

ORIGINAL

Decision No. 83299

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
of VALLECITO WATER COMPANY, a
corporation for a Certificate of
Public Convenience and Necessity
to furnish water service to Tracts
29803 and 29942, adjacent to its
present service areas.

Application No. 50485
(Filed August 13, 1968;
amended August 21, 1968)

CLINTON O. HARRIS and FLORA HARRIS,

Complainants,

-vs-

VALLECITO WATER COMPANY,
a corporation,

Defendant.

Case No. 9549
(Filed April 30, 1973)

J. E. Skelton, Attorney at Law, for Vallecito
Water Company, applicant in A.50485 and
defendant in C.9549.

Gibson, Dunn & Crutcher, by Raymond L. Curran,
Attorney at Law, for API and Prudential
Savings and Loan Association, and Donnelly,
Clark, Chase & Haakh, by Ernest M. Clark, Jr.,
Attorney at Law, for United California Bank,
interested parties in A. 50485 and intervenors
in C.9549.

Remington & Jackman, by Michael Remington and
James A. Jackman, Attorneys at Law, for
Bodinus Homes, protestant in A.50485 and
intervenors in C.9549.

Martin E. Whelan, Jr., Attorney at Law, for
Clinton Harris and Flora Harris, complainant
in C.9549 and protestant in A.50485.

Elinore C. Morgan, Attorney at Law, and Robert
C. Durkin, for the Commission staff.

ORDER REOPENING PROCEEDINGS

On August 13, 1968, Vallecito Water Company (Vallecito) filed Application No. 50485 seeking a certificate of public convenience and necessity to furnish water service to Tracts 29803 and 29942 adjacent to its existing service area. By Decision No. 75014 dated November 26, 1968 the requested authority was granted ex parte.

On November 5, 1970 Vallecito filed a "Petition For Supplemental Order" (reproduced below):

"This petition of Vallecito Water Company (Vallecito) respectfully shows that:

1. By Decision No. 75014, dated November 26, 1968 this Commission granted a certificate of public convenience and necessity to Vallecito, authorizing it to construct a public utility water system to serve the area including Tracts Nos. 29803 and 29942, excluding Lot No. 148, Los Angeles County. By its Advice Letter No. 20, filed August 5, 1969, effective August 9, 1969, Vallecito accepted this certificate of public convenience and necessity, and filed a revised service area map and provided for the application of its then tariff schedules to the area certificated by Decision No. 75014.
2. Service to the public in the area certificated by Decision No. 75014 first commenced May 16, 1970.
3. Vallecito was authorized by Decision No. 75014 to deviate from its filed main extension Rule No. 15 to accept contributions in aid of construction for the installation of special facilities plus land with its improvements for reservoir sites to provide service to Tracts Nos. 29803 and 29942. The installation of these special facilities was undertaken and completed by Affiliated Properties, Inc. (Affiliated), a subsidiary of Financial Federation, Inc. The latter is also parent of Prudential Savings and Loan Association (Prudential). Transfer of title to these special facilities and land to Vallecito is pending.

4. In conjunction with the authorization to deviate from its filed main extension Rule No. 15 to accept contributions in aid of construction, Vallecito was ordered to submit a study to determine what benefits would be realized by developers in adjacent areas from the special facilities, land and improvements to be contributed. Vallecito was also ordered to submit a plan showing an equitable assignment of the cost of these special facilities and related improved land to developers of the adjacent areas. For the purpose of complying with these orders Affiliated has furnished to Vallecito a study and plan of allocating costs which have been prepared by its consulting engineers, Brown and Caldwell. Copies of this study and plan, together with a covering letter dated July 9, 1970 addressed to Mr. Richard R. Entwistle, Vice President of San Gabriel Valley Water Company, are attached as Exhibit E and made a part hereof for the purpose of complying with the orders referred to. Mr. Entwistle is also vice president of Vallecito and for this purpose should have been addressed in that capacity.
5. Subsequently, Affiliated modified the plan of allocating costs by substituting final costs for costs used in the Brown and Caldwell study. Vallecito was furnished with a copy of the modified plan and a covering letter dated October 26, 1970. Copies of the covering letter and modified plan of allocating costs are attached as Exhibit F and made a part of the petition.
6. Both Exhibit E and Exhibit F specify 307 acres to be served by the contributed special facilities. Seven designated areas comprise the 307 acres. Three of the areas, including Tracts Nos. 29803 and 29942, totalling 161.9 acres, are owned by Prudential (designated API on page 4 of Exhibit E). Exhibit E designates Urich,

Harris and Bodinus as owners or possible owners of three of the remaining areas with one owner undesignated. Vallecito believes the owners other than Prudential to be as follows:

Area No. 3A - Independent Service Station Operators, Inc., Jack Urich, President, 12920 E. Whittier Blvd., Whittier, California 90602.

Area No. 4A - Clinton O. and Flora H. Harris, 13617 E. Whittier Blvd., Whittier, California 90605.

Area No. 5A - Batistelli Bros., 15381 La Belle Street, Hacienda Heights, California 91745.

Area No. 6A - Bodinus Land Company, 916 N. Highland, Fullerton, California 92632.

Vallecito also believes Areas Nos. 1A (excluding Lot No. 148), 2A, 4A (in part), 5A and 6A to be located within its present certificated area and the balance of areas to be adjacent thereto. Because an ensuing order of the Commission herein may affect the terms under which water service may be obtained by the presumed owners named herein or the developers of the properties, a copy of this petition has been mailed to each person or entity believed to be an owner.

7. Costs of off-site and special facilities plus the land with its improvements were estimated to be \$335,900 in Exhibit C and \$405,800 in Exhibit E. Final costs are stated to be \$469,544.12 in Exhibit F. This latter exhibit allocates \$257,041.00 to Prudential properties and \$212,503.12 to properties of others.

8. Ordering paragraph 6 of Decision No. 75014 states in part that 'Upon acceptance or modification of this plan, the Commission will, by supplemental order, authorize and direct its implementation. Any assignment of costs to future developers shall be collected by Vallecito Water Company and paid to Prudential Savings and Loan Association or its successors in interest in accordance with such supplemental order.'

"WHEREFORE, Vallecito respectfully petitions this Commission to make its supplemental order or orders --

- (a) Accepting the submission herewith of Exhibits E and F as compliance by Vallecito with the requirements of Ordering Paragraph 6 of Decision No. 75014, and
- (b) Authorizing or directing such other or further action or making such other order or orders as it deems necessary or proper.

Dated: November 4, 1970."

By notice mailed March 31, 1971 hearing on the petition was set for April 19, 1971. By notice mailed April 14, 1971 the matter was reset for June 2, 1971. Hearing was held on June 2, 1971 before Examiner Rogers. At the conclusion of a full day of hearing, the matter was continued to June 8, 1971 in order that the parties could "work out your stipulation". On June 8, 1971 hearing was again held before Examiner Rogers. No stipulation concerning all parties had been made and no party was ready to proceed. Consequently, the matter was set over to August 10, 11, and 12, 1971. Hearing was held on August 10 before Examiner Rogers. At the close of the hearing a motion was made^{1/} to dismiss the petition for supplemental order and to strike Ordering Paragraph 6 of Decision No. 75014.

^{1/} By Bodinus Homes, joined by United California Bank and Mr. and Mrs. Harris.

The matter was taken off calendar subject to the receipt of opening and closing briefs.

Voluminous briefs, both opening and closing, were received and considered by the Commission. On January 11, 1972 by Decision No. 79576 the Petition for Supplemental Order was dismissed and Decision No. 75014 was amended by striking therefrom Ordering Paragraph 6 on the ground that "it appears to be without any basis or legal support."

On January 20, 1972 API filed a "Petition for Rehearing of Affiliated Properties, Inc." By Decision No. 79960 dated April 18, 1972 rehearing was granted.

By notice dated October 4, 1972 a prehearing conference was set for November 1, 1972. A prehearing conference was held as scheduled at Los Angeles before Examiner Gillanders. All parties were present and although the matter was thoroughly discussed nothing came out of the conference except an agreement to meet again on December 19, 1972. For sundry reasons the conference was postponed to February 14, 1973 and again postponed to March 13, 1973. At the March 13 prehearing conference, the matter was again discussed but no agreement could be reached except that the matter should proceed to hearing.

By notice mailed March 20, 1973 the matter was set for hearing beginning April 24, 1973. API requested a continuance as its principal witness was not available. The continuance was granted and the matter removed from the calendar.

On April 30, 1973 Case No. 9549 was filed.

Application No. 50485 and Case No. 9549 were consolidated and hearing was held at Los Angeles on October 23 and 24, 1973 before Examiner Gillanders.

At the October hearings, API continued the presentation it began on June 2, 1971 through its main witness, Mr. Luthin, and other witnesses. At the conclusion of API's direct case it offered its exhibits into evidence as well as requesting that Exhibit 1 be received into evidence.^{2/} API's exhibits were received into evidence. However, there was an objection to the receipt of Exhibit 1 on the basis that no witness was available to stand cross-examination on the exhibit. As the staff was not prepared to provide a witness to testify on the exhibit, it was not received into evidence.

During cross-examination of Mr. Luthin, Mr. Whelan moved to strike all of Mr. Luthin's testimony and related exhibits and testimony of other witnesses concerning allocation of costs on the basis that Mr. Luthin did not prepare all of the material in his exhibits, and therefore could not be properly cross-examined. The persons who did prepare the underlying material in the exhibits were not made available. The presiding examiner granted the motion. Thereupon, Mr. Whelan moved that Application No. 50485 be dismissed and that Case No. 9549 be severed and set for hearing at another date. The examiner took this motion under submission with the understanding that his ruling could be appealed to the Commission.

By letter dated October 25, 1973 API requested an opportunity to submit a written statement and points and authorities to appeal from the examiner's ruling. API requested that the material be filed twenty days after receipt of the transcript. By letter dated October 31, 1973 the request was granted.

^{2/} Exhibit 1 is the staff report which served as the basis for the Commission's ex parte Decision No. 75014.

On November 19, 1973, API filed a "Statement And Points And Authorities In Opposition To Motion To Dismiss And In Support Of A Reconsideration Of Motion To Strike Certain Testimony Of Witness John C. Luthin".

On December 6, 1973, Mr. Whelan filed a "Statement And Points And Authorities On Behalf Of Clinton O. Harris And Flora Harris In Support Of Motion To Dismiss And In Opposition To Motion To Reconsider Striking Of Certain Testimony".

On December 20, 1973, API filed a "Reply Of Affiliated Properties, Inc. To The Statement And Points And Authorities In Support Of Motion To Dismiss And In Opposition To Motion To Reconsider Striking Of Certain Testimony".

On June 18, 1974, API filed a "Petition For Further Supplemental Order"; on June 20, 1974, the Harrises filed a motion to strike the petition.

Discussion

We have reviewed the statements filed by the parties as well as the transcript and exhibits of the entire proceeding.

The genesis of the hearings in these matters was Ordering Paragraph 6 of Decision No. 75014 dated November 26, 1968. Ordering Paragraph 6 states:

- "6. Within one hundred eighty days after the effective date of this order, applicant shall submit a study to determine what benefits would be realized by developers in adjacent areas because of the special facilities to be constructed and the land with its improvements to be utilized for the reservoir sites in connection with this development. Applicant shall also submit a plan showing an equitable assignment of the cost of these special facilities and related improved land to developers of the adjacent areas. Upon

acceptance or modification of this plan, the Commission will, by supplemental order, authorize and direct its implementation. Any assignment of costs to future developers shall be collected by Vallecito Water Company and paid to Prudential Savings and Loan Association or its successors in interests in accordance with such supplemental order".

It was not until July 9, 1970 that API delivered a study to San Gabriel Valley Water Company which purported to be the study required by Ordering Paragraph 6.

It appears from an examination of Decision No. 75014 that Finding 4 therein was overlooked.^{3/} That finding is based on Exhibit 1, the staff engineer's report, which is a part of the record. Finding 4 includes a statement of the staff engineer's opinion relative to the desirability of cost allocations among those developers who will be benefited by construction of the special facilities. Thus, there was support in the record for Ordering Paragraph 6, contrary to the conclusion reached in Decision No. 79576 which ordered the paragraph stricken.

After the Petition for Supplemental Order was filed, notice to the adjacent land developers was given and a hearing was had

^{3/} Finding 4 states:

- "4. Applicant would be required to pay for all of the back-up plant required for the requested area in a short time if it followed the main extension rule in this instance. Due to the unusually high back-up plant expenditures required, which would be of limited utility to applicant's existing customers, the requested deviation requiring contributions in aid of construction rather than advances for construction for the back-up plant should be authorized. However, if the off-site plant installed for this development is to be utilized for further extensions of service into adjacent areas, it would be equitable to have the future subdividers make a contribution on a pro rata basis which would revert to Prudential".

regarding some aspects of the plan that was submitted. The notice given did not contemplate striking Ordering Paragraph 6. Vallecito and API were apparently ready to go forward with their presentation when the motion to dismiss the petition was made. API alleges that it has expended in excess of \$400,000 in justifiable reliance on the opportunity to present its evidence pursuant to Ordering Paragraph 6, which, it is alleged, it has "barely been able to commence..." (Pet., Sheet 16.)

It appears that there was no testimony presented at the hearing on the Petition for Supplemental Order as to the reasons for including Ordering Paragraph 6 in the first instance. Since the study and plan have been made and money has been expended pursuant to Ordering Paragraph 6, the substantive rights of the parties have been affected. Therefore, due process, and the terms of Section 1708 of the Code, requires notice and hearing on the issue of whether Ordering Paragraph 6 should be stricken. The inclusion of Ordering Paragraph 6 in the order is not a question of mistake in the sense of clerical error. There is support in the record forming the basis for Decision No. 75014 for its inclusion, and it is presumed that the Commission's decisions are made based on the record presented. (Dyke Water Co. v PUC, (1961) 56 C 2d 105, 126.) Ordering Paragraph 6 of Decision No. 75014 should not have been stricken.

We have previously outlined the events which took place after rehearing was granted. There is no question that API finally had an opportunity to present its entire case. There is also no question that API utterly failed to substantiate its position. Its principal witness, Mr. Luthin, could not directly testify to a substantial portion of the facts and figures that he presented in his exhibits. Regarding these facts and figures he could only say that they were prepared under his direction. Those who prepared the underlying information were not presented as witnesses. His assumptions as to other evidence were shown to be erroneous. For example, see Transcript page 288, lines 27-29, see also Transcript page 310, line 28, through Transcript page 332, line 3.

Exhibit 1, which was made part of the record in Application No. 50485 and which underlies ex parte Decision No. 75014, was not admitted in the current proceeding because there was no competent witness to sponsor it. Decision No. 75014 established the rule for this proceeding that future developers could be required to contribute to the costs of special facilities to be constructed and of the land with its improvements to be utilized for reservoir sites to the extent that such improvements benefit the future developers. Exhibit 1 supports Finding 4 and Ordering Paragraph 6 of Decision No. 75014. But merely because Exhibit 1 was used in support of Decision No. 75014 does not mean it can be used against new parties without giving the new parties an opportunity to cross-examine the person who prepared the exhibit. We do not understand the confusion over the foundation for the admittance of Exhibit 1. (Nor do we understand why Exhibit 1 is needed at all at this stage of the proceedings.) Parties deeming Exhibit 1 necessary can subpoena the person who prepared it. If, for any reason that procedure is not desired, the parties can present their own engineer to testify to the matters covered by Exhibit 1. We have made an independent

appraisal of Exhibit 1 and see nothing in that exhibit which could not be testified to by a competent engineer who went out and did the work that was done by the engineer who prepared Exhibit 1.

We are not satisfied with the progress of this proceeding. API asserts that it has spent substantial sums of money in building water plant that will benefit others. Whether this is true and whether others are required to pay for some of that plant, and, if so, in what amounts, is still to be decided. If there is an obligation on the part of others we will not permit it to be avoided because the basic issues have been clouded by procedural maneuvering. For this reason we will give Vallecito and API, the real party in interest, another chance to prove their case. At the reopened hearing Vallecito or API must present witnesses to the facts. If Exhibit 1 is part of their case they should be prepared to offer witnesses to substantiate it.

So that there will be no mistake as to what is expected of the parties at the reopened hearing, the examiner is instructed to receive evidence upon which to make findings of fact on the following three questions:

1. What is the extent of the special facilities constructed and of the land with its improvements to be utilized for reservoir sites in connection with the development that is the subject of Application No. 50485?
2. To what extent, if any, do the facilities described in Question 1 benefit each new developer?
3. Are the developers liable for their share of any benefits found to accrue to them?

All motions and petitions not specifically discussed and resolved by this opinion are denied.

O R D E R

IT IS ORDERED that submission of these proceedings is set aside and the proceedings are reopened for further hearing at a date to be set to determine the questions discussed in this opinion.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 20th
day of AUGUST, 1974.

Veronica L. Sturgeon
President
William J. Lyons
William J. Lyons
William J. Lyons
William J. Lyons
Commissioners