ALJ/EA/jt

Decision 83 03 011 MAR 2 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Lydia Reese, Complainant, vs. Garrapata Water Company, Defendant.	Case 11048 (Filed November 25, 1981; amended December 30, 1981 and April 12, 1982)

Helm, Budinger & Lemieux, by Jerome M. Budinger, Attorney at Law, for complainant.
Silver, Rosen, Fischer & Stecher, by Ellis Ross Anderson, Attorney at Law; and Germino, Layne, Brodie, Runte, Maguire & Rummonds, by Donald M. Layne, Attorney at Law; for defendant.

O P I N I O N

This complaint concerns a main extension together with special facilities installed in 1975 to serve property owned and subdivided by complainant as well as certain other property. The complaint was not filed until November 25, 1981. It seeks, among other things, that:

1. All four of the lots into which complainant's 30-acre parcel was subdivided be included within defendant's service area and be entitled to service under its tariffs.
2. The main extension contract between defendant and complainant be modified to be in compliance with the Uniform Main Extension Rule.

3. Defendant refund to complainant three quarters of that portion of the advanced $11,500 assigned as costs advanced for special facilities together with interest from the date such refunds became due and that the other one-quarter portion become due from defendant to complainant when water service is requested for the unbuilt upon lot.

4. Defendant refund to complainant 22% of the revenue received from customers served by the main extension together with interest.

5. Attorney fees.

An Earlier Municipal Court Action

In September 1979 complainant filed an action (Case No. 27064) against defendant in the Municipal Court, Monterey Judicial District, seeking an accounting and refunds allegedly due her under the main extension contract. On December 11, 1981 defendant filed with the Commission a notice to have this complaint dismissed because of the then pending action in Municipal Court. By Decision 82-01-071 dated January 19, 1982, we directed defendant to answer the complaint since it assertedly concerned the proper application of Rule 15 of defendant's tariffs.

According to complainant, the following occurred concerning the Municipal Court case:

1. Her attorney in that case withdrew as her counsel after she filed her complaint with the Commission without her attorney's advice, but upon the advice of a Commission staff member.

2. On March 26, 1982, she attempted to have the Municipal Court case dismissed, without prejudice, having obtained and followed instructions from the office of the clerk of the court on how to do so.

3. On March 29, 1982 she telephoned the court and was advised that the case had been dismissed and was taken off calendar.

4. Relying on that information, she did not appear at the scheduled court hearing on March 29, 1982.

However, the court hearing was held as scheduled and the court, in the absence of plaintiff and at the request of defendant, entered judgment that the complaint be dismissed, that plaintiff recover nothing, and that defendant recover costs in the sum of $61.58. The judgment was signed and entered on April 7, 1982. It is defendant's position the Commission must dismiss this case because the action is barred by final judgment of the Municipal Court entered prior to the commencement of the Commission's hearing.

That hearing was held before Administrative Law Judge Main in Los Angeles on April 20 and 21, 1982. The matter was submitted upon the August 2, 1982 filing of the response brief of complainant. Subsequently, complainant filed in the Municipal Court action a Notice of Motion to Set Aside Default and Default Judgment, Memorandum of Points and Authorities, and Declaration of Lydia Reese. By the court's order dated September 30, 1982, the motion to vacate judgment was denied. Complainant plans to appeal.

Matters in dispute here lie within this Commission's jurisdiction even if the municipal court had taken substantive action on the items in dispute. Moreover, a later applicable decision by the Commission would supersede the prior court judgment. (Barnett v Delta Lines, 137 CA 3d 674.)

Interrelated Main Extension Agreements

In settlement of earlier litigation brought by complainant against defendant and others, complainant and defendant entered into a main extension agreement dated November 25, 1974. A companion main extension agreement dated December 3, 1974 was entered into by Garrapata Ranch Associates and Mucha Bonita Properties, Inc. (which are jointly referred to as the Doctors Groups) and defendant.

The two agreements called for the construction of certain facilities. These facilities, together with their estimated costs, were specified in Exhibit B to the agreements as follows:

"Item 1	New well will be drilled in Garrapata Creek and equipped with multi-stage 7.5 hp turbine pump with a rating of approximately 60,000 gallons per day. This pump is to be interconnected with the existing well and pump, thus providing stand-by and spare equipment. Estimated cost, installed	$ 4,450.00
"Item 2	Controls at Company's main storage tank will be revised to accommodate two new multi-stage turbine pumps, having a combined capacity of 30,000 gallons per day, which will pump to the top of the mountain, elevation 875 ft.	$ 4,600.00
"Item 3	One pipeline with valves and controls, consisting of a combination galvanized steel and polyvinylchloride pipe schedules 80 to 40 ASTM	$ 5,700.00
"Item 4	Main storage tank located at elevation 875 ft. The storage capacity of this tank is to be 25,000 gallons	$ 6,800.00
"Item 5	Surveying for above	$ 500.00
"Item 6	Electrical for above	$ 950.00
	Total estimated cost	$23,000.00"

Although it is stated in the two agreements that applicants (viz., complainant and the Doctors Groups) advanced the above estimated cost of $23,000 to defendant, there was no mention of each applicant's share of the total. However, there is no dispute on this point, the facts of record having established that $11,500 was advanced by complainant and $11,500 was advanced by the Doctors Groups.

Of the two agreements, only the one dated December 3, 1974 gives some indication of the property to be served, namely:

"Garrapata Ranch Associates 37 acres
Mucha Bonita Properties, Inc. 81 "
Reese Trust Acreage - 4 lots"

The Reese Trust holding was approximately 30 acres which was subdivided into four lots in 1972. In addition to serving the Reese and the Doctors Groups properties and certain then existing customers, the parties to the two agreements contemplated that additional users might, in the future, be served by the main extension. The agreements provided that for each such additional customer complainant and the Doctors Groups would be entitled to a combined refund equal to the actual cost of 50 feet of the extended facilities.

The two main extension agreements are defective in many respects, but they are fatally flawed in that defendant failed to obtain the requisite authority mandated under Section A.2.b. of the Uniform Main Extension Rule (Rule 15 of defendant's tariffs). That section reads:

"Whenever the outstanding advance contract balances plus the advance on a proposed new extension would exceed 50 percent of total capital, as defined in Section A.2.a. plus the advance on the proposed new extension, the utility shall not make the proposed new extension of distribution mains without authorization of the Commission."

At the time that defendant entered into the main extension contracts with complainant and the Doctors Groups, its total water utility plant, less depreciation reserve, was $8,084. The advances under the contracts subject to refund were $23,000.

In light of the prohibition under the above-quoted Section A.2.b., the contracts were not valid. Given their invalidity, an examination of defendant's present and past operations and related matters is instrumental to an understanding of our resolution of this dispute.

Garrapata Water Company

A - Present Operations

Defendant is among the smallest of utilities subject to the Commission's jurisdiction. It presently provides water service to approximately 33 customers located on the California coast about 10 miles south of Carmel. According to its annual report for 1981, revenues generated from utility operations were $8,340. Corresponding operating deductions were $10,588, leaving a net operating loss of $2,248.

All of the stock of defendant is held by the Estate of Josel M. Morris. Barbara Morris Layne has managed and operated the water company since Mr. Morris' death in 1978.

B - Formation and Attempted Expansion

Defendant was formed in 1962 by a group of doctors to provide water service to lands which they owned and were selling. In 1971 defendant filed Advice Letter 6 seeking to enlarge its service area to include some, if not all, of the land parcels to which the interrelated main extension contracts involved in this proceeding apply. Advice Letter 6 was rejected.

C - Change of Controlling Interest

In September 1974, shortly before the two interrelated main extension contracts were entered into, Joel Morris acquired control of defendant. At that time the system served approximately 17 customers. Although the facilities financed by the $23,000 advance under the two main extension contracts were needed to serve the Reese and Doctors Groups properties, the facilities probably also served to improve water service to other parts of defendant's service area.

D - Failure to Seek Commission Approval

Given the earlier rejection of Advice Letter 6 seeking to expand the service area, the lack of economic feasibility of very small water companies, and defendant's failure to comply with Section A.2.b. of the Uniform Main Extension Rule, it appears defendant, the Doctors Groups, and complainant's attorney were, at the time of entering the main extension contracts, reluctant to bring this service area expansion to the Commission's attention. Had they done so, and if any expansion were permitted, it would have been necessary for complainant and the Doctors Groups to make nonrefundable contributions of the plant facilities necessary to serve their properties.

Otherwise, an excessive burden would result for defendant's customers. Very small water companies are by their nature uneconomical. Any return on rate base is problematical and sufficient cash flow to make refunds on main extension contracts is seldom present. Defendant is no exception. Clearly, the extension itself, serving only a few customers, would not develop nearly enough revenue to be self-supporting. On a total company basis the increase in defendant's plant per customer from the $23,000 advanced approximates $700.

Defendant asserts that the actual cost of constructing the extended facilities called for under the two interrelated main extension contracts was $28,094, or $5,094 more than the $23,000 advance. There appear to be discrepancies in defendant's books and records, however.

In 1975 defendant obtained a rate increase, using the system expansion and improvements financed primarily by the $23,000 advance as partial justification for the rate increase. Defendant is severely reprimanded for this misrepresentation. However, that improper conduct does not alter the basic lack of economic feasibility of this very small water company.

Resolution of the Dispute

Given the realities of very small water companies, the indicated financing for the water system expansion to serve the Reese and Doctors Groups properties was, and continues to be, contributions in aid of construction. Thus, a deviation from the Uniform Main Extension Rule, as it was constituted in 1974 was, and continues to be, warranted. The deviation required is a nonrefundable contribution of the cost of all facilities necessary to serve the Reese and Doctors Groups properties. So structured, the deviation is responsive to the limitation of expansion imposed by Section A.2.b. of the Uniform Main Extension Rule, the section that renders the two companion main extension agreements invalid for lack of the requisite authorization of this Commission.

Because of a number of factors, the alleged cost overrun should not be borne by complainant and the Doctors Groups. These factors include:

1. In some measure the special facilities constructed also benefit customers on other parts of the water system;
2. Discrepancies exist in defendant's books and records, making an accurate determination of the total project cost problematical;
3. The advance was made and construction completed about seven years ago; and
4. Defendant's failure to comply with Section A.2.b. of the Uniform Main Extension Rule.

The $23,000 advanced by complainant and the Doctors Groups for constructing the expansion project should be accounted for by defendant in its books and records as contributions in aid of construction, as an imputed arrangement displacing the unauthorized contracts.

Accordingly, complainant's requests to have its invalid 1974 main extension contract modified to conform to the Uniform Main Extension Rule and for refunds should be denied. Except for the request relating to the inclusion of the main extension area within defendant's service area, all of complainant's other requests, including the request for attorney fees, should also be denied.

Our overall objective here, as in the Uniform Main Extension Rule, is to make sure that unreasonable burdens are not placed on the utility's customers. Defendant's failure to follow its filed tariffs in this matter is a violation of law and must not be repeated.

Findings of Fact

1. Complainant entered into a main extension contract with defendant on November 25, 1974.

2. Under that contract complainant advanced $11,500, as one-half of the estimated cost, of a water system expansion project.

3. The main extension contract contained refund provisions.

4. At the time the main extension contract was entered into, defendant's total water utility plant, less depreciation reserve, was $8,084, or $3,416 less than the $11,500 advance.

5. Section A.2.b. of Rule 15 of defendant's tariffs (Uniform Main Extension Rule) reads:

> "Whenever the outstanding advance contract balances plus the advance on a proposed new extension would exceed 50 percent of total capital, as defined in Section A.2.a. plus the advance on the proposed new extension, the utility shall not make the proposed new extension of distribution mains without authorization of the Commission."

6. Defendant failed to obtain the authorization required under Section A.2.b. to make the then proposed main extension.

7. Apart from this basic lack of authorization, the main extension contract failed to comply with the Uniform Main Extension Rule in other ways. The contract is structured in many respects as a main extension to serve individuals and not a subdivision, yet the main extension project includes special facilities. The provisions for special facilities, however, are contained in the portion of the rule applying to subdivisions. Any such departures from the main extension rule require specific approval of the Commission.

8. In the Municipal Court action (Case No. 27064) complainant, as plaintiff, sought an accounting and refund potentially due her under a main extension contract she had erroneously assumed to be valid.

9. Defendant is one of the smallest utilities subject to the Commission's jurisdiction. It provides water service to approximately 33 customers.

10. According to defendant's 1981 annual report, revenues generated from utility operations were $8,340. Corresponding operating deductions were $10,588, leaving a net operating loss of $2,248.

11. Given the realities of very small water companies, the indicated financing for the water system expansion to serve the Reese and Doctors Groups properties was, and continues to be, contributions in aid of construction rather than refundable advances under the main extension rule.

Conclusions of Law

1. For failure to comply with the Uniform Main Extension Rule, the main extension agreement between complainant and defendant is invalid.

2. Defendant's motion to dismiss should be denied because this proceeding concerns the proper application of defendant's tariff Rule 15, Main Extensions, which is a subject within this Commission's jurisdiction.

3. The $11,500 advanced by complainant should be accounted for by defendant in its books and records as contribution in aid of construction, as an imputed arrangement displacing the invalid contract.

4. Complainant is not entitled to refund of any part or all of the $11,500 advanced.

5. The area served by the main extension is within defendant's service area and should be shown as such in defendant's tariff service area map. In all other respects, the relief sought by complainant, including the request for attorney fees, should be denied.

O R D E R

IT IS ORDERED that:

1. Defendant Garrapata Water Company's motion to dismiss this complaint is denied.

2. Within 20 days after the effective date of this order, defendant shall file, in compliance with General Order Series 96, a revised tariff service area map which includes the area served by the main extension involved in this complaint. In all other respects, the relief sought by complainant Lydia Reese is denied.

3. Defendant shall account, in its books and records, for the $11,500 advanced by complainant as a contribution in aid of construction.

This order becomes effective 30 days from today.

Dated MAR 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. Bodovitz, Executive Director

4. Relying on that information, she did not appear at the scheduled court hearing on March 29, 1982.

However, the court hearing was held as scheduled and the court, in the absence of plaintiff and at the request of defendant, entered judgment that the complaint be dismissed, that plaintiff recover nothing, and that defendant recover costs in the sum of $61.59. The judgment was signed and entered on April 7, 1982. It is defendant's position the Commission must dismiss this case because the action is barred by final judgment of the Municipal Court entered prior to the commencement of the Commission's hearing.

That hearing was held before Administrative Law Judge Main in Los Angeles on April 20 and 21, 1982. The matter was submitted upon the August 2, 1982 filing of the response brief of complainant. Subsequently, complainant filed in the Municipal Court action a Notice of Motion to Set Aside Default and Default Judgment, Memorandum of Points and Authorities, and Declaration of Lydia Reese. By the court's order dated September 30, 1982, the motion to vacate judgment was denied. Complainant plans to appeal.

We believe there are elements of this proceeding which are significantly different than those included in the Municipal Court case. For example, in this proceeding complainant seeks to have the contract modified to be in compliance with defendant's tariffs, thereby determining for complainant and defendant their respective rights and obligations under a valid contract.

8. In the Municipal Court action (Case No. 27064) complainant, as plaintiff, sought an accounting and refund potentially due her under a main extension contract she had erroneously assumed to be valid.

9. Defendant is one of the smallest utilities subject to the Commission's jurisdiction. It provides water service to approximately 33 customers.

10. According to defendant's 1981 annual report, revenues generated from utility operations were $8,340. Corresponding operating deductions were $10,588, leaving a net operating loss of $2,248.

11. Given the realities of very small water companies, the indicated financing for the water system expansion to serve the Reese and Doctors Groups properties was, and continues to be, contributions in aid of construction rather than refundable advances under the main extension rule.

Conclusions of Law

1. For failure to comply with the Uniform Main Extension Rule, the main extension agreement between complainant and defendant is invalid.

2. Defendant's motion to dismiss should be denied because this proceeding concerns the proper application of defendant's tariff Rule 15, Main Extensions, which is a subject within the Commission's jurisdiction. ~~whereas the action in the Municipal Court was directed toward construing an invalid contract.~~

SS

3. The $11,500 advanced by complainant should be accounted for by defendant in its books and records as contribution in aid of construction, as an imputed arrangement displacing the invalid contract.