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JAN 19 1982

ORIGINAL

Decision

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PORTOLA BUILDING COMPANY
(A California Corporation),

Complainant(s).

vs.

CALIFORNIA WATER SERVICE COMPANY
(A California Corporation),

Defendant(s).

Case 11019
(Filed August 26, 1981)

ORDER OF DISMISSAL

Statement of Facts

The area in Daly City at issue, bounded on the east by Hillside Boulevard, on the north by Market Street, on the west by Third Avenue, and on the south by Fisher Street, is within California Water Service Company's (Cal Water) South San Francisco District service territory. Formerly part of Cal Water's Broadmoor District prior to incorporation of the two districts in 1979 (see Advice Letter 692 filed September 29, 1979 and effective October 1, 1979 by Resolution W-2554), the area at issue has been satisfactorily served for many years by Cal Water by means of a 4-inch main installed in Third Avenue in 1946.^{1/} Until recent developments, there were as many as eight service connections in the area.

In 1980 Portola Building Company (Portola) proposed to erect a residential and commercial subdivision on the area in issue. The subdivision is to be known as Cobblestone Square (Subdivision 79-7).

1/ Service Area maps on file with the Commission as far back as PUC Sheet 114-W (filed October 6, 1955 and effective November 1, 1955 by Resolution W-475) show the area as included within Cal Water's service territory.

The subdivision proposal received tentative approval by the city council of Daly City on December 13, 1980 following acceptance by the city of an environmental impact report dated September 15, 1980. This report stated that the project was within Daly City Water Division's jurisdiction, and that a combined effort from the Fire Department, the Water Division, and KCA Engineers, Inc. would design the water system, obtaining water service from the nearby Daly City Water System.

Cal Water informed Portola that it stands prepared to extend water service to Cobblestone Square under the terms of its filed tariffs at an estimated cost to the developers of \$123,631. General Order 103 prescribes a fire flow of 2,500 gpm for a development of this magnitude. However, the Daly City Fire Marshall has informed Cal Water that it would require 5,500 gpm. The utility plans to install a 2,640-foot 12-inch off-site main in Hillside Boulevard at developer's expense to meet these requirements. This off-site main, together with existing Cal Water mains and the city system, will provide the requisite fire flow.

If the developer could obtain service from the city rather than from Cal Water, it would save the \$123,631 off-site extension costs.^{2/} Accordingly, by this complaint Portola requests that this Commission divest Cal Water of its service territory, with any compensation to be as mutually agreed upon by Daly City and Cal Water. Cal Water states in its answer to the complaint that it has endeavored to enter into a dialogue with Daly City for the purpose of arriving at a satisfactory solution, but has received no encouragement from Daly City that the city is interested in negotiating such a solution. There is nothing in the complaint to indicate that Daly City has

^{2/} The developer argues that this would be conducive to the State's efforts to provide low to moderate income housing.

any intention of paying Cal Water for loss of its facilities and service territory. Accordingly Cal Water asks that the complaint be dismissed.

Discussion

In essence, what we are asked by a potential customer to do here, is to take away part of the service area from a certificated public utility which has dedicated facilities to the public use to serve that area and has been rendering public utility service to other customers in that area, and give that part of the service area thus taken away to a municipal utility, leaving it up to the public utility somehow to persuade the municipal utility to make some compensation for the loss. However, apart from articulating its request and attendant circumstances, the complainant has failed to include any grounds which would serve to state a cause of action which could bring the request within the ambit of our jurisdiction.

Here the municipal utility is not a party to the complaint. The complainant is a developer, a private party who would be benefited by a lower construction cost were its service to be provided by the municipal rather than the public utility. The complainant has set forth no act or thing done or omitted to be done by the public utility, nor does it state any violation of any provision of law or of any order or rule of this Commission. We are directed to no deficiencies of service on the part of the public utility. Rather it is clear that the public utility, one of the larger ones in the State, stands ready and able to meet its obligation to provide extension of public utility water service to Cobblestone Square under the provisions of its filed tariffs.

If the municipal utility wishes to acquire the rights to render water service in the area at issue, there are well-settled ways by which it can proceed. It can either acquire that part of the service territory directly by eminent domain proceedings, or it can duplicate the facilities of the public utility in the area (which may constitute inverse condemnation). But either way, the

"taking" clauses in the federal and state constitutions mandate that private property cannot be appropriated for public use without the payment of just compensation.^{3/} The Legislature, by Chapters 8 and 8.5 of the Public Utilities Code, has provided methods by which just compensation can be determined and obtained in either event. But these are options open only to political subdivisions (county, city and county, city, municipal water district, county water district, irrigation district, public utility district, or any other public corporation), not to private parties with a preference. ✓

On October 7, 1981 Administrative Law Judge Weiss advised complainant's representative Chapman of the deficiencies in the pleadings. Chapman informed the ALJ that complainant was in close communication with the authorities involved for the municipal utility, and that if the public authorities were prepared to proceed, Al Polanski, city attorney of Daly City would call. There have been no further communications from either the complainant or the public entity. Accordingly the complaint will be dismissed for failure to state a cause of action. ✓

Finding of Fact

The complaint fails to allege any violation or claimed violation of any provision of law or of any order or rule of this Commission.

Conclusion of Law

The complaint should be dismissed in that it fails to state a cause of action.

3/ See U.S. Constitution Amendments V and XIV, § 1; and California Constitution Article 1, § 19. In addition, California has broader provisions than the Fifth Amendment, requiring compensation whenever private property is taken or damaged for public use, see California Constitution Article 1, § 19.

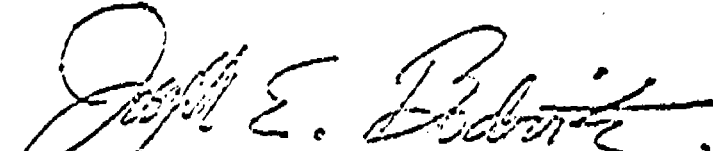
IT IS ORDERED that the complaint in Case 11019 is dismissed for failure to state a cause of action.

This order becomes effective 30 days from today.

Dated JAN 19 1982 , at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR GALVO
PRISCILLA C. GREW
Commissioners

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


Joseph E. Bodovitz, Executive Director