ALJ/ec/md

ORIGINAL

Decision 82 06 066 JUN 15 1982

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of WOODY DEVELOPMENT CO., INC. for authorization to construct overhead utility (power and telephone) service in place of the required underground facilities and for exemption from that requirement.	Application 59060 (Filed August 10, 1979; amended June 26, 1980)

Gerald M. Leverett, Attorney at Law, for Woody Development Co., Inc., applicant.
Vladislav Bevc, P.E., for the Commission staff.

OPINION ON REHEARING

Background

Woody Development Co., Inc. (Woody) filed its original application in August 1979 for authority to construct overhead power and telephone services in place of required underground facilities in Woody, Kern County. Woody alleged that certain rules in Southern California Edison Company (SCE) and Continental Telephone Company of California (CTC) tariffs allow construction of overhead instead of underground services. Woody states that overhead extensions may be authorized in a subdivision or development when the lots within that subdivision or development existed as legally described parcels prior to May 5, 1970, and significant overhead lines exist within the subdivision or development. SCE stated in a letter dated July 18, 1978 that there is no reason to deviate from its general rule requiring underground facilities.

The administrative law judge (ALJ) assigned to the original application requested additional information by letter dated October 10, 1979. An amended application was filed by Woody on June 26, 1980. By Decision (D.) 92520, issued ex parte on December 16, 1980, the application was denied without prejudice based on Woody's failure to allege sufficient grounds to warrant an exemption from the undergrounding requirement. The findings in D.92520 refuted Woody's allegation that the cost of constructing the facilities underground would be prohibitive. By D.92815 dated March 17, 1981 we granted a rehearing of D.92520, limited to the receipt of evidence on the issue of Woody's qualification for exemption under Rule 15 C.1.a.(1).

Rehearing was held in San Francisco on November 24, 1981 before ALJ John Lemke. The matter was submitted subject to the receipt of closing briefs.

Issue

Woody and the Commission staff (staff) are agreed that the sole issue before us in this proceeding is whether Woody meets the criteria specified in Rule 15 C.1.a.(1), and may thus be entitled to an exemption from the requirement that facilities must be constructed underground. The rule is set forth below:

"Rule No. 15

LINE EXTENSIONS

(Cont'd.)

"C. Overhead Extensions to Serve Residential Subdivisions or Developments.

"1. Conditions of Service. Overhead extensions may be constructed when conditions in either a. or b. below are found to exist.

"a. (1) The lots within the residential subdivision or the development existed as legally described parcels prior to May 5, 1970, and significant overhead lines exist within the subdivision or development."

Evidence

Woody presented evidence in support of its request through two witnesses.

Richard Weringer is president of Woody. His testimony consisted principally of the following:

1. Presentation of a certified copy of a map (Exhibit 1) of the subdivision in question, showing that the lots were legally described prior to May 5, 1970.
2. Identification of Exhibit 2, an enlargement of Exhibit 1, showing the existing power and telephone service in the subdivision. He testified that there is more than a mile of overhead telephone service and more than a mile of power service in the subdivision at the present time.
3. Presentation of 12 photographs (Exhibit 3) showing the existing overhead service.

Weringer testified that the existing overhead service is the only service in the area. The general locale of this area is the western foothills of the Sierra-Nevada Mountains. The overhead facilities serve all parties in the entire area, and not just this development or subdivision. He stated that the minimum size parcels for sale in the subdivision will consist of two lots per parcel, so that although there are approximately 100 lots in the subdivision, there will be a maximum of about 50 parcels.

Mrs. Myrna Weringer also testified for Woody concerning late-filed Exhibit 4. She directed our attention to a buffer zone shown on the exhibit which is 100 feet wide and lies on the west side of Weringer Street, south of Main Street in the southern part of the subdivision. A buffer zone is a nonresidential area where motels, fast-food establishments, etc. are permitted.

Vladislav Bevc is a supervising utilities engineer in the Commission's Utilities Division. His testimony included the staff's interpretation of the meaning of the word "significant" as used in the rule in SCE's tariff. Bevc stated that the staff deems "significant" as requiring that 25% or more of the lots in the subdivision would have to be already served by overhead utility services.

Bevc developed on cross-examination of Weringer that 13 residential lots actually receive electric service and telephone service at this time, and that another eight residences outside of the subdivision receive service from the lines located within the subdivision. The 13 residences receiving overhead service are situated along thoroughfares located in the southern part of the development.

Bevc cited the following factors underlying the Commission's preference for underground facilities:

1. Lower maintenance costs, which are in the final analysis borne by all ratepayers;
2. Less interruptions of service due to weather conditions;
3. Safety factors;
4. Environmental considerations.

Bevc believes that it would not be in the public interest to accede to this request because it would favor an individual interest over a general policy based on statewide benefits.

There is a dispute between Woody and the staff concerning whether the subdivision in question consists of 207 lots, as portrayed in Exhibit 2 introduced as "Weringer's map of Woody," surveyed in June 1909, or whether it consists of a smaller area which would substantially reduce the number of lots shown in Exhibit 2. Exhibit 2 purports to portray the subdivision in question; however, Woody in its application alleges that the size of its proposed development consists of 135 parcels. The territory excluded by Woody consists mainly of an area located

in the northwest corner of the original development shown in Exhibit 2. Weringer now alleges that there are 104 residential lots in the subdivision, and that these will be combined into about 50 parcels.

Bevc points out that by excluding some of the lots shown in Exhibits 1 and 2 from consideration in this proceeding, the total number of lots which Woody would have us consider would be reduced, and would thus increase the percentage of lots currently receiving overhead service. He states such gerrymandering tactics would subvert Commission policy in this area. He believes that the entire original subdevelopment should be considered in the determination of this question. Exhibit 2 shows clearly that the Woody development consists of seven blocks with a total of 207 lots.

The staff notes that the 13 lots receiving overhead service are located in an area where overhead construction occurred prior to Commission decisions regarding undergrounding.

The Law

The staff has cited five Commission decisions in support of its position that the undergrounding exemption should not be granted here.

The first of these, D.76394 dated November 4, 1969, in Case (C.) 8209, is relevant because by that decision a general policy of underground extensions on a statewide basis was established. However, the decision did not discuss exception, which is the only issue before us in this proceeding.

D.77187 dated May 5, 1970 in C.8993 affirmed our finding in D.76394 that undergrounding should be the standard for all extensions, and contained the following observation:

> "From an aesthetic standpoint, there is no merit to the contention that undergrounding should not be required for 'lot-type' or 'recreational community' developments, where construction of residences is spread over many years. Slow growth does not make it

> desirable to have festoons of electric and telephone lines in a tract. However, the record shows that some developments have progressed to the point where plans cannot be changed without serious or even disastrous financial impact on the developer. The order made herein will exempt such developments from the mandatory undergrounding provisions. Other developers who do not fall within this exemption but feel that for one reason or another they should be exempted from the mandatory requirement of the subdivision line extension rules, may file a formal complaint with the Commission seeking relief, or the appropriate utility may file an application requesting such relief. However, the Commission wishes to emphasize that only exceptional circumstances will hereafter justify the granting of any further exemptions."

D.78294 dated February 9, 1971 in C.8993 did not address the issue before us -- the definition of "significant overhead lines."

D.80864 dated December 19, 1972 in C.9364 dealt with overhead electric and communication distribution facilities in proximity to State Scenic Highways, but did not consider the construction of additional overhead extensions in subdivisions existing prior to May 5, 1970 where significant overhead service exists.

The last decision cited by the staff -- D.82455 dated February 13, 1974 in C.9556 -- concerned the undergrounding of line extensions to serve new apartment buildings with separately metered dwelling units.

In summary, while the decisions cited by the staff all address the position of the Commission that future undergrounding should be the rule, none of them addresses the issue before us here -- "significant existing overhead facilities", as the term appears in SCE's Rule 15.

Counsel for Woody, however, contends that case law for the State of California does give help in determining how the term "significant" should be interpreted, citing No Oil, Inc. v City of Los Angeles (1974) 13 Cal. 3d 68. In that decision the California Supreme Court determined that an agency should prepare an environmental impact report whenever it perceives "some substantial evidence that a project may have a significant effect environmentally." Counsel for Woody quotes Judge Friendly in construing the phrase, "significantly affecting the quality of the human environment" (42 U.S.C. Section 4332):

> "While...determination of the meaning of 'significant' is a question of law, one must add immediately that to make this determination on the basis of the dictionary would be impossible. Although all words are 'chameleons,' which reflect the color of their environment, 'significant' has that quality more than most. It covers a spectrum ranging from 'not trivial' through 'appreciable' to 'important' and even 'momentous.'"

The staff, on the other hand, would have us consider Webster's International Dictionary, Second Edition (Unabridged) where "significant" is defined as "3. deserving to be considered; important; momentous."

Discussion

In his direct testimony Weringer identified a map of the subdivision in question as "Weringer's Map of Woody." A copy of the map was offered as Exhibit 1. An enlargement of the map showing power and telephone lines and poles, is Exhibit 2. Both exhibits show that there are 207 lots in the original development, which was surveyed and the map of it was filed with the Kern County Recorder in 1909.

Yet Weringer stated that there are only 104 lots in the proposed subdivision, and in page 2 of its amended application Woody speaks of a proposed development consisting of 135 parcels. Exhibit "B"

attached to the amended application purports to be a map of the proposed development and describes 132 lots. It differs from Exhibits 1 and 2 in that it excludes certain areas shown in the northern part of the original development. Furthermore, Weringer testified that while there are about 100 lots in the subdivision, there will be a maximum of 50 parcels -- two lots per parcel. In short, the development identified on the maps received as Exhibits 1 and 2 consists of seven blocks and 207 lots; but Woody tells us it seeks an exemption for an area comprising only 104 of those lots -- a maximum of 50 parcels -- situated in four of the seven blocks.

The rule in question provides that overhead lines may be constructed when "The lots within the residential subdivision or the development existed as legally described parcels prior to May 5, 1970, and significant overhead lines exist within the subdivision or development..." (Emphasis added.)

Both clauses of Rule 15 C.1.a.(1) require scrutiny in order to interpret the rule correctly. Woody admits that only 13 parties in the subdivision are receiving service from the overhead facilities. It would be difficult to consider the 13 services as "significant" if they are to be considered in relation to 207 lots. Woody would have us consider only 104 of the lots (50 parcels) for the purposes of this proceeding. But even then, 13 services in relation to 104 or 50 may not be significant (although it would obviously be easier to consider 13 more significant considered against 104 or 50 than against 207).

Staff believes a determination that significant overhead lines exist in the smaller proposed area shown in Exhibit "B" would endorse a device for gradually extending overhead facilities throughout the entire original development. Such was not our intention in providing the exemption from the general rule requiring that extensions

be placed underground. The rule does not require the subdivision, but the lots existing within the subdivision or development, to have existed as legally described prior to May 5, 1970. The staff's concern over the gerrymandering tactics proposed by Woody is not misplaced. Such gradual extending of subdivisions accompanied by findings of increasingly "significant" overhead lines, was not our purpose in promulgating Rule 15.

We need not consider only present services in order to determine whether significant overhead lines exist within the subdivision or development.

Weringer testified that there exists about a mile of primary overhead power lines and 2,250 feet of secondary lines. He also stated that there are about 5,400 feet of telephone lines in the subdivision. There are no underground utility facilities in the development. It is not clear whether Weringer was declaring the above footages of existing lines exist in the area shown in Exhibits 1 and 2 or in his proposed subdivision.

The 13 parties served by overhead facilities are situated in a small area located along and to the south of Main Street at the southern end of the development. The subdivision to be developed appears to cover about 75% of the area depicted by Exhibit 2. There are no existing services from overhead lines in this undeveloped area. An overhead telephone line traverses 41, and an overhead electric line 28, of the 207 lots shown in Exhibit 2.

These same telephone and power lines traverse 30 and 18, respectively, of the lots shown in Exhibit "B" to the application. The electric line shown in Exhibit 2 is a single main line running in a generally east-west direction with two branch lines extending off the main line to the south. The telephone line consists of a single main line running generally north-south and bisecting the subdivision.

There is a branch line extending from the main telephone line westward along Main Street. We do not consider these existing overhead lines "significant" when considered in relation to either the proposed subdivision shown in Exhibit "B" to the application or the somewhat larger area shown in Exhibits 1 and 2.

Findings of Fact

1. SCE's Rule of General Application 15 D, (Revised Cal. PUC Sheet 4463-E), requires that line extensions must be constructed underground.

2. An exception to Rule 15 D is provided in Rule 15 C.1.a.(1), authorizing overhead extensions when the lots within a residential subdivision or development existed as legally described parcels prior to May 5, 1970, and significant overhead lines exist within the subdivision or development.

3. Woody sought permission from SCE to have overhead facilities constructed in a subdivision situated in the town of Woody, Kern County. SCE informed Woody by letter dated July 18, 1978 that there was no reason to deviate from the rule requiring that all new facilities serving residential subdivisions be underground.

4. The maps shown in Exhibit "B" to the application and in Exhibits 1 and 2 depict the subdivision for which Woody seeks authority to have underground facilities constructed. The map in Exhibits 1 and 2 depicts a total of 207 lots situated within the development described as Woody. The map shown in Exhibit "B" describes the subdivision as a smaller area, consisting of about 135 parcels.

5. There are 5,250 feet of primary and 2,250 feet of secondary overhead power lines, and 5,400 feet of overhead telephone lines in the subdivision. Service from these overhead telephone and power lines is presently received by 13 parties located in a limited area in the southern part of the subdivision.

6. Exhibit 2 depicts the existing overhead facilities located within the proposed subdivision.

7. The existing overhead telephone line traverses 30, and the existing overhead power line 18, of the lots described in the proposed subdivision depicted in Exhibit "B". There is a total of 132 lots shown in the proposed subdivision in Exhibit "B".

Conclusions of Law

1. Significant overhead lines do not exist within the subdivision proposed to be developed by Woody in the community of Woody, Kern County.

2. The application should be denied.

ORDER ON REHEARING

IT IS ORDERED that Application 59060 is denied.

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

Counsel for Woody, however, contends that case law for the State of California does give help in determining how the term "significant" should be interpreted, citing No. 0.1, Inc. v City of Los Angeles (1974), 13 Cal. 3d 68. In that decision the California Supreme Court determined that an agency should prepare an environmental impact report whenever it perceives "some substantial evidence that a project may have a significant effect environmentally." Counsel for Woody quotes Judge Friendly in construing the phrase, "significantly affecting the quality of the human environment" (42 U.S.C. Section 4332):

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be placed underground. The rule does not require the subdivision, but the lots existing within the subdivision or development, to have existed as legally described prior to May 5, 1970. The staff's concern over the gerrymandering tactics proposed by Woody is not misplaced. ~~In fact, the rule may be flawed because a strict reading of it apparently would not prevent piecemeal subdividing in a situation of this sort, and~~ such gradual extending of subdivisions accompanied by findings of increasingly "significant" overhead lines, was not our purpose in promulgating Rule 15.

We need not consider only present services in order to determine whether significant overhead lines exist within the subdivision or development.

Weringer testified that there exists about a mile of primary overhead power lines and 2,250 feet of secondary lines. He also stated that there are about 5,400 feet of telephone lines in the subdivision. There are no underground utility facilities in the development. It is not clear whether Weringer was declaring the above footages of existing lines exist in the area shown in Exhibits 1 and 2 or in his proposed subdivision.

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