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Decision 92-02-005 February 5, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

William T. Quigley and other
neighbors,

Complainants,

vs.

San José Water Company, a
California corporation
(U-168-W),

Defendant.

ORIGINAL

Case 91-03-038
(Filed March 19, 1991)

William T. Quigley, for himself and neighbors,
complainants.

Robert A. Loehr, Attorney at Law, for San José
Water Company, defendant.

O P I N I O N

Statement of Facts

In 1964, the Los Gatos Hills Development Company developed a hillside subdivision on Tract 3514 located above and south of Blossom Hill Road in the most eastern area of the Town of Los Gatos in Santa Clara County. The subdivision, as relevant here, was constructed on parallel streets bounded on the west by Bacigalupe Drive and on the east by Harwood Road, and roughly followed contour lines, ladder like, descending down the steep slope toward Blossom Hill Road. The elevation drop, top to bottom, in the hillside slope subdivision is substantial. The highest subdivision street is Belridge Drive, the area involved in this dispute.

The subdivision being within the service territory of the then San Jose Water Works (today, San Jose Water Company (SJWC)), the developer sought public utility water service from the utility.

Service was proposed to be extended up to the new subdivision. Water would originate through the utility's system from the Belgato Reservoir which is located on a knoll to the west of and above the subdivision area.

In 1964, Commission General Order 103 (GO 103) required public water utilities subject to its jurisdiction to supply water at a customer's meter at a pressure of not less than 25 pounds per square inch gauge (psig), except that during hourly periods of maximum demand the minimum was 20 psig. But SJWC at that time had, as a design objective and not as a minimum to be observed under all normal operating conditions, a self-imposed standard higher than the Commission's GO 103 required 25 psig. Its objective was to provide a minimum of 40 psig.

Belridge Drive takes a deep dip mid-block so that both ends of the block, like an arc, are substantially higher than the middle of the block. While the utility knew that the system it installed in the subdivision would be able to supply water at the utility's self-imposed 40 psig as far up the hillside as Belridge Drive, and over most of Belridge Drive as well, it also knew that it could not meet its 40-psig objective at either high end of Belridge Drive, specifically to Lots 100 and 108 through 113.

Accordingly, by a February 5, 1965 utility letter from its new business manager to the developer, the utility notified the developer that it would be necessary for the developer to install pressure systems to provide adequate pressure for the lots indicated, and that subsequent purchasers would have to operate and maintain these systems. The letter further stated that should the developer elect not to install pressure systems, deeds would have to state that purchasers later requiring such systems would have to install, operate, and maintain them at their own expense, and that if not obtained, the utility was released from claims and damage

demands. Exhibit 2 in this proceeding purports to be a copy of this 1965 letter.¹

The utility installed a 6-5/8 inch main down Belridge Drive (west to east) to serve lots on both sides of that street as far as the six lots at issue here at the eastern high end of the street. That main then bypassed the six lots to loop into the main in Harwood Road. To serve the six problem lots, a 4-inch main was installed to run reverse-wise to the west from Harwood. It is an appendage to the Harwood main and is not looped. Water was then delivered to the rest of the subdivision subject to the utility's self-imposed 40-psig minimum pressure (excluding Lot 100, not at issue here), while the six lots on the east of Belridge received service at or above the 25-psig GO 103 requirement.

As matters evolved, the developer elected to install a pressure tank system in each of the half dozen specific lots at issue here. These systems were installed in the garages of the homes built on the lots, and consisted of a large tank and associated piping occupying approximately 4 x 5 feet of space. The homes of the subdivision were sold and the developer is long gone.

¹ The letter's final paragraph asks that the developer, if in accord with these terms and conditions for service, sign and return the letter. The letter copy entered as Exhibit 2 bears no indication of compliance by the developer with this request.

In two instances,² the evidence is that the executive vice-president of the development company told the purchasers that it was necessary that they have a pressure system (which was included in the purchase price of their property), but that it would be temporary as the development company was looking for an alternative future hook-up for these properties.

In 1975, a generic investigation on the Commission's own motion (Case 9263) relating to the feasibility of amending or revising GO 103 with regard to fire protection standards and services resulted in Decision (D.) 84334. This decision revised GO 103 to require normal minimum pressure of 40 psig with a permissible drop to 30 psig at times of maximum demand. But the decision also recognized that it might not be economical or otherwise feasible to rebuild existing systems or portions of them to meet the standard, and effectively "grandfathered" such existing nonconforming facilities until new mains are installed or mains which reach the end of their useful lives are replaced. Utilities were required to make tariff filings listing service areas with special pressure conditions (the "grandfathered" areas). SJWC made

2 In one instance the pressure system was installed in November of 1965, three days after the purchaser had moved in, but during his absence. As his cars would not fit, the purchaser complained to the developer who relocated the pressure system to another place in the garage. After approximately 15 years, and having repaired parts and made replacements, the owner, concluding there was adequate pressure without the system, had it removed.

In the second instance, the purchaser was a construction superintendent for the developer in building the subdivision. At the hearing in this proceeding, he testified that the developer's executive vice-president stated that the installations were temporary and would be replaced by a future water hook-up, but gave no time reference. He still has the pressure system in operation.

One other home retains the pressure system. In the others, the systems have been removed.

the requisite filings, and has updated the filings since. Its filing includes Belridge Drive and Harwood Road. The utility points out that these areas are exempted from the current minimum standards under D.84334, until the existing system can feasibly be rebuilt or replaced.

Over the years since the subdivision was built, several of the homeowners living in homes on lots subject to the special pressure conditions have removed their developer-installed pressure systems. Those retaining the systems have had to repair them as the systems aged or malfunctioned. On three occasions, pressure drops to 8 psig have been reported to SJWC. Each time the problem was ascertained to be a faulty valve at the Belgato Reservoir. Each time the problem was corrected within two to four hours. In November of 1990, low pressure at one home was traced to a valve that had been turned off in the street in front of the home. Who turned off the valve was never discovered, but usual pressure was restored when the valve was turned back on.

Early in 1974, William T. Quigley, a homeowner who had in 1965 purchased one of the homes in the special pressure condition area (and who later had removed his developer-installed pressure system), began sending letters to the Commission contending that SJWC should be required to "correct the situation." Assertedly, letters were written in 1984, 1985, 1989, 1990, and 1991. Each time he was informed that pursuant to GO 103 the utility need not take action until the system was rebuilt or replaced.

Early in 1991, Quigley informally protested, with the same result, to Consumer Affairs. On March 19, 1991, joined by four similarly located neighbors, he filed the captioned formal complaint. On April 11, 1991, at the request of Administrative Law Judge (ALJ) John B. Weiss, an informal review meeting was conducted by Consumer Affairs Manager Marco Valenti with Quigley and four co-complainants and SJWC managers at the utility's San Jose office. Review of pressure tests made showed that the utility was providing

service at each complainant's meter that met the minimum of 25 psig required under GO 103 in areas with special pressure conditions.

The company discussed four options with the complainants:

1. There now being a more recently installed high pressure line nearby in Harwood Road connected to the Alta Vista Subdivision above the Los Gatos Hills Subdivision, a tie-in with high pressure service to the five lots on the eastern end of Belridge Drive could be installed to meet the needs of the five complainants. But the estimated probable cost to be divided among the five would be \$42,000. Furthermore, high pressure is very dangerous and can cause serious property damage or personal injury. Pressure regulators would have to be installed to be maintained by the customers. As the pressure before regulation would exceed 125 psig, acknowledgment would also be required on each property deed of the condition. Extensive street cuts would be required, as well as permits and asphalt replacements, and it is believed that the existing asbestos cement main would have to be replaced with ductile iron cement lined pipe to handle the pressure.
2. Another option would be to hook up everyone on Belridge Drive, all 27 homes, to the high pressure line, thereby rezoning the entire street. This avoids the necessity of replacing mains and extensive street work. But all 27 homeowners would have to agree to accept high pressure service with

3 In intervening years, another developer constructed the recent Alta Vista Subdivision with a separate pressure zone substantially higher and to the west of Belridge Drive. To serve this subdivision a 10-inch ductile iron cement lined pipe (DICL pipe) extension capable of withstanding the very high pressure needed to get water up to the Alta Vista Subdivision was installed up Harwood Road to Harwood Court. Alta Vista is an acreage subdivision of very large mansion-type homes entirely independent of Los Gatos Hills.

its dangers and deed restrictions, and to share the estimated \$28,000 cost.

3. The least expensive option would be for the five complainants to continue with, or install their own pressure system (which costs about \$800 each).
4. The fourth option would be to install a group pressure tank at the end of the street, assuming the city would approve a site and the five complainants would pay the costs of the system, including operation and maintenance.

The utility asserted that the area wherein the complainants have their homes is one specifically subject to the low pressure tariff provided by D.84334; that complainants or their predecessors in interest knew of the low pressure condition existing for their lots; and that this small group cannot expect the utility's other customers to subsidize the costs of upgrading their service. The utility asserts that absent occasions of mechanical failures over the years, it has delivered and continues to deliver water at the meter at or above 25-psig minimum pressure, and therefore is meeting its obligation. It points out that had it not been concerned about pressure, it would not have pushed the developer to install individual pressure tanks - the alternative the developer adopted.

The complainants wanted the first of the options the utility offers but wanted the utility to pay the \$42,000 cost. They also asked for a delay in proceeding so that they could further study the options. The ALJ held the matter off calendar to afford them time.

Subsequently, the complainants advised the ALJ that they wished to go to a formal hearing on the issues. After a continuance to accommodate complainants, a duly noticed formal evidentiary hearing was held in San Jose on August 28, 1991 before ALJ Weiss. Complainants presented evidence through four of their

number; Messrs. Quigley, Van Gastel, Erdmann, and Garnett. The utility presented its evidence through its vice-president for regulatory affairs, Mr. Meyer; a field customer service supervisor, Mr. Salas; and its engineering department planning supervisor, Mr. Bentson.

The utility concluded by stating that when the subdivision was completed in 1965 it met GO 103 requirements; that since the 1975 changes in GO 103, it has continued to meet the requirements under the special exemptions allowed. The company stated it had filed the necessary documents to indicate its special pressure areas including this one. Thus, it states, it has done all that is required under the tariff and general order in providing service to the five complainants.

Complainant Quigley concluded by stating his feeling that GO 103 is one-sided in favor of the utility, and that SJWC has demonstrated a lack of consumer interest by failing to disclose to prospective purchasers or to have put into deeds the conditions that apply under the general order. He asserts that it is the utility's responsibility to make every effort to replace conditions when necessary or possible. Complainant Van Gastel concluded by stating that the system, as it was designed and installed, indicates that there would be future improvements, and that this constitutes an implied contract for the utility to do so.

At conclusion of the hearing, the matter was submitted for decision.

Discussion

As relevant to this complaint proceeding, Public Utilities (PU) Code § 1702 provides that a complaint may be entertained by the Commission provided it sets forth "any act or thing done or omitted to be done by any public utility . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission."

The issue presented by the captioned complaint, therefore, is whether or not SJWC has done or omitted to do anything in violation of any law, or order or rule of this Commission.⁴ In their pleadings, testimony, and argument, the complainants contend that SJWC and the developer were guilty of a failure to disclose to buyers of certain of the homes on Belridge Drive the existence of a low pressure condition. While we have no jurisdiction over the developer and his purported lack of representations, we do have jurisdiction over the utility. The contention that the utility failed to disclose is a generalized allegation unsupported by any reference to any specific law, or order or rule of the Commission which required the utility to seek out prospective purchasers or to take other steps to alert them. The allegations simply assert that since SJWC is solely responsible for supplying water to the development and the home occupants, it should have made certain that the low pressure situation was disclosed not only to possible initial purchasers but later to subsequent buyers on resales.

But that contention ignores the factual circumstances here present, and also disregards the pressure requirements the utility had legally to meet in 1964-1965 and thereafter. In 1964-1965 when SJWC first extended service to their subdivision,

4 Utility rules, when published and filed as tariffs, have the force and effect of a statute (Dyke Water Co. v. Public Util. Comm'n. (1961) 56 C 2d 105, cert. den. 368 US 939), and are binding upon the utility and its patrons, and even upon the Commission, until changed in a lawful manner (Solomon v. Southern Cal. Tel. Co. (1945) 45 CRRC 775). Orders of the Commission are the conclusion and judgment of the Commission upon any proceeding before it, and upon becoming final are binding upon the parties and the utilities involved. The Commission's rules with regard to minimum standards in relation to the design, construction, and operation of waterworks facilities by water utilities operating under its jurisdiction are set forth in the Commission's GO 103.

the only provision of law, or order or rule of the Commission pertaining to minimum pressure that applied was that found in the Commission's then controlling GO 103. This general order had been adopted by the Commission in D.53204 on June 12, 1956 in Case 5663. It then provided that a utility had to maintain normal operating pressure of not less than 25 psig except during periods of maximum use when the pressure could not be less than 20 psig. The 1956 order further provided that in the interpretation of the rule it was understood that in systems of widely varying elevations a utility could furnish service which did not comply if the customer was fully advised of the condition and agreed in writing. But this latter "understanding" was not relevant to the Los Gatos Hills development, because in providing service the utility was providing pressure at well above the GO 103 minimum, at 40 psig to all of the subdivision except to Lot 100 and Lots 108 through 113. And to these latter seven lots it provided service at or above the required 25 psig. In fully meeting or exceeding the only legally imposed minimums, there was no requirement that customers be advised of anything else, much less that they had to agree to anything. That SJWC was trying to be progressive and designing its systems for 40 psig,⁵ higher than the industry standard then required, imposed no additional requirements or legal obligations upon it. It had filed no tariff provisions that could be

5 In the early 1960s, there was a dawning appreciation in the industry's leading utilities that possibly higher pressures than 25 psig were desirable for adequate and proper functioning and increasing usage of water-operated household appliances and sprinkler systems in the more expansive modern homes being built. Consequently, some utilities were voluntarily adopting higher pressures as a design objective, but not as a minimum to be observed under all normal operating conditions. SJWC was one of these progressive utilities.

interpreted as having imposed notice requirements. It was in full compliance with minimum standards.

Nonetheless, on February 5, 1965, the utility informed the developer that it could not provide pressure that the utility considered adequate under its design objectives. This real estate development consisted of quality homes; and although the 25-psig pressure that could be provided these seven homes was allowed under then prevailing GO 103 requirements, the utility informed the developer that to obtain "adequate" pressure the developer would have to install individual pressure systems in these homes or, in the alternative, the utility to provide service would require statements in the deeds to prospective buyers. The developer chose to install pressure systems.

Accordingly, the utility was not only meeting the minimum requirements then applicable, but by installing pressure systems the developer was providing the means to exceed the minimum, and the utility's design objective of "adequate pressure" was also met. The utility had no legal obligation to do more. And certainly the presence of these 5 x 5-foot pressure systems with included piping in the respective garages, not the usual accouterment of the average garage, was sufficiently distinctive to give notice to any prospective buyer that something was different.⁶ Furthermore, the evidence at the hearing was that the developer's executive vice-president readily discussed the low pressure situation, albeit also assertedly stating that the condition was temporary for a year

6 Quigley testified that a pressure system had been installed without his prior knowledge and authorization while he was out a couple of days after he had moved in during November of 1965; that he thereupon complained of the location and that the developer had relocated it within the garage. Only then, according to Quigley, was he told that low pressure required the installation which would be temporary for a year or two until a better pressure could be supplied.

or two until another water source could be located. If surprised or dissatisfied, the buyer's recourse lay with the developer-seller or with the buyer's nondisclosing broker, not the water company.

Years later, several of the owners, including Quigley, elected to remove their pressure systems. Several sold after removing their systems. Subsequent purchasers, if not informed of the low pressure condition before purchasing, could have recourse under contemporary real estate disclosure laws against their brokers and/or the sellers. But the utility, being in compliance with the requirements of the controlling general order, had and has no obligation to seek out and inform prospective purchasers.

The Commission's 1975 amendment of GO 103 (D.84334 issued April 15, 1975 in Case 9263),⁷ while adopting a new 40-psig minimum pressure requirement to replace the former 25-psig requirement, did not mandate that public water utilities had to rebuild existing systems or portions of these to comply. The Commission recognized that it might not be economical to rebuild an existing system to maintain a minimum pressure of 40 psig. In adopting the new minimum normal pressure standard, the Commission commented:

"It should be stressed, however, that such prescribed minimum pressures are intended for the design, construction, and operation of future facilities and that continued full utilization of existing facilities is contemplated"⁸

7 The amendment decision, D.84334 issued April 15, 1975 in Case 9263 cited as Modification of General Order No. 103, (1975) 78 CPUC 239, was not reported in full in the former reporter.

8 The mains here at issue have an anticipated depreciation schedule of 75 years. Installed in 1964, these mains have a substantial remaining service life.

The Commission went on to permit those utilities confronted with special circumstances affecting pressure to file tariffs referring to the areas within which exceptions to the new minimum pressures might be found. Finding 18 to the modification order stated in this regard:

- "18. Exemptions to these new minimums should be permitted for present systems or portions of them which were designed to meet the present minimum pressure of 25 p.s.i.g. and cannot feasibly be rebuilt to meet the increased minimum pressures. Tariff filings delineating such areas should be filed within a twelve-month period following the effective date of this decision."

Ordering Paragraph 4 to the amendment decision provided:

- "b. As new mains are installed or as mains which have reached the end of their useful lives are replaced, the new or replacement mains shall be sized and designed to accommodate the standards of Paragraph II.3.a."

The utility filed the appropriate exemption filings and has since periodically updated these listings of areas where normal operating pressure does not meet the current GO 103 requirements. These listings include Belridge Drive and Harwood Road.

No evidence was presented, apart from approximately three instances of mechanical breakdown across the years since 1975, that SJWC has not been furnishing water at the complainants' meter connections at or above 25 psig. At the hearing the utility's evidence showed that at the specific requests of complainants Van Gastel, Erdmann, and Garnett, on May 13, 1991, May 17, 1991, and May 14, 1991, pressure and volume test procedures were performed on the respective homes of the named complainants. These tests were supervised by Salas, the utility's field customer service supervisor, and were performed by the utility's service personnel. The results were:

<u>Van Gastel:</u>	Static pressure meter box	28 psig
	Static pressure front hose bib	25 psig
	Residual pressure rear hose bib	23 psig
	With pressure system	35 psig
<u>Erdmann:</u>	Static pressure meter box	33 psig
	Static pressure front hose bib	33 psig
	Residual pressure rear hose bib	32 psig
	No pressure system	-
<u>Garnett:</u>	Static pressure meter box	37 psig
	Static pressure front hose bib	35 psig
	Residual pressure rear hose bib	25 psig
	With pressure system	55 psig

On November 15, 1990, the static's pressure at Quigley's home was tested and found to be 35 psig. Thereafter, a recording 24-hour pressure gauge placed on the hydrant in front recorded an average pressure of 30 psig.⁹ When most recently the pressure was tested at Quigley's home, the residual pressure at the hydrant in front was 32 psig, and 23 psig at the front hose bib after Quigley replaced an aged supply line to the house from the meter connection. Thus, the pressure supplied to Quigley's line is above the minimum grandfathered GO 103 requirement as established since 1975 in D.84334. SJWC has in no way done or omitted to do anything in violation of any provision of law or of any order or rule of the Commission in regard to provision of service to these five complainants.

Finally, complainant Van Gastel argues that the design of the 4-inch main serving him and others of the low pressure group indicates that the utility intended ultimately to add to the system to provide higher pressure; that this design served to create an implied contract to do so which the Commission should now require

⁹ But at no time during the 24-hour span was the recording below 25 psig. The Dickinson Company recording disk is Exhibit 5 to the prepared testimony of Meyers which is Exhibit 3 in this proceeding.

the utility to perform. An implied contract is one, the existence and terms of which are manifested by conduct. But it is customary that water utilities, with eventual or possible future additions or refinements in mind at the time of initial installation, make provision in the design and installation for future developments, installing valves, and oversizing mains as may be indicated. But these provisions against the future do not set timetables running. The timing of a utility's obligation to bring minimum pressures in these defined special pressure condition areas is set forth in the general order. It does not arise under an implied contract concept.

The original purchasers of the low pressure homes in this 1964-1965 subdivision knew or should have known, if only from the very obvious presence of the large pressure tank system in each's garage, that there was a low pressure condition requiring the system to boost the pressure to more desirable levels. Several elected to remove the systems and by so doing they accepted the consequences. All initially had recourse to the developer if there had been no disclosure. Purchasers on resales had recourse to the seller or their broker if there was no disclosure. But the water utility has met its service obligations under the law. No violations under the tariff or general order have been shown. Accordingly, having failed to meet the requirements of PU Code § 1702, the complaint must be dismissed.

Findings of Fact

1. SJWC (earlier known as San Jose Water Works) at all times relevant herein has been a public utility water corporation subject to the jurisdiction of this Commission.
2. In 1964, a SJWC service extension was made to a Los Gatos Hills Development Company subdivision constructed on steep hillside terrain in eastern Los Gatos.
3. In 1964, at the time of this service extension, GO 103 included a requirement for a minimum normal pressure of 25 psig at

the meter box point of delivery to individual lots in a subdivision.

4. Pursuant to SJWC's self-adopted design objective at the time, the utility assured pressure up to 40 psig to all but seven of the individual lots in the subdivision; but to these seven, by reason of their location, it could only assure meter box normal minimum pressure which either met or slightly exceeded the GO 103 minimum requirements.

5. In response to SJWC's insistence, the developer installed individual pressure tank systems in the garages of the homes on each of the seven low pressure lots, thereby enabling these homes to enjoy pressure above the GO 103 minimum at the time of 25 psig.

6. In 1975, D.84334 modified GO 103 to establish a new normal minimum pressure requirement of 40 psig, but recognizing economic realities, stressed that the new minimum was intended "for the design, construction, and operation of future facilities and that continued full utilization of existing facilities is contemplated," and provided for utility designation of its then existing low pressure areas, and grandfathered these existing installations until replacement at end of service life or other reconstruction.

7. At all times since installation of service to these seven lots, except during several facilities' malfunctions, SJWC has provided water at a normal minimum pressure at or exceeding 25 psig to these seven lots.

8. Complainants herein are either original purchasers or have purchased the properties in the low pressure area from former owners.

9. Several of the complainants have removed their pressure systems for one or another reason, or have purchased lots where the systems had been removed by the prior owner-sellers.

10. Tests evidence that the utility continues to provide service at or above the 25 psig normal minimum pressure permitted

under the grandfathering provisions of GO 103 as amended by D.84334.

11. The utility has offered ameliorative alternatives to the complainants to provide high pressure service, but at complainants' expense.

12. Complainants have failed to set forth "any act or thing done or omitted to be done . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission," as required under PU Code § 1702.

Conclusions of Law

1. The utility's obligations with regard to eventual reconstruction or replacement of facilities to meet present GO 103 requirements do not arise under an implied contract concept.

2. The complaint should be dismissed for failure to state a cause of action as required pursuant to provisions of PU Code § 1702.

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ORDER OF DISMISSAL

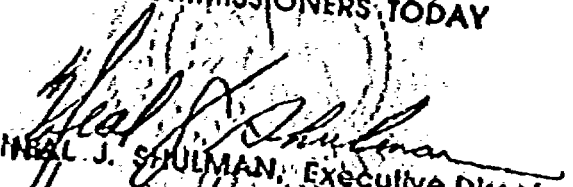
IT IS ORDERED that Case 91-03-038 is dismissed with prejudice by reason of having failed to set forth "any act or thing done or omitted to be done . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission," as required pursuant to Public Utilities Code § 1702.

This order becomes effective 30 days from today.

Dated February 5, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

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


NEAL J. SHULMAN, Executive Director

AB