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Decision 92-07-060 July 22, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)	ORIGINAL
of Suburban Water Systems (U-339-W))	
for Authority to Sell Certain)	
Utility Property.)	
_____)	
		Application 90-10-029 (Filed October 9, 1990; Petition for Modification filed May 5, 1992)

INTERIM OPINION

1. Summary of Decision

The Division of Ratepayer Advocates (DRA) petitions for modification of Decision (D.) 91-11-074, asking that it be made a final order without the requirement of hearings. The petition is denied. However, the scheduled hearings in this matter, and further service of prepared testimony, are stayed as a matter of administrative efficiency.

2. Background

In Application 90-10-029, Suburban Water Systems seeks retroactive authority, pursuant to Public Utilities (PU) Code § 851, to sell a parcel of real property located in the City of Whittier. The sale was made in December 1989 to the City of Whittier Redevelopment Agency in connection with the Whittier Earthquake Recovery Redevelopment Plan.¹

In D.91-11-074, the Commission held that the record was insufficient, and that a hearing would be required, to decide (1) whether the property in question was necessary or useful in the performance of utility service, and (2) whether capital gain-on-sale of real property should accrue to shareholders of the

¹ Suburban Water Systems states that the failure to seek prior authority from the Commission was inadvertent and arose because of a misunderstanding of the requirements for sales made under threat of condemnation.

utility, as proposed by Suburban Water Systems. The Commission directed DRA to participate in the hearing.

Accordingly, a prehearing conference was conducted on January 17, 1992. Seven parties, including the California Water Association (the Association) and five water utilities, entered appearances. Exchange of prepared testimony was scheduled between April 20, 1992, and August 17, 1992, with hearing set for August 24-27, 1992. Suburban Water Systems served its direct testimony on April 20, 1992.

On May 5, 1992, DRA filed a petition to modify D.91-11-074.² The petition asks the Commission to revise the decision to eliminate the proposed hearings, to grant authority for the sale of the property, and to allocate gain-on-sale of the property to reduce Suburban Water Systems' rate base. DRA states that gain-on-sale should be governed by the "enduring enterprise" principle enunciated by the Commission on March 31, 1992, in Re Southern California Water Company, D.92-03-094 (the SoCalWater Decision). Three parties in this matter have filed in opposition to DRA's petition.

3. Position of DRA

Based on its preliminary investigation, DRA states that it has no reason to oppose Suburban Water Systems' application except on the issue of how to allocate the approximately \$200,000 gain-on-sale of the parcel of land. DRA concludes, at least initially, that the sale was prudent. The utility's arrangement in a long-term lease to continue operation of booster pump facilities on the property appears to benefit ratepayers, DRA states, although it continues its investigation of costs of relocating one of the pumps.

² DRA states that its petition is filed in accordance with Rule 43 of the Rules of Practice and Procedure.

The utility has filed an alternative motion to dismiss on the theory that the land that was the subject of sale was not necessary or useful in public utility service, and therefore Commission approval of its sale is not required under PU Code § 851.³ DRA regards this as a non-issue (or, in its words, "pure nonsense") because the land has been included in rate base for the entire period that it was owned by Suburban Water Systems. Although it cites no authority for its position, DRA states that inclusion in rate base, standing alone, is sufficient to make property "necessary or useful" under Section 851.

Thus, in DRA's view, the only issue is allocation of gain-on-sale. This issue, DRA maintains, has been definitively dealt with in the recent SoCalWater Decision. In that case, a water utility sold its former headquarters building and replaced it with a new one, realizing a gain-on-sale in the transaction. The utility sought to have the gain distributed to shareholders; DRA urged that the gain be used as an offset against revenue requirements to benefit ratepayers. The Commission rejected both approaches, reasoning that an immediate distribution of gain ignores the fact that a portion of the utility's assets was being liquidated at the same time that the utility's continuing obligation to serve had not been altered. The Commission directed that the gain should remain within the utility's operations and be applied against its rate base, stating:

"Ratepayers will benefit over the long term through a reduction in rate base by the amount of the gain-on-sale and the consequent

³ Section 851 prohibits utilities from disposing of property "necessary or useful in the performance of its duties to the public" without the approval of the Commission. However, the statute adds that "[n]othing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public...."

réduction in the return on the reduced rate base. By not using the gain-on-sale as a direct offset against the utility's revenue requirement, but rather as a reduction to rate base, the gain-on-sale will remain in the utility's operation. As such, the gain-on-sale will accrue to the benefit of shareholders in the future if and when the utility's operations are liquidated and its obligation to serve is dismissed." (D.92-03-094, p. 15.)

DRA states that the logic of the SoCalWater Decision compels an identical result here. Suburban Water Systems has sold an asset, but its continuing obligation to serve the public has not been altered. While Suburban Water Systems has not replaced the asset (as in the Southern California Water Company case), DRA states that "the determinative factor in the SoCalWater Decision was not the replacement of the asset, but the utility's unchanged obligation to serve..."

4. Position of the Utilities

Suburban Water Systems, the Association, and San Jose Water Company have filed in opposition to DRA's petition. They argue that the petition is improper under Rule 43, that the facts of the SoCalWater Decision are distinguishable, and that summary disposition of the Suburban Water Systems' application without hearing poses problems of due process. Suburban Water Systems also notes that Southern California Water Company has filed an application for rehearing of the SoCalWater Decision, and that the application is now pending before the Commission.⁴

⁴ Applications for rehearing are governed by PU Code §§ 1731 through 1736 and by Rules 85 through 86.2, and may or may not involve a temporary suspension of the order or decision in question.

4.1 Rule 43 Procedural Objection

San Jose and Suburban Water Systems urge that DRA's petition be dismissed for failure to comply with Rule 43. Rule 43 states in part:

"Petitions for modification, other than in highway carrier tariff matters, shall only be filed to make minor changes in a Commission decision or order. Other desired changes shall be by application for rehearing or by a new application."

San Jose states that a petition asking the Commission to reverse its order directing hearings in this application raises, on its face, more than a "minor" issue. Suburban Water Systems argues that an attempt to bring a matter of this magnitude before the Commission under the guise of a Rule 43 petition is plainly barred by the very language of that Rule."

4.2 Different Fact Patterns

The Association challenges DRA's assertion that a utility's unchanged obligation to serve is the determinative factor in the SoCalWater Decision. The replacement of the old asset with a new asset and the ratepayers' obligations for depreciation and operating and maintenance expenses of the new asset were factors considered by the Commission in reaching its conclusions (D.92-03-094, p. 15), and these factors, the Association states, are not present in the Suburban Water Systems' application.

The Association and the two utilities also take issue with DRA's implication that the SoCalWater Decision is intended to govern all gain-on-sale cases and replace a case-by-case approach. The Association states:

"(T)here is no reasonable or logical interpretation of the SoCal Water Decision which could possibly support an argument that the Commission intended to foreclose any consideration of the specific facts of a specific sale of utility property. In its summary of the decision, the Commission stated that 'the theory of the 'enduring enterprise'

...[is]...the principle by which we will examine gain-on-sales for cases with this fact situation.' Clearly the Commission intended to examine gain-on-sale cases, not foreclose examination of them." (Citation omitted.)

The Association states that one reason the Commission ordered hearings in the Suburban Water Systems' application is to consider whether the property sold was necessary or useful in public utility service. Inclusion of the property in rate base does not resolve this question, the Association states. It cites Citizens Utilities Co. of California (1987) 28 CPUC 2d 108, 118, where the Commission stated that "whether or not property is in rate base does not bear on this point [of whether property is necessary or useful]...The key issue is not how the property is accounted for, but how it is used."

4.3 Due Process Challenge

The Association and San Jose argue that if the Commission had intended the principle of the enduring enterprise to be applied as a generic rule in all gain-on-sale cases, it would have proceeded by way of rulemaking under Rules 14.2 and 14.3, rather than in an application in which the only participating parties were DRA and Southern California Water Company. The Association states:

"If the Commission intended the SoCal Water Decision to be its final word on gains on sale, it has both deprived itself of the benefit of the views of all the other utilities which it regulates and violated its own rules and the due process rights of those utilities who were not given an opportunity to express their views."

San Jose states that hearings in the Suburban Water Systems' application will give other utilities and DRA an opportunity to test the validity of the enduring enterprise principle when applied to facts different from those that confronted the Commission in the Southern California Water Company case.

5. Discussion

We do not agree that DRA's petition seeks to establish a "rule" by which all gain-on-sale cases will be governed. We read the petition to state that if a gain-on-sale case involves liquidation of an asset without reduction in a utility's obligation to serve its customers, then the precedent of the SoCalWater Decision is likely to produce the same result. If that premise is accepted, then DRA is correct in asserting that its resources, and the resources of other parties, can be put to better use than in rearguing countless gain-on-sale cases.

However, DRA's position is premature. By definition, precedent applies to same or similar fact patterns, and parties are entitled to seek to distinguish precedent, or to apply their version of other precedents, in subsequent cases. Indeed, precedent is strongest when it can be shown that it has been tested and followed in a line of cases.

In this application we directed that hearings be conducted to determine whether the property that has been sold was necessary or useful in the performance of utility services, and, if so, whether there are facts that bear on the proper allocation of gain-on-sale. (D.91-11-074, p. 3.) We are not persuaded by DRA's petition that the need for a record is no longer required in considering Suburban Water Systems' application.

With that said, we take note of the fact that Southern California Water Company on May 5, 1992, filed an application for rehearing of the SoCalWater Decision. Because of this, and in the absence of any suggestion of prejudice to any party, the assigned administrative law judge on June 3, 1992, granted DRA's request to stay further proceedings in this matter pending action on the application for rehearing. We agree that a stay is justified in terms of administrative efficiency.

Findings of Fact

1. As part of this application proceeding, DRA on May 5, 1992, filed a petition to modify D.91-11-074 to:

- a. Eliminate proposed hearings;
- b. Authorize Suburban Water Systems' requested sale of property, and;
- c. Allocate gain-on-sale of the property to reducing Suburban Water Systems' rate base.

2. Timely responses in opposition to the petition to modify were filed by Suburban Water Systems, the Association, and San Jose Water Company.

3. D.91-11-074, issued on November 20, 1991, directed hearings in this application to consider whether a parcel of property sold by Suburban Water Systems was necessary or useful to utility operations, and to determine the proper allocation of gain-on-sale.

Conclusions of Law

1. The petition to modify should be denied.

2. The petition to modify does not state a valid reason to cancel hearings required by D.91-11-074.

3. Because an application for rehearing has been filed as to D.92-03-094, the decision underlying DRA's petition, a stay of proceedings in D.91-11-074 should be granted to serve administrative efficiency.

4. Since this order deals with procedural matters, it should be immediately effective.

INTERIM ORDER

IT IS ORDERED that:

1. The petition of the Division of Ratepayer Advocates to modify Decision 91-11-074 is denied.
2. The evidentiary hearings and further service of prepared testimony in Application 90-10-029 are stayed pending further action by the Commission or by the assigned administrative law judge.

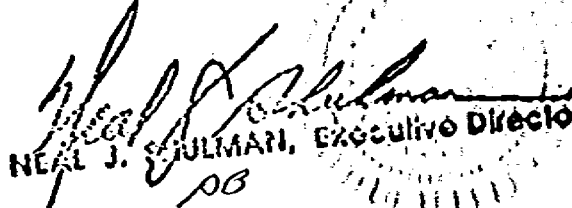
This order is effective today.

Dated July 22, 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. SCHULMAN, Executive Director
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