessity was granted in 1957. It authorized it to acquire and operate a public utility water system in Section 32, Township 7 North, Range 12 West and the North 1/2 of Section 4, Township 6 North, Range 12 West, S.B.B. and M. On March 2, 1966, Antelope filed with the Commission a tariff map which showed its service area to include the Southwest 1/4 of Section 28, Township 7 North, Range 12 West, S.B.B. and M. That portion of Section 28 consists of 160 acres and is contiguous to the area which Antelope is authorized to serve in its certificate of public convenience and necessity. On November 25, 1969, Antelope filed an amended tariff page which described the territory served by the utility. The description included the portion of Section 28 here under consideration.

Gadsden developed six housing subdivisions in Section 28: Tracts Nos. 26992, 28318, 29587, 29588, 26499 and 30299. Antelope extended water service to the six subdivisions under main extension agreements in accordance with its tariff. Antelope contends that the water system grid installed in the six subdivisions was constructed with the parties contemplating that it would eventually serve the 10 acres

here in question. Antelope alleges that it expended an additional $12,000 in installing mains in the six subdivisions which would have the capacity to provide the additional service to the 10 acres.[2/] The 10 acres here under consideration are contiguous to the eastern boundary of Tract No. 30299. The District has a water pipeline in the vicinity.

As indicated, Antelope's certificate does not include any portion of Section 28. Section 1001 provides in part that:

> "No railroad corporation whose railroad is operated primarily by electric energy, street railroad corporation, gas corporation, electric corporation, telegraph corporation, telephone corporation, or water corporation shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.
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> "This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations, or for an extension into territory either within or without a city or city and county contiguous to its street railroad, or line, plant, or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility or of the water system of a public agency, already constructed, the commission, on complaint of the public utility or public agency claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable."

2/ If the 10 acres are in Antelope's service area and they are annexed by the District, presumably the $12,000 would be included in Antelope's claim for inverse condemnation.

Clearly, when the six subdivisions were physically connected to Antelope's water system, they became part of its service area. The question to be determined is the status of the remaining portion of the Southwest 1/4 of Section 23, including the 10 acres here involved.

A determination of the issue here involved depends upon the answer to the following question: What is the legal effect of filing a tariff map and description which includes an area for which the utility is not certificated but which is contiguous to the utility's certificated area; where no physical extension of the system has been effected and no main extension agreement has been executed?

There is no question that where the Commission affirmatively grants a certificate of public convenience and necessity for a described area, all of that area is part of the utility's service territory. Section 491 of the Public Utilities Code provides that:

> "Unless the commission otherwise orders, no change shall be made by any public utility in any rate or classification, or in any rule or contract relating to or affecting any rate, classification, or service, or in any privilege or facility, except after 30 days' notice to the commission and to the public. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the changes to be made in the schedule or schedules then in force, and the time when the changes will go into effect. The commission, for good cause shown, may allow changes without requiring 30 days' notice, by an order specifying the changes so to be made, the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate or classification, or in any form of contract or agreement or in any rule or contract relating to or affecting any rate, classification, or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item."

The filings by Antelope of the tariff service area map on March 2, 1966, and tariff description on November 25, 1969, were made under authority of Section 491 and General Order No. 96-A.

Ordinarily, a utility cannot expand its service area by unilateral action. (Coast Truck Line v. Railroad Commission, 191 Cal. 257.) The provisions of Section 1001 permitting extension into contiguous areas are a limited statutory exception to the general rule. Extensive research has failed to disclose a case in which the Commission considered the precise point here under consideration. In Happy Valley Telephone Co., 67 Cal. P.U.C. 423, the Commission made the following conclusion of law:

> "3. Section 1001 of the California Public Utilities Code permits a telephone utility to expand its service into a territory which is contiguous to its own without having to obtain a certificate of public convenience and necessity therefor, where such service is not being provided in such contiguous territory by any other utility. The filing of an advice letter, such as has been done here, is an appropriate procedure for providing notice of such intended expansion." (67 Cal. P.U.C. at p. 427.)

In Sierra Water Co., 57 Cal. P.U.C. 186, the Commission held that: "The mere filing of a so-called 'tariff service area map' by a water utility is not conclusively determinative of the territory within which such utility may be entitled to serve."

Application of the principles enunciated in the Happy Valley and Sierra cases leads to the conclusion that the filing by a utility of a tariff service area map or description, and the acceptance thereof by the Commission, does not have the effect of making uncertificated, contiguous territory described therein part of the utility's service area. While such map or description may disclose the utility's intention to serve an area, the area itself does not actually become part of its service territory until it has been physically interconnected to the utility's system or a valid main extension agreement

has been executed between the utility and the owner of the land involved. The effect of filing such a map is to indicate, until it is modified or withdrawn, the utility's intention to dedicate service to the area in accordance with applicable provisions of law and the utility's tariffs. The foregoing conclusion is supported by analogy to cases involving reparations. Section 734 of the Public Utilities Code provides for the award of reparations in specified circumstances. Section 734 in part provides that: "No order for the payment of reparation upon the ground of unreasonableness shall be made by the Commission in any instance wherein the rate in question has, by formal finding, been declared by the Commission to be reasonable...." In reparations cases, it has been held that the filing by a utility and acceptance by the Commission of a tariff provision with respect to a rate does not constitute a finding by the Commission of the reasonableness of the rate in question. (Pacific Telephone & Telegraph Co. v. Public Utilities Comm., 62 Cal. 2d 634, 654-55; Pittsburgh Plate Glass Co. v. American Cartage Co., 67 Cal. P.U.C. 737; see, also, Coca-Cola Co. v. Southern Pacific Co., 45 C.R.C. 730; Carnation Co. v. Southern Pacific Co., 50 Cal. P.U.C. 443.) It may also be concluded from the reparations cases that the filing and acceptance of a tariff service area map or description does not constitute a finding that all of the area described therein is part of the utility's service territory.

In the light of the foregoing authorities, the Commission holds that the filing by Antelope of a tariff service area map and description, which includes the 10 acres here under consideration, was not sufficient, in and of itself, to make that area part of its service territory. No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. Antelope's certificate of public convenience and necessity was granted by the Commission in 1957 in Decision No. 54854. It authorized it to acquire and operate a public utility water system in Section 32, Township 7 North, Range 12 West and the North 1/2 of Section 4, Township 6 North, Range 12 West, S.B.B. and M.

2. On March 2, 1966, Antelope filed with the Commission a tariff map which showed its service area to include the Southwest 1/4 of Section 28, Township 7 North, Range 12 West, S.B.B. and M. That portion of Section 28 consists of 160 acres and is contiguous to the area which Antelope is authorized to serve in its certificate of public convenience and necessity.

3. On November 25, 1969, Antelope filed an amended tariff page which described the territory served by the utility. The description included the Southwest 1/4 of Section 28, Township 7 North, Range 12 West, S.B.B. and M.

4. Gadsden developed six housing subdivisions in Section 28: Tracts Nos. 26992, 28313, 29587, 29588, 26499 and 30299. Antelope extended water service to the six subdivisions under main extension agreements in accordance with its tariff.

5. Gadsden intends to develop a subdivision in an area of approximately 10 acres, which area is contiguous to the eastern boundary of Tract No. 30299 and is more particularly described as follows:

> That portion of the SW 1/4 of Section 28, T 7 N, R 12 W, S.B.M., described as follows:
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> Beginning at the southeast corner of said southwest one-quarter of said section; thence N 0° 18' 06" W, 50.00 feet to the true point of beginning; thence N 89° 49' 25" W, 609 feet; thence N 0° 10' 35" E, 235.00 feet; thence N 25° 23' 35" E, 724.79 feet; thence N 7° 09' 31" E, 252.48 feet; thence S 89° 43' 44" E, 260.00 feet to the east line of the SW 1/4, Section 28, T 7 N, R 12 W, S.B.M.; thence S 0° 18' 06" E, along said east line to the true point of beginning.

Antelope's water system is not physically interconnected in said area. There is no main extension agreement between Antelope and Gadsden with respect to the area.

Conclusions of Law

1. The Commission has jurisdiction over the issues raised in this application.

2. The filing of a tariff service area map or description which describes an area for which the utility is not certificated, but which is contiguous to the utility's certificated area, does not have the effect of making the area part of the utility's service area. Such area becomes a part of the utility's service area only when it is physically interconnected with the utility's system in accordance with law or a valid main extension agreement covering the area has been executed between the utility and landowner.

3. Subdivisions Nos. 26992, 28318, 29587, 29588, 26499 and 30299 in the Southwest 1/4 of Section 28, Township 7 North, Range 12 West, S.B.B. and M. are part of Antelope's service area.

4. The aforesaid 10 acres which are contiguous to the eastern boundary of Tract No. 30299 are not part of Antelope's service area.

5. Either Antelope or District may furnish water service to the proposed subdivision in said 10 acres.

O R D E R

IT IS ORDERED that if Gadsden Corporation (or its successor in interest, Park Somerset of Lancaster) does not enter into a main extension agreement with Antelope Valley Water Co. but instead causes the approximately 10 acres hereinafter described to be annexed by Los Angeles County Water Works District No. 4, then, in such event, Antelope shall delete from its tariff service area map and territorial description the following territory:

That portion of the SW 1/4 of Section 28, T 7 N, R 12 W, S.B.M., described as follows:

Beginning at the southeast corner of said southwest one-quarter of said section; thence N 0° 18' 06" W, 50.00 feet to the true point of beginning; thence N 89° 49' 25" W, 609 feet; thence N 0° 10' 35" E, 235.00 feet; thence N 25° 23' 35" E, 724.79 feet; thence N 7° 09' 31" E, 252.48 feet; thence S 89° 43' 44" E, 260.00 feet to the east line of the SW 1/4, Section 28, T 7 N, R 12 W, S.B.M.; thence S 0° 18' 06" E, along said east line to the true point of beginning.

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

Dated at San Francisco, California, this 31st day of MAY, 1972.

Chairman

Commissioners

Commissioner Thomas Moran, being necessarily absent, did not participate in the disposition of this proceeding.