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ORIGINAL

Decision 82 06 059 JUN 15 1982

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PHILIP KARP,

Complainant,

vs.

CALIFORNIA WATER SERVICE COMPANY,

Defendant.

Case 82-04-01
(Filed April 2, 1982)

O P I N I O N

Basis of Complaint

Philip Karp (complainant) alleges that California Water Service Company (defendant) has interpreted defendant's main extension agreement with complainant to defendant's advantage and has refused to refund proper sums of money due to complainant.

The complaint and answer show that complainant is the successor to the interest of LeSand Properties, Inc. (LeSand) in an agreement entered into between defendant and LeSand on July 26, 1961. The agreement was made in accordance with defendant's Rule 15, Main Extensions, in effect at that time. The pertinent portions of the agreement are set forth in Appendix A. The portions of defendant's Rule 15 referred to in the agreement are set forth in Appendix B.

The agreement provided for the installation by defendant of water facilities to serve a subdivision that LeSand was developing in defendant's South San Francisco District. LeSand advanced the estimated cost of the facilities, $4,605, and subsequently deposited another $61. When the facilities had been installed and the actual

cost ascertained, $1,081.98 was returned to LeSand, leaving a balance of $3,584.02 to be refunded according to the provisions of the agreement and Rule 15. Defendant made refunds yearly for a period of 20 years, the term provided in the contract. At the end of the 20-year period, an unrefunded balance remained. In dispute in this proceeding is whether the balance of the contract, which complainant alleges amounts to $1,936.35 and which defendant claims is $1,838.35, is refundable to complainant. Defendant says the $1,838.35 has been transferred to Contributions in Aid of Construction pursuant to Rule 15 and the 1961 agreement.

The part of the agreement specifying refund procedures is quoted as follows:

> "7. Refund. Provided that the Applicant is not in default hereunder, the Utility agrees to refund to the Applicant or other party or parties entitled thereto 22% of the estimated annual gross revenue derived by the Utility from all bona fide customers, as defined in Rule 15-A-1, exclusive of any customer formerly served at the same location, connected directly to the Facilities installed hereunder, during the twenty years following the date of completion of the installation of the Pipeline Facilities hereunder; provided however, that the total amount refunded shall not exceed the amount deposited by the Applicant hereunder, without interest. Refunds will be made annually within forty-five days of the anniversary of the date of completion of the installation of the Pipeline Facilities. The estimated gross revenue upon which the annual refunds shall be based shall consist of the sum of:
>
> "(1) the actual revenue derived during the yearly period from service other than residential and business service (including

fire hydrant revenue only if the cost of hydrants or services for hydrants is included in the amount deposited by Applicant hereunder), and

"(2) the estimated residential and business revenue calculated upon the basis of the number of bona fide customers actually receiving service, and, as provided in Rule 15-A-8, upon the basis of the Utility company average revenue per residential and business customer for the prior calendar year, such average to be effective on April 1st and used until the following April 1st. In the case of a residential or business customer receiving service for less than a full year, appropriate proration shall be made of the average annual revenue."

Subparagraph (2) quoted above sets forth the refund provisions of Section A-8 of defendant's Rule 15 - Water Main Extensions in effect at the time the contract was executed. Under the terms of the agreement pursuant to former Rule 15, it is conceivable that an applicant may not be fully reimbursed when the 20-year period expires. Unreimbursed amounts are placed in the account for Contributions in Aid of Construction. In this case, complainant was not fully reimbursed for his costs.

The gist of the complaint, while not expressly stated, seems to be that refunds should be based on 22% of the revenue actually derived from the installed facilities rather than 22% of the prior year's utility company average revenue per residential and business customer. Complainant contends that:

"Said Agreement (Exh. 1) provides for refunds of amounts advanced by returning 'the sum of 22% of the revenue derived from all customers...connected directly to the facility installed' (Par. 7, Pg. 4 'Refund'

of Agreement and Par. C (b) of Exh. B to Agreement).[1]

"It is the intent of the Agreement, as well as custom and practice in the trade, that developer will advance the cost of installation of water line and will be reimbursed over a period of 20 years by receiving 22% of the revenue derived from the line installed.

"Defendant has interpreted the 'Agreement' to its advantage despite the specific terms to the contrary and has refused to refund the proper amounts of money to Complainant, with the result that Defendant is unjustly enriched by the amount of money properly due this Complainant.

"As to the conflict in REFUND TERMS:

"Par. 7 (2) does speak of 'average' method of refund.

"But this is in conflict with Par. 7 of the Agreement and with Par. C, 2 (b) of Exh. B to the agreement -- both of which specifically specify the 22% method of refund.

"It is a well settled principle of law that where a conflict in terms in a contract exists, such conflict will be resolved against the party who created the conflict.

"In this case, the contract was drawn up by California Water. Therefore, it is clear that the contract interpretation should be determined against California Water.

"At the hearing to be held, this Complainant will present evidence of other similar Agreements with other companies wherein the 22% method of refunding was used.

"It is equally clear that if Defendant is permitted to use its superior bargaining position to refuse to pay others similarly situated Defendant will be unjustly enriched by many thousands of dollars that does not properly belong to them.

---

[1] Exhibit B is defendant's Rule 15 as filed at the time of the agreement.

> "Finally, at the formation stage of the Agreement, Defendant exercises its superior bargaining position to impose a contract of adhesion on anyone doing business with said Defendant. A developer cannot go elsewhere for water, he is compelled to do business with California Water and must sign Defendant's contract and cannot vary the terms of the agreement, for they will not permit any changes.
>
> "Clearly, Defendant should be required to make the proper refunds."

The complaint concludes with a request for "an order requiring Defendant to pay to Complainant the sum of $1,936.05 plus interest from time proper refund should have been made and such other relief as you may find proper and just under the circumstances."

In its answer defendant claims that the agreement was made in full accordance with defendant's main extension rule in effect at that time and states that there is no basis for the granting of the relief asked by complainant. Defendant asks that the Commission issue its order in this proceeding without a hearing, based on the contents of the complaint and answer.

Discussion

A careful reading of the agreement discloses that it was made according to the Uniform Main Extension Rule prescribed by the Commission for all water utilities by Decision (D.) 50580 dated September 28, 1954 in Case (C.) 5501. This uniform rule, ordered after extensive study and eight days of hearing, provided that, for subdivisions, the utility would refund "22% of the estimated annual revenue from each bona fide customer" (Section C.2.b.) and defined "estimated annual revenue" as follows:

> "For the purposes of this rule, the estimated annual revenue for residential and business service will be the Utility average annual revenue per residential and business customer for the prior calendar year, such average to be effective on April 1st and used until the following April 1st. For other classes of service the Utility will estimate the annual revenue to be derived in each case." (Section A.8.)

Acting according to the Commission's order, all water utilities filed the uniform rule, designated Rule 15, as part of their filed tariffs. Having filed it, the water utilities were obligated to apply it, or secure Commission authorization to deviate from it (Public Utilities (PU) Code Section 532).

The complaint states that although the "average" method is mentioned in Subparagraph (2) of Paragraph 7 of the agreement, this terminology conflicts with Paragraph 7 and Section C.2.b. of Rule 15. Such is clearly not the case. Both of the latter use the phrase "estimated annual revenue" as specifically defined in Section A.8. of the uniform rule. There is thus no conflict of terms in the contract to be resolved. Complainant has either not correctly understood the agreement or misread it. Defendant is not unjustly enriched because Contributions in Aid of Construction are deducted from the utility's investment to determine a rate base for setting rates.

On January 21, 1969, by D.75205 in C.5501, Rule 15 was revised to provide that refunds be based on actual revenues received from the facilities for which the advance was made. Contracts made after this date are required by the new rule to base refunds on 22% of actual revenues, and no useful purpose would be served by a hearing for the purpose of advising the Commission of the provisions of contracts made according to the Commission's own rule as effective after that date.

The Commission has in the past considered a very similar case (Feldscher v Calif. Water Serv. Co., D.58780 dated July 21, 1959 in C.6207). The complainants in that case contended that the then existing Rule 15 was illegal and in derogation of their state and federal constitutional rights and that refunds should be based on revenue derived only from those customers directly connected to the facilities for which cost was advanced by complainants. The Commission ruled, however, that the utility average revenue, as defined in Rule 15, was the proper base for refunds. There is no showing in this complaint that would lead the Commission to reverse that decision.

Since no further refunds are due, the Commission need not reach the amount unrefunded at the termination of the 20-year refund period.

Inasmuch as defendant has not deviated from the terms of the agreement or violated any rule, law, or order of the Commission, and there being no factual dispute, a public hearing is not necessary. The complaint should be dismissed.

Findings of Fact

1. Complainant is the successor to the interest of LeSand in a main extension agreement between LeSand and defendant.

2. At the expiration of the 20-year period, an amount of the original main extension advance remained unrefunded.

3. The main extension agreement was made according to Rule 15 of defendant's filed tariffs as on file at that time.

4. Refunds were properly made according to the agreement and the then effective Rule 15.

5. No further moneys are due complainant.

Conclusions of Law

1. The complaint should be dismissed.

2. A public hearing is not required.

O R D E R

IT IS ORDERED that C.82-04-01 is dismissed.
This order becomes effective 30 days from today.
Dated JUN 15 1982, at San Francisco, California.

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

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

Joseph E. Bodovitz, Executive Director

APPENDIX A
Page 1

Pertinent Portions of Agreement Referred to
In Complaint in C.82-04-01

"2. Applicable Rule. This agreement is made pursuant to Sections A, C-1 and C-2B of the Utility's Rule No. 15 as on file with the Public Utilities Commission of the State of California, a copy of which is attached hereto marked 'Exhibit B' and by this reference made a part hereof."

* * *

"7. Refund. Provided that the applicant is not in default hereunder, the Utility agrees to refund to the Applicant or other party or parties entitled thereto 22% of the estimated annual gross revenue derived by the Utility from all bona fide customers, as defined in Rule 15-A-1, exclusive of any customer formerly served at the same location, connected directly to the Facilities installed hereunder, during the twenty years following the date of completion of the installation of the Pipeline Facilities hereunder; provided however, that the total amount refunded shall not exceed the amount deposited by the Applicant hereunder, without interest. Refunds will be made annually within forty-five days of the anniversary of the date of completion of the installation of the Pipeline Facilities. The estimated gross revenue upon which the annual refunds shall be based shall consist of the sum of:

"(1) the actual revenue derived during the yearly period from service other than residential and business service (including fire hydrant revenue only if the cost of hydrants or services for hydrants is included in the amount deposited by Applicant hereunder), and

"(2) the estimated residential and business revenue calculated upon the basis of the number of bona fide customers actually receiving service, and, as provided in Rule 15-A-8, upon the basis of the Utility company average revenue per residential and business customer for the prior calendar year, such average to be effective on April 1st and used until the following April 1st. In the case of a residential or business customer receiving service for less than a full year, appropriate proration shall be made of the average annual revenue."

(END OF APPENDIX A)

APPENDIX B
Page 1

Portions of Defendent's Rule 15 Referred to in Paragraph 2 of Agreement

"A. General Provisions"

* * *

"6. Revenue from fire hydrant service will be included in the computation of refunds under the percentage of revenue method in those cases where the cost of fire hydrants or services for fire hydrants is included in the amount of the advance."

* * *

"8. For the purposes of this rule, the estimated annual revenue for residential and business service will be the Utility average annual revenue per residential and business customer for the prior calendar year, such average to be effective on April 1st and used until the following April 1st. For other classes of service the Utility will estimate the annual revenue to be derived in each case."

* * *

"C. Extensions to Serve Subdivisions, Tracts, Housing Projects, Industrial Developments or Organized Service Districts

"1. An applicant for a main extension to serve a new subdivision, tract, housing project, industrial development or organized service district shall be required to advance to the Utility before construction is commenced the estimated reasonable cost of installation of the mains, from the nearest existing main at least equal in size to the main required to serve such development, including necessary service stubs or service pipelines, fittings, gates and housings therefor, and including fire hydrants when requested by the applicant or required by public authority, exclusive of meters. If additional facilities are required specifically to provide pressure or storage exclusively for the service requested, the cost of such facilities may be included in the advance upon approval by the Commission.

"2. The money so advanced will be subject to refund by the Utility without interest to the party or parties entitled thereto. The total amount so refunded shall not exceed the amount advanced. Refunds may be made under either of the following methods at the option of the Utility:"

* * *

"b. Percentage of Revenue Method

The Utility will refund 22% of the estimated annual revenue from each bona fide customer, exclusive of any customer formerly served at the same location, conected directly to the extension for which the cost was advanced. The refunds will, at the election of the Utility, be made in annual, semiannual or quarterly payments and for a period of 20 years."

(END OF APPENDIX B)

cost ascertained, $1,081.98 was returned to LeSand, leaving a balance of $3,584.02 to be refunded according to the provisions of the agreement and Rule 15. Defendant made refunds yearly for a period of 20 years, the term provided in the contract. At the end of the 20-year period, an unrefunded balance remained. In dispute in this proceeding is whether the balance of the contract, which complainant alleges amounts to $1,936.35 and which defendant claims is $1,838.35, is refundable to complainant. Defendant says the $1,838.35 has been transferred to Contributions in Aid of Construction pursuant to Rule 15 and the 1961 agreement.

The part of the agreement specifying refund procedures is quoted as follows:

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Subparagraph (2) quoted above sets forth the refund provisions of Section A-8 of defendant's Rule 15 - Water Main Extensions in effect at the time the contract was executed. Under the terms of the agreement pursuant to former Rule 15, it is conceivable that an applicant may not be fully reimbursed when the 20-year period expires. Unreimbursed amounts are placed in the account for Contributions in Aid of Construction. In this case, complainant was not fully reimbursed for his costs.

The gist of the complaint, while not expressly stated, seems to be that refunds should be based on 22% of the revenue actually derived from the installed facilities rather than 22% of the prior year's utility company average revenue per residential and business customer. Complainant contends that:

> "Said Agreement (Exh. 1) provides for refunds of amounts advanced by returning 'the sum of 22% of the revenue derived from all customers...connected directly to the facility installed' (Par. 7, Pg. 4 'Refund'

of Agreement and Par. C (b) of Exh. B to Agreement).[1]

"It is the intent of the Agreement, as well as custom and practice in the trade, that developer will advance the cost of installation of water line and will be reimbursed over a period of 20 years by receiving 22% of the revenue derived from the line installed.

"Defendant has interpreted the 'Agreement' to its advantage despite the specific terms to the contrary and has refused to refund the proper amounts of money to Complainant, with the result that Defendant is unjustly enriched by the amount of money properly due this Complainant.

"As to the conflict in REFUND TERMS:

"Par. 7 (2) does speak of 'average' method of refund.

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"In this case, the contract was drawn up by California Water. Therefore, it is clear that the contract interpretation should be determined against California Water.

"At the hearing to be held, this Complainant will present evidence of other similar Agreements with other companies wherein the 22% method of refunding was used.

"It is equally clear that if Defendant is permitted to use its superior bargaining position to refuse to pay others similarly situated Defendant will be unjustly enriched by many thousands of dollars that does not properly belong to them.

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[1] Exhibit B is defendant's Rule 15 as filed at the time of the agreement.

> "Finally, at the formation stage of the Agreement, Defendant exercises its superior bargaining position to impose a contract of adhesion on anyone doing business with said Defendant. A developer cannot go elsewhere for water, he is compelled to do business with California Water and must sign Defendant's contract and cannot vary the terms of the agreement, for they will not permit any changes.
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> "Clearly, Defendant should be required to make the proper refunds."

The complaint concludes with a request for "an order requiring Defendant to pay to Complainant the sum of $1,936.05 plus interest from time proper refund should have been made and such other relief as you may find proper and just under the circumstances."

In its answer defendant claims that the agreement was made in full accordance with defendant's main extension rule in effect at that time and states that there is no basis for the granting of the relief asked by complainant. Defendant asks that the Commission issue its order in this proceeding without a hearing, based on the contents of the complaint and answer.

Discussion

A careful reading of the agreement discloses that it was made according to the Uniform Main Extension Rule prescribed by the Commission for all water utilities by Decision (D.) 50580 dated September 28, 1954 in Case (C.) 5501. This uniform rule, ordered after extensive study and eight days of hearing, provided that, for subdivisions, the utility would refund "22% of the estimated annual revenue from each bona fide customer" (Section C.2.b.) and defined "estimated annual revenue" as follows:

> "For the purposes of this rule, the estimated annual revenue for residential and business service will be the Utility average annual revenue per residential and business customer for the prior calendar year, such average to be effective on April 1st and used until the following April 1st. For other classes of service the Utility will estimate the annual revenue to be derived in each case." (Section A.8.)

Acting according to the Commission's order, all water utilities filed the uniform rule, designated Rule 15, as part of their filed tariffs. Having filed it, the water utilities were obligated to apply it, or secure Commission authorization to deviate from it (Public Utilities (PU) Code Section 532).

The complaint states that although the "average" method is mentioned in Subparagraph (2) of Paragraph 7 of the agreement, this terminology conflicts with Paragraph 7 and Section C.2.b. of Rule 15. Such is clearly not the case. Both of the latter use the phrase "estimated annual revenue" as specifically defined in Section A.8. of the uniform rule. There is thus no conflict of terms in the contract to be resolved. Complainant has either not correctly understood the agreement or misread it. Defendant is not unjustly enriched because Contributions in Aid of Construction are deducted from the utility's investment to determine a rate base for setting rates.

On January 21, 1969, by D.75205 in C.5501, Rule 15 was revised to provide that refunds be based on actual revenues received from the facilities for which the advance was made. Contracts made after this date are required by the new rule to base refunds on 22% of actual revenues, and no useful purpose would be served by a hearing for the purpose of advising the Commission of the provisions of contracts made according to the Commission's own rule as effective after that date.

The Commission has in the past considered a very similar case (Feldscher v Calif. Water Serv. Co., D.58780 dated July 21, 1959 in C.6207). The complainants in that case contended that the then existing Rule 15 was illegal and in derogation of their state and federal constitutional rights and that refunds should be based on revenue derived only from those customers directly connected to the facilities for which cost was advanced by complainants. The Commission ruled, however, that the utility average revenue, as defined in Rule 15, was the proper base for refunds. There is no showing in this complaint that would lead the Commission to reverse that decision.

Since no further refunds are due, the Commission need not reach the amount unrefunded at the termination of the 20-year refund period.

Inasmuch as defendant has not deviated from the terms of the agreement or violated any rule, law, or order of the Commission, and there being no factual dispute, a public hearing is not necessary. The complaint should be dismissed.

Findings of Fact

1. Complainant is the successor to the interest of LeSand in a main extension agreement between LeSand and defendant.
2. At the expiration of the 20-year period, an amount of the original main extension advance remained unrefunded.
3. The main extension agreement was made according to Rule 15 of defendant's filed tariffs as on file at that time.
4. Refunds were properly made according to the agreement and the then effective Rule 15.
5. No further moneys are due complainant.

Conclusions of Law

1. The complaint should be dismissed.
2. A public hearing is not required.

O R D E R

IT IS ORDERED that C.82-04-01 is dismissed.
This order becomes effective 30 days from today.
Dated JUN 15 1982, at San Francisco, California.

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

APPENDIX A
Page 1

Pertinent Portions of Agreement Referred to In Complaint in C.82-04-01

"2. Applicable Rule. This agreement is made pursuant to Sections A, C-1 and C-2B of the Utility's Rule No. 15 as on file with the Public Utilities Commission of the State of California, a copy of which is attached hereto marked 'Exhibit B' and by this reference made a part hereof."

* * *

"7. Refund. Provided that the applicant is not in default hereunder, the Utility agrees to refund to the Applicant or other party or parties entitled thereto 22% of the estimated annual gross revenue derived by the Utility from all bona fide customers, as defined in Rule 15-A-1, exclusive of any customer formerly served at the same location, connected directly to the Facilities installed hereunder, during the twenty years following the date of completion of the installation of the Pipeline Facilities hereunder; provided however, that the total amount refunded shall not exceed the amount deposited by the Applicant hereunder, without interest. Refunds will be made annually within forty-five days of the anniversary of the date of completion of the installation of the Pipeline Facilities. The estimated gross revenue upon which the annual refunds shall be based shall consist of the sum of:

"(1) the actual revenue derived during the yearly period from service other than residential and business service (including fire hydrant revenue only if the cost of hydrants or services for hydrants is included in the amount deposited by Applicant hereunder), and

"(2) the estimated residential and business revenue calculated upon the basis of the number of bona fide customers actually receiving service, and, as provided in Rule 15-A-8, upon the basis of the Utility company average revenue per residential and business customer for the prior calendar year, such average to be effective on April 1st and used until the following April 1st. In the case of a residential or business customer receiving service for less than a full year, appropriate proration shall be made of the average annual revenue."

(END OF APPENDIX A)

APPENDIX B
Page 1

Portions of Defendent's Rule 15 Referred to in Paragraph 2 of Agreement

"A. General Provisions"

* * *

"6. Revenue from fire hydrant service will be included in the computation of refunds under the percentage of revenue method in those cases where the cost of fire hydrants or services for fire hydrants is included in the amount of the advance."

* * *

"8. For the purposes of this rule, the estimated annual revenue for residential and business service will be the Utility average annual revenue per residential and business customer for the prior calendar year, such average to be effective on April 1st and used until the following April 1st. For other classes of service the Utility will estimate the annual revenue to be derived in each case."

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"C. Extensions to Serve Subdivisions, Tracts, Housing Projects, Industrial Developments or Organized Service Districts

"1. An applicant for a main extension to serve a new subdivision, tract, housing project, industrial development or organized service district shall be required to advance to the Utility before construction is commenced the estimated reasonable cost of installation of the mains, from the nearest existing main at least equal in size to the main required to serve such development, including necessary service stubs or service pipelines, fittings, gates and housings therefor, and including fire hydrants when requested by the applicant or required by public authority, exclusive of meters. If additional facilities are required specifically to provide pressure or storage exclusively for the service requested, the cost of such facilities may be included in the advance upon approval by the Commission.

"2. The money so advanced will be subject to refund by the Utility without interest to the party or parties entitled thereto. The total amount so refunded shall not exceed the amount advanced. Refunds may be made under either of the following methods at the option of the Utility:"

* * *

"b. Percentage of Revenue Method

The Utility will refund 22% of the estimated annual revenue from each bona fide customer, exclusive of any customer formerly served at the same location, conected directly to the extension for which the cost was advanced. The refunds will, at the election of the Utility, be made in annual, semiannual or quarterly payments and for a period of 20 years."

(END OF APPENDIX B)