

ORIGINAL

Decision 84 02 048

FEB 16 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LATTANZIO ENTERPRISES, a
partnership,

Complainant,

vs.

PPD Corporation, dba NORTHEAST
GARDENS WATER COMPANY,

Defendant.

Case 10166
(Filed August 31, 1976)

(See Decision 89056 for appearances.)

Additional Appearance

Michael Willoughby, Attorney at Law,
for defendant.

INTERIM OPINION

By Decision (D.) 89056 PPD Corporation (defendant) and Francis Ferraro, its president and Southwest Enterprises (complainant), a general partnership consisting of Robert Lattanzio, Nick Lattanzio and Bruno Lattanzio, successor in interest to Lattanzio Enterprises, a partnership, were ordered to execute a main extension contract in conformity with the main extension rule in effect in 1973, and for defendant to refund advances totaling \$54,901.39. To date no refunds have been made nor has a main extension contract been executed.

On May 10, 1979 complainant filed a petition for an order to show cause why defendant should not be held in contempt for failure to make the refunds ordered by D.89056. Defendant opposed the petition and requested that the case be reopened for the purpose of modifying D.89056 to reflect complainants' inability to convey the 8-inch pipeline easements or rights-of-way and fee interest in the site for a pump station.

D.90476 dated June 19, 1979 denied defendants' request and ordered defendant to appear and show why it should not be adjudged in contempt for failure to comply with D.89056.

After hearing, D.91916 dated June 17, 1980 found that: (1) main extension contracts require easements or rights-of-way to enable a utility to perform its public utility obligations, (2) neither of the parties to this controversy had made a good faith attempt to execute a main extension contract, (3) the parties should be given a reasonable time in which to obtain the necessary easements and grant deed and to execute a main extension contract, and (4) a reasonable solution to the complaint would be for defendant, pending execution of a main extension contract to deposit in an escrow account monies ordered refunded by D.89056, plus interest at 7% from August 10, 1978. That decision also ordered execution of a main extension contract within ninety days and the deposit of the refund amount into an escrow account, deferring a ruling on the contempt question in order to give the parties time to comply with the order. Defendant opened the escrow account on August 11, 1980 and has made refund deposits regularly since that date.

Having been unable to reach an agreement on who should bear the expense of acquiring the easements, on October 25, 1983 defendant filed a document entitled, "Application for Clarification of Decision No. 91916, dated June 17, 1980 Regarding Necessity of Condemnation of Easements and Allocation of Costs Thereof." Defendant states that

despite the efforts of both parties to obtain the easements ordered by D.89056 and D.91916, they have been unable to obtain said easements from the current property owners without compensation.¹ Defendant seeks clarification of D.91916 with regard to proper allocation of liability of the respective parties for payment of costs, fees, expenses and just compensation for any condemnation to obtain the necessary easements. Defendant asks that liability for all costs, including attorneys' fees and just compensation, be allocated to complainants.

Defendant states that easements form an essential part of the consideration conveyed from the developer to the utility through the execution of a standard main extension contract. Defendant states that complainants (1) conveyed the property to third parties without retention of utility easements and are thereby unable to convey them, (2) are intimately familiar with the necessity of retaining title to public utility easements in the development of real estate having reserved general utility easements in the subdivision maps, (3) necessary easements were reserved and conveyed to the appropriate utility for power and telephone, and (4) complainant had title to the water utility easements, had identified them on parcel maps and were, at the time of the sale of the lots to third parties in the best position to reserve said easements for transfer to the utility.

Defendant argues that complainants were uniquely and exclusively positioned to insure that these easements were not conveyed to uncooperative third parties. Defendant avers that complainants sold the property at a profit, and could have reserved the easements without cost and that nothing done by the water utility contributes in any way to complainants' failure to reserve the

¹ Extensions of service, however, have been made.

easements. Defendant states complainants alone are responsible for preparation and execution of the deeds by which they sold the property on which the easements for the main extensions and other water utilities are located.

Finally, defendant states that everything necessary for the execution of the main extension contract has been completed except the necessary water utility easements. It states it has been directed to and has performed as if the proper main extension contract was executed as was ordered in D.89056 but that complainants cannot perform all obligations.

Defendant states that while it has the power of condemnation it should not be required to pay the cost and expenses of condemnation and just compensation as well as the refunds under the main extension contracts. It states the total cost to acquire the necessary easements is the developers' responsibility, and that amount should be deducted from the total refunds now held in a trust account and that upon the proper execution of the main extension contract, the balance of the refunds due would be paid to the Lattanzio Enterprises.

In response to defendant's application for clarification, complainant states that while defendant was ordered to make the refunds on or before November 11, 1978, defendant has refused and that even though the parties were given until June 17, 1980 to execute a main extension contract, no contract has been executed and no monies have yet been paid.

Complainant states that the present problem exists because all of the parcels of realty were sold long before defendant informed complainant of the need for easements and that the present owners refuse to convey any such easements.

Complainant states defendant has not attempted to assert its power of eminent domain and condemnation or to establish the

existence of implied easements and refuses to act unless all costs are paid by complainant.

Complainant argues that any costs involved in obtaining the easements are due to defendant's failure to request the reservation of easements. Complainant states the easements could and would have been reserved, as were telephone and power easements, had such a request been made.

Complainant avers that defendant knew it would need the easements yet did not make it known to complainant until D.89056 ordered the execution of a main extension contract and refund of the monies advanced. Further, notwithstanding D.89056, defendant still waited until complainant requested an order to show cause regarding contempt before raising the easement problem before the Commission.

Complainant states that this project was its first real estate development and thus relied on defendant's knowledge and expertise regarding regulatory requirements and the need for a main extension contract.

Complainant states it should not pay any of the costs to obtain the easements, having already paid a high penalty in not having the benefits of the monies advanced.

Discussion

The facts in this case are not disputed. Defendant assisted complainant in obtaining a loan which defendant used to install the necessary mains and improvements to provide water service to complainant's real estate development. The parties did not execute a main extension contract. The complainant understood the advance was to be refunded. Defendant treated the funds as advances for construction. By D.89056 we ordered the parties to enter into a main extension contract and to refund the advances. To date neither has been accomplished, each party blaming the other for noncompliance. Details of the controversy are discussed in depth in D.89056 and D.91916.

As noted in D.91916 the parties themselves have the key to the resolution of this controversy and neither has acted responsibly to resolve the impasse. With defendant's request for clarification it is obvious there will be no resolution without an order from this Commission.

Accordingly, defendant should proceed forthwith to take steps through condemnation to obtain the necessary easements, or rights-of-way, keeping the Commission informed of its progress.

With respect to the associated costs, unlike the electric and gas utilities Main Extension Rule No. 15, which does not require the utility to obtain the easements, the water utility main extension rule does not provide who should obtain the easements or rights-of-way. Thus under the circumstances the costs can be assessed to one party or apportioned based on a determination of the responsibility for obtaining the easements or rights-of-way.

Since we have previously found that neither party in this controversy has acted responsibly (Finding 12 of D.91916) and because each has shown no inclination to cooperate with the other to resolve the conflict, it is equitable that the parties share equally the costs associated with obtaining the necessary easements. The costs to be shared should include all costs of condemnation, including legal costs and any just compensation. Complainants' share should be deducted from refund monies now held in escrow.

To ensure that costs are reasonable the defendant should keep the Commission apprised of the progress and should furnish data concerning the associated costs. Defendant should have the burden of proof as to the reasonableness of the costs prior to their approval.

Findings of Fact

1. Findings of Fact 1-13 in D.91916 dated June 17, 1980 are still current and are incorporated here by reference.
2. A reasonable time for compliance with D.91916 has elapsed.
3. Defendant should proceed forthwith with condemnation proceedings to obtain the easements or rights-of-way, including fee

title to the pump station site necessary to execute a main extension contract.

4. Because of the parties' conduct, equity requires that costs associated with obtaining the necessary easements be shared equally by the parties.

5. Defendant has the burden of showing the costs for obtaining the easements or rights-of-way are reasonable.

6. Defendant should establish to the Commission's satisfaction that the associated costs of obtaining the necessary easements or rights-of-way are reasonable.

7. Complainants' share of costs for obtaining the easements or rights-of-way should be deducted from refund monies now on deposit in an escrow account.

8. Because this matter has been pending since 1976 with no action taken by parties since D.91916 in 1980, this order should be effective today.

Conclusions of Law

1. The Concusions of Law in D.91916 dated June 17, 1980 are still current and are incorporated here by reference.

2. Defendant should proceed forthwith to obtain the easements or rights-of-way necessary to execute a main extension contract.

3. The costs associated with obtaining the easements or rights-of-way should be shared equally by complainant and defendant.

4. Initial costs associated with obtaining the easements or rights-of-way should be paid by defendant with complainants' share deducted from refund monies now on deposit in an escrow account.

5. Defendant should file for Commission approval details of the costs associated with obtaining the easements or rights-of-way.

INTERIM ORDER

IT IS ORDERED that:

1. PPD Corporation shall initiate the condemnation action(s) within 30 days after the effective date of this order to obtain the easements and fee title necessary for the execution of the main extension contract ordered by D.89056.

2. PPD Corporation shall file with the Commission staff details of costs incurred in obtaining the easements or rights-of-way.

3. Failure to promptly comply with this order shall subject defendant to an action of contempt of the Commission. In view of the long-standing nature of this controversy and repeated failures of the parties to act, failure of defendant to act within the time limit specified in Ordering Paragraph 1 shall also subject defendant to being responsible for all costs of the ordered condemnation action(s).

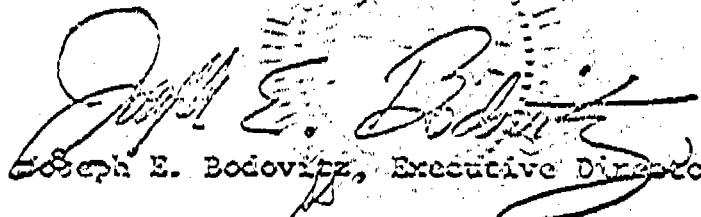
This order is effective today.

Dated FEB 16 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
PRISCILLA C. CREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

Commissioner Victor Calvo,
being necessarily absent, did
not participate

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director