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Decision 83 02 004 FEB 2 - 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FAIRCHILD CAMERA & INSTRUMENT )  
CORPORATION, )

Complainant, )

v. )

Great Oaks Water Company, )

Defendant. )

Case 82-08-16  
(Filed August 31, 1982)

ORDER OF DISMISSAL

Statement of Facts

Under authorization from this Commission granted by Decision (D.) 59173 dated October 20, 1959 in Application (A.) 41363, Great Oaks Water Company (Great Oaks), a California corporation, operates a public utility water service in and adjacent to the southeastern area of the City of San Jose. Among its customers is the Fairchild Camera and Instrument Corporation (Fairchild).

On August 31, 1982 Fairchild filed this complaint against Great Oaks relating to the rates charged Fairchild by Great Oaks for water service from Great Oaks' Well 13. This was followed on September 10, 1982 by Great Oaks' answer, and what was purported to be a cross-complaint. More recently, on October 19, 1982, Great Oaks filed a motion to dismiss with prejudice on the grounds that the Commission has no jurisdiction to grant the relief sought by the Fairchild complaint.

Preliminary to our discussion of this motion, we should set forth the applicable rules regarding the scope of our authority involving ruling on a motion to dismiss based on the pleadings in the complaint.

The facts of any individual matter must determine the extent of the Commission's jurisdiction in that case. While we are not bound by many of the rules of formal pleading (Public Utilities (PU) Code Section 1701), or by the prayer of the complaint (cf. Zellner v Wassman (1920) 184 C 80, 88), the general rule is that on a motion to dismiss we confine our consideration to the face of the complaint to determine whether sufficient facts are stated to give rise to a cause of action within the ambit of our jurisdiction. But this general rule has exceptions, one of which is that the complaint may be read as though it included matters which lie within the scope of our official notice. The point is that the pleadings must not be cast so as to be misleading or suppress damaging facts which are officially known.

The determinative point which the complaint seeks to raise is the applicability of Great Oaks' published tariff rate to the service Great Oaks is providing Fairchild. In our consideration of the efficacy of the complaint in framing this point in the context of a cause of action within the Commission's jurisdiction, to assure factual integrity we must include facts and statements from two further sources. Both are such that we may and do take official notice of them. Both have particular relevance to our consideration and both are specifically identified in the complaint. The first is Order No. 82-12 (NPDES No. CA 0028185) of the California Regional Water Quality Control Board, San Francisco Bay Region (the Board). The second is Great Oaks'

published tariff. Here we have particular reference to Schedule No. 1 - General Metered Service, and Rule No. 2 - Description of Service, paragraph C - Quality.

Therefore, the Statement of the Complaint which follows was drawn exclusively from the facts alleged in Fairchild's complaint and from the facts contained in the documents officially noticed. Our determination whether taken together they adequately constitute and state a claim for relief which the Commission can grant will be made from this framework.

Statement of the Complaint

That Fairchild is and has been a Great Oaks' customer, regularly purchasing large quantities of water from Great Oaks for use in Fairchild's Bernal Road semiconductor manufacturing facility in San Jose.

That there was a leakage of a mixture of chemicals from an underground solvent storage tank at Fairchild's Bernal Road plant which resulted in contamination of groundwater in the area between its plant and Great Oaks' Well 13, necessitating removal of Well 13 from Great Oaks' water distribution system. Unless countered by pumping in large quantity there is danger the contamination will spread further.

That while not admitting liability, but responding to an administrative request from the executive officer of the Board that Fairchild clean up and abate the contamination, Fairchild proposed that it would take the contaminated water, to be extracted through Well 13 and a new well or wells to be constructed, and have it delivered to Fairchild's plant where it would be filtered to specified standards before discharge to storm drains.

That Fairchild's proposal was approved by regional authorities and Fairchild obtained a National Pollutant Discharge Elimination System (NPDES) permit from the Board enabling it to proceed.

That starting January 19, 1982 Fairchild sought and took delivery of the contaminated water from Great Oaks and began the treatment and discharge.

That this extraction, delivery, treatment, and discharge continue by the named extractor Fairchild under the Board's order.

That Great Oaks has invoiced and continues to invoice Fairchild at Great Oaks' published tariff rate for all water delivered, both contaminated water from Well 13 and uncontaminated water delivered from Great Oaks' other sources.

That Fairchild considers that the Great Oaks' tariff rate should not apply to water from Well 13 in that Fairchild is not using the Well 13 water for any domestic or commercial purposes, that Great Oaks is pumping the polluted water from Well 13 only to deliver it to Fairchild for filtration purposes so that Fairchild can comply with the Board's order to abate the contamination.

That since the water is unfit for human consumption, Great Oaks should not be permitted to sell that polluted water (although Great Oaks' published tariff contains neither a restriction relating to the types of water which may be sold nor does it provide for a variance in rates to be charged).

That Fairchild paid Great Oaks' invoices for the deliveries of contaminated water from Well 13 during January, February, and March 1982 solely to avoid the appearance of disregard for the Board's order.

That when Fairchild disputed Great Oaks' invoices for water from Well 13, Great Oaks threatened to discontinue pumping from Well 13 (which Fairchild asserts would frustrate the intent and purpose of the Board's order) as well as to cease making deliveries of unpolluted water.

That to avoid discontinuance of service Fairchild deposited funds with the Commission in the amount of the disputed April and May 1982 invoices, and continues to do so against subsequent monthly invoices - all under Great Oaks' Tariff Rule No. 10 pertaining to disputed bills.

By way of relief Fairchild seeks: (1) orders that Great Oaks' published tariff rate does not apply to Well 13 water, and that Fairchild and Great Oaks be left free to negotiate their own basis for reimbursement for the service; (2) an order that Great Oaks be prohibited from discontinuing Well 13 service so long as Fairchild pays in accordance with the tariff for the wholesome water also furnished; and (3) a finding that Fairchild legally withheld the disputed payments subsequently deposited with the Commission, and an order that the entire sum be returned to Fairchild.

Discussion

At the onset of this matter the Commission is confronted with defendant's motion to dismiss on the ground that the Commission has no jurisdiction to grant the relief prayed for. PU Code Section 1702 provides that a complaint will be heard provided it sets forth any act or thing done or omitted to be done by a utility, in violation or claimed to be in violation of any provision of law or any Commission order. In our proceedings pleadings are liberally construed with a view to substantial justice between the parties. It is not essential that a complaint state a cause of action for the relief sought, but it is essential that a complaint state facts which support some right of recovery if complainant is to stay in court. If the law requires the granting of a motion to dismiss, the Commission is duty bound to dismiss. It would be a waste of time and effort and would involve a needless expense to proceed further. (Pacific Tel. and Tel. Co. (1950) 50 CPUC 247, 250.) In the instant matter, we are unable to ascertain from the facts set forth what Great Oaks has done or omitted to do that is in violation of any provision of law or Commission order, or how this Commission can be deemed to have jurisdiction to grant the relief requested.

In considering Fairchild's complaint, we must take the pleading as an entity since its numbered paragraphs really do not separately allege facts which set forth independent causes of action; rather, they present a narrative of successive allegations of facts, which, when taken in the total context, purport to state a claim for relief. But what has Great Oaks done or omitted to do that violates either the law or a Commission order? The facts show only that Great Oaks has in response to a legitimate demand furnished contaminated water to Fairchild at Great Oaks' published tariff rate applicable to all water service.

The Board's order shows no violations by Great Oaks. The Board's order is directed to Fairchild, not to Great Oaks. It is an order at the administrative request stage of Board proceedings<sup>1/</sup> that Fairchild could have resisted but which Fairchild elected to comply with without protest, although it did not admit fault. It is an order which identifies Fairchild, not Great Oaks, as the "extractor." The order makes clear that it is

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<sup>1/</sup> We note that under provisions of the Water Quality Control Act of 1970, as amended, a California Regional Water Quality Control Board proceeds, as necessary, by three stages to accomplish abatement and removal of a contamination situation.

- a. The investigation and administrative action step whereby the discharger is required to submit for Board approval his schedule and plans for specific actions to correct the situation. If there is cooperation, no further steps need issue.
- b. The issuance by the Board after a hearing of its cease and desist order to the discharger.
- c. The Board requests the Attorney General to enter Superior Court to obtain an injunction compelling compliance with the Board's abatement schedule and procedures.

Fairchild, not Great Oaks, which has the obligation to abate the contamination resulting from a leak in Fairchild's solvent tank at the Bernal Road plant. Fairchild, not Great Oaks, was "mandated" to pump out the contamination in the underground aquifer. Fairchild could have accomplished this by immediately constructing its own wells, albeit at great cost; but instead Fairchild proposed to the Board that it would do so by obtaining the contaminated water from Great Oaks through Well 13, and from other wells (presumably wells which might be subsequently constructed by Fairchild). The Board and local authorities accepted Fairchild's proposal and the Board incorporated it in substance as an order. Deliveries started January 19, 1982.

Great Oaks has authority from this Commission to sell water to any and all types of customers in its service territory, whether they be residential, business, industrial, agricultural, etc. It is not restricted under its filed tariff as to the quality of water it may sell. It may sell water of a quality suitable for any legal purpose. Indeed, paragraph C of Rule No. 2 of Great Oaks' published tariff relating to quality provides that:

"Whenever furnished for human consumption or for domestic uses, the utility will endeavor to provide water that is wholesome, potable, in no way harmful or dangerous to health and insofar as practicable from objectionable odors, taste, color and turbidity." (Emphasis added.)

The very language used recognizes that under some circumstances Great Oaks might sell water not fit for human consumption or domestic uses. There is nothing in the tariff language which restricts Great Oaks from selling polluted water to Fairchild or to any other company if polluted water is what is wanted and the end use is not illegal. Here Fairchild is not in the position of the usual customer complainant

before the Commission who, expecting to receive and paying for wholesome, potable water, instead receives something substantially less. Here Fairchild specifically asked for and received exactly what it sought, contaminated water. It knew Great Oaks' tariff rate; nonetheless it took the water, hoping to negotiate a better rate later, and paid the first three months' bills, albeit under protest.

Thus Fairchild's only quarrel with Great Oaks is over the price it wants to pay for the water received. Fairchild believes that it should pay a lesser price or that the basis for the charge should be different than that provided in the Great Oaks' tariff. But the mere fact that Fairchild may be under a "mandate" to take water does not entitle it to a rate less or different than that set forth in Great Oaks' tariff. This Commission, not the Board or any city, county, or other public body, has jurisdiction under the law over the rates of water utilities.

Great Oaks has only one tariff rate schedule applicable for all water service other than residential construction or fire protection. It is Schedule No. 1. It applies regardless of what use the water may be put to, residential, commercial, agricultural or industrial, or whatever quality water is furnished. The rates found in Schedule No. 1 when adopted were found by the Commission to be just and reasonable. These rates do not allow Great Oaks to apply a reduced rate for supplying unwholesome or unpotable water. Great Oaks is not authorized to provide any "pumping service"; it is in the water service business. Nor can Fairchild and Great Oaks be free to agree upon whatever basis they deem appropriate what payment Fairchild should make to Great Oaks for the water service already provided, or to be provided. It is



elementary that a public utility may not deviate from its filed tariff, either by its own acts or in agreement with a customer, without authority from this Commission. PU Code Section 532 states in pertinent part, "...no public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time,..."

Great Oaks does nothing, nor does it omit to do something, that violates either the law or a Commission order when it insists upon payment according to the rates in its published tariff. The tariff of a public utility is as binding upon the utility as upon its customers, and any departures or deviations, unless specifically authorized by the Commission, are unlawful (Dyke Water Co. (1963) 60 CPUC 491). The fixing of rates is legislative in character. Under PU Code Section 728 and other sections, the Legislature has given the Commission authority to prescribe rates prospectively only.

(Los Angeles v Public Utilities Commission (1972) 7 C 3d 331 at 356-357-) As to the past, Fairchild is bound by the tariff.

Finally, looking prospectively, we see that Fairchild, relying upon this complaint to seek a change in Great Oaks' tariff, fails to meet the statutory requirements for standing to petition the Commission for such change. PU Code Section 1702, besides providing that a complaint must set forth something done or omitted to be done in claimed violation of any law or Commission order, further provides in pertinent part that:

"... . No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service."

Thus, apart from the fact that no claimed violation of any law or Commission order has been shown on the face of the complaint, Fairchild also has not been joined in this complaint on the reasonableness of the Great Oaks' filed tariff by the civic authorities of the involved political subdivision or by the requisite number of actual or prospective customers. Furthermore, it would not be appropriate for the Commission on its own motion to determine in this complaint proceeding whether or not Great Oaks' tariff should be prospectively revised to provide some separate rate schedule applicable to a customer such as Fairchild legitimately receiving contaminated water through Well 13. Such a tariff revision necessarily would involve systemwide cost factors, including for example, far-reaching considerations such as rate base, alternative and/or replacement wells and sources of supply and distribution and their financing, appropriate rate design, etc. Such considerations affect all Great Oaks' ratepayers, and are properly matters that should be considered only in the context of a general rate proceeding in which all patrons of the utility have opportunity to appear and be heard.

It is obvious that the Commission may not close its eyes to the defects of Fairchild's complaint. Viewed most favorably to Fairchild the complaint fails to allege any violations of law or of Commission orders, but shows on its face that Great Oaks has acted in compliance with its tariff as it is required to do by statute. Accordingly the complaint has failed to state a cause of action and will be dismissed with prejudice.

In a petition filed December 23, 1982 (which in turn complemented and augmented an earlier petition filed December 14, 1982), Fairchild argues that "before the Commission may decide the merits of this case (emphasis added), a hearing must be held or, at a minimum, the parties must stipulate to all the relevant facts." But the thrust of this petition, and that of its predecessor, avoids the fundamental distinction that by issuing this dismissal we are not deciding "the merits of this case," rather we are ruling upon a jurisdictional motion brought by the defendant. As we have noted, PU Code Section 1702 is quite explicit in stating the acts or things, or the circumstances, which give a complainant a right to a hearing. We settled that the water being furnished Fairchild by Great Oaks is subject to the Great Oaks' tariff. Fairchild's complaint, in its essence, therefore, is an attack on the reasonableness of the rates set in Great Oaks' tariff, and Fairchild by this complaint does not meet the threshold test of Section 1702. Had Fairchild's complaint met that threshold test, Great Oaks' motion to dismiss would have been denied, and then, before we could decide the merits of Fairchild's contentions, a hearing or a stipulation as to the facts would be required. But the complaint fails to meet that test. ✓

In its December 23, 1982 petition, as in its December 14, 1982 petition, Fairchild argues that it was afforded no opportunity

to respond to Great Oaks' motion to dismiss. But as we set forth initially, our dismissal order is based upon the facts of the complaint as set forth by Fairchild in the complaint, supplemented by matters lying within the scope of our official notice, namely, the order of the California Regional Water Quality Control Board and Great Oaks' published tariff. The dismissal is clearly a jurisdictional ruling. The Commission may, without argument and without hearing, grant a motion to dismiss a complaint when on its face that complaint fails to state a cause of action within our jurisdiction. Nonetheless, however, Fairchild has had ample opportunity to respond had it chosen to do so. We note that following the filing of the motion to dismiss on October 19, 1982, there were a number of written communications from Fairchild's attorneys to Administrative Law Judge (ALJ) Weiss. In one, that of November 12, 1982, Fairchild's attorney stated that his previous letter of November 2, 1982 was "certainly not intended as a response to Great Oaks' motion for summary adjudication," but went on to state that it was in support of Fairchild's request for a pre-hearing conference; that "very simply, Fairchild does not accept all of the facts upon which Great Oaks bases this motion." As late as November 17, 1982, Great Oaks' attorney in a letter to the ALJ (with a copy to Fairchild) asked that "the motion be ruled on without benefit of Fairchild's reply unless Fairchild files such document by November 22, 1982." Instead, Fairchild waited until the Commission's public agenda indicated that the Commission at its December 15, 1982 conference would consider a proposed decision to dismiss the Fairchild complaint, and then Fairchild filed its petition to set aside submission and to require a proposed report and stated its objection to proposed ruling (December 14, 1982). This was followed by its petition that Commissioner Calvo withdraw and reconsider his

proposed dismissal order before the Commission, and stated at length and with some specificity its opposition to the motion to dismiss (December 23, 1982). Fairchild continued to argue its views on the merits of its disagreement with Great Oaks but also took the opportunity to respond to the jurisdictional motion to dismiss before the Commission.

Remaining is disposition of those funds deposited by Fairchild with the Commission under provisions of Rule 10 of Great Oaks' published tariff relative to the disputed bills, funds in turn deposited in interest-bearing bank accounts under Interim D.82-10-026 dated October 6, 1982, and identified as "PUC Impound Trust Account: Fairchild Camera and Instrument Corporation - Great Oaks Water Company, Application 82-08-16." Fairchild in its December petitions argues that the Commission, should it dismiss the complaint, cannot disburse the funds deposited with the Commission under the disputed bills rule. We disagree. The disputed bills rule in Great Oaks' published tariff provides that should the amount of the bill for service be questioned, service will not be discontinued for nonpayment if the payment is deposited with the Commission pending outcome of the Commission's review. The Commission having determined that Great Oaks' tariff applies to the service rendered, and there being no dispute over the computation of the bills under that tariff, there is no disputed bill and the payment for the services rendered belongs to Great Oaks. Fairchild's complaint being dismissed with prejudice, the Executive Director of the Commission will be directed to pay these funds together with any interest accrued as a result of the deposits directed by D.82-10-026 to Great Oaks. Furthermore, failure of Fairchild to make future payments will warrant discontinuance of service without further notice as provided in Great Oaks' tariff.

In conclusion, we believe that, as to the future, the parties to the complaint should work together with Commission staff to find some ground for compromise which would then be presented by the utility to the Commission.

Because of the substantial amount of money being held by the Commission, this order should be effective on the date it is signed to permit immediate disbursement to Great Oaks.

Findings of Fact

1. Great Oaks is a public utility within the jurisdiction of this Commission.
2. Fairchild is a customer of Great Oaks and operates a semiconductor manufacturing plant receiving water service from Great Oaks.
3. A solvent tank leak at Fairchild's plant caused contamination of the underground aquifer in the area between the plant and Great Oaks' Well 13, so that the well now produces contaminated water.

4. Ordered by the Board to abate the contamination, Fairchild proposed, and the Board agreed and ordered, that Fairchild should withdraw the contaminated water, taking it through Well 13 and other wells, and treat it before discharge until such future time as the contamination is abated.

5. Fairchild voluntarily is complying with the Board's order, the Board having jurisdiction over water quality in the Bay region.

6. Great Oaks has a single tariff schedule applicable to all water service other than residential construction and fire protection, regardless of the quality or end use of the water provided.

7. Great Oaks is charging Fairchild as provided by its published tariff for all water it is providing Fairchild, both wholesome and contaminated.

8. Great Oaks' published tariff contemplates and provides for the sale of other than wholesome water.

9. Fairchild by this complaint contends that Great Oaks' tariff rate should not be applicable to the contaminated water service being furnished to Fairchild. It is therefore a complaint on the reasonableness of Great Oaks' rate.

10. The complaint sets forth no act or thing done or omitted to be done by Great Oaks in violation of any provision of law or Commission order.

11. The complaint is not signed by the civic authorities of the involved political subdivision or by the requisite number of actual or prospective customers.

12. Fairchild by the complaint seeks retroactive revision of Great Oaks' published tariff, something the Commission has no jurisdiction to authorize in this complaint proceeding.

13. Prospective revision of the Great Oaks' published tariff would involve consideration of matters properly beyond the scope of a complaint proceeding in that the interests of all Great Oaks' ratepayers necessarily would be substantially involved.

14. Under protest to Great Oaks, Fairchild paid for all water services provided to it by Great Oaks during January, February, and March 1982.

15. For that portion of the water service covering delivery of contaminated water, beginning with and subsequent to April 1982, Fairchild has deposited payment with the Commission as provided under Rule 10 of Great Oaks' published tariff concerning disputed bills.

16. The complaint fails to come within the purview of Section 1702 of the PU Code.

17. The complaint fails to state a cause of action for which the Commission can grant relief.

Conclusion of Law

The motion to dismiss with prejudice should be granted.



IT IS ORDERED that the complaint of Fairchild Camera and Instrument Corporation against Great Oaks Water Company is dismissed with prejudice.

The Executive Director is directed to withdraw and deliver to Great Oaks the funds deposited under Decision 82-10-026 dated October 16, 1982 in Crocker National Bank, Bank of America, Security Pacific National Bank, and Wells Fargo Bank, together with whatever interest may have accrued.

This order is effective today.

Dated February 2, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.  
President

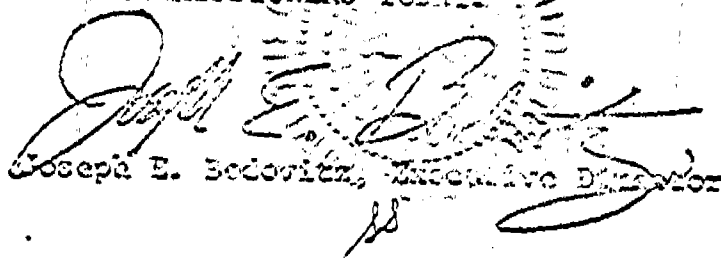
VICTOR CALVO

PRISCILLA C. GREW

DONALD VIAL

Commissioners

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

  
Joseph E. Sedovitz, Executive Director

In conclusion, we believe that, as to the future, the parties to the complaint should work together with Commission staff to find some ground for compromise which would then be presented by the utility to the Commission.

Findings of Fact

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2. Fairchild is a customer of Great Oaks and operates a semiconductor manufacturing plant receiving water service from Great Oaks.
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*is.*  
This order becomes effective ~~30 days~~ from today. *KL*  
Dated FEB 2 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.  
President  
VICTOR CALVO  
PRISCILLA C. GREW  
DONALD VIAL  
Commissioners