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Decision

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

James P. Phillips and E. Lois Phillips,
Complainants,

vs

B. L. and E. Co.

Defendants.

Case 82-07-04
(Filed July 9, 1982)

Robert L. and Stella M. Lillienthal,
Complainants,

vs

B. L. and E. Co. and Sheila Kurwitz,

Defendants.

Case 82-08-11
(Filed August 25, 1982)

O P I N I O N

Complainants James P. and E. Lois Phillips, husband and wife, and Robert L. and Stella M. Lillienthal, husband and wife, seek an order requiring B. L. and E. Co. (BL&E) to provide the facilities necessary to furnish their lots with water service. BL&E, a California corporation, serves about 25 water customers near Trinidad in Humboldt County, about 35 miles north of Eureka.

Complaint in Case(C.) 82-07-04

The Phillips allege in their verified complaint:

"We purchased Lot #60 in the Big Lagoon
Subdivision in 1968 for the purpose of providing

a site for a retirement home. Our Parcel # is 517-252-35. Our deed indicated that water would be provided to the subdivision by BL&E Co., a public utility. In Dec., 1981 we talked with Sheila Kurwitz and Ronald Millsaps, owners and operators of BL&E, asking for a water hookup. They indicated that they could not provide a hookup, since they were not allowed to serve more than twenty-five customers. They also told us that the Big Lagoon Elementary School had tapped into the BL&E water system without their knowledge, thus affecting pressure in the subdivision. BL&E was subsequently contacted by our building contractor, Mr. Don Grace, with the same result. On June 25, 1982, Mr. Grace and I talked with Mr. Millsaps. We were again told that water could not be supplied. We have written several letters to PUC and have talked to Mr. John Reader and Mr. William Adams in the Hydraulic Branch. Whereas Mr. Millsaps had indicated that PUC will not tell him how to modify his system in order to serve more than 25 customers, PUC advises that BL&E has not applied to expand service. PUC Decision #92660, dated Feb. 4, 1981, approved the sale of a portion of the BL&E system. This limited BL&E to serve a maximum of 25 lots in our subdivision. We were not notified of this decision at that time. There are 60 lots in the Big Lagoon Subdivision."

The Phillips request the following relief:

"We want to receive water service at the earliest possible date in order to construct our retirement home. Since there are other owners who are interested in obtaining water in the near future, we ask that the Commission take action necessary to correct the deficiency in the water system which presently limits service to 25 of 60 lots."

Complaint in C.82-08-11

The Lilienthals allege in their verified complaint:

"Complainants are owners of a parcel of land in a subdivision in Humboldt County, State of

California, commonly known as Ocean View Estates. The named defendants are obligated to supply water to this subdivision. Defendants have sold a portion or all of the existing water system to landowners in an adjoining development. Defendants have been requested by this Commission to make application for approval to proceed with work necessary to supply water service to complainants' property and other property in the subject subdivision. Complainants understand defendants have failed to respond. Complainants' property is presently unmarketable as there is no available water, all to complainants' substantial detriment."

The Lillienthals request an order:

"Directing and ordering defendants to proceed forthwith with any and all work necessary to supply water, of suitable quality and quantity, to the aforementioned real property of complainants."

History of BL&E

By Application (A.) 44736, filed August 28, 1962, Georgia Pacific Corporation sought authority to construct and operate a domestic water system in the Big Lagoon Park Subdivision-Block A (Big Lagoon) in Humboldt County. The subdivision consisted of 60 lots.

On February 21, 1964, Georgia Pacific filed an amendment to A.44736 in which it substituted BL&E as applicant and requested authority for BL&E to issue and sell to Georgia-Pacific 4,300 shares of its capital stock (\$1 par value) in consideration for the transfer by Georgia-Pacific to BL&E of certain water distribution system facilities and real property owned by Georgia-Pacific and \$5,000 in cash to be used by BL&E as working capital. Of the capital stock to be issued 3,800 shares would be in exchange for the physical facilities, the original cost of which was \$28,000, while 500 shares would be in exchange for the \$5,000 of working cash.

In its amendment Georgia-Pacific alleged:

"The flow of the well presently available to the water system is 17 gallons per minute. BL&E has been advised that a system immediately adjoining its system supplies 70 residential users on a comparable flow. If, however, in spite of the foreseeable use, the Public Utilities Commission determines that the flow is adequate only for a lesser number of users, BL&E hereby requests that the permit be issued for such lesser number, but in no event less than 25 users. Such a procedure would seem warranted in these circumstances because full construction of residences is not anticipated for several years. BL&E will undertake upon granting of such permit to obtain a connection for emergency service from a source of water situated on contiguous property owned by Big Lagoon County Park."

In Decision (D.) 67298 (June 2, 1964) the Commission approved the application as amended. It described the water system as follows:

"It consisted of a well equipped with a submersible pump, a 20,000-gallon redwood storage tank, a booster pump and 3,324 feet of 6-inch asbestos cement (pipe). The system meets the requirements of General Order No. 103."

In Ordering Paragraph 6 of D.67298 the Commission imposed the following condition on BL&E:

"When the number of customers reaches 25, or within one year after the date service is first furnished to the public under the authority herein granted, whichever is earlier, applicant shall have installed a standby source of water to provide for the reasonable continuation of an adequate supply of water to customers in case of the failure of the single source of supply. Within 30 days after such alternate facilities are installed, applicant shall file a written report with this Commission, showing the number of customers then served and the details of the manner in which the requirement of this paragraph has been accomplished."

¹ This ordering paragraph is identical to the ordering paragraph proposed by the staff in its report. (Exhibit 1.)

Service was first rendered to the public on June 9, 1968.

On August 27, 1973, BL&E and Richard Kurwitz filed A.54285 seeking authority to transfer control of BL&E to Kurwitz, a permanent resident of Big Lagoon and a logging contractor. By D.81917, dated September 25 1973, the Commission authorized the transfer of control subject to the following conditions:

"IT IS FURTHER ORDERED that this order shall become effective when BL&E has filed with the Commission a written report relating to its standby source of water supply, which report is required by Ordering Paragraph No. 6 of Decision No. 67298, dated June 3, 1962, in Application No. 44736."

In a May 10, 1974 letter Kurwitz stated that BL&E had acquired a standby well. However, the staff did not treat the acquisition as full compliance with D.67298 and D.81917 because the primary well and standby well were not interconnected. As late as January 3, 1975, the staff informed Louisiana-Pacific Corporation, the successor in interest to Georgia-Pacific, by letter, that Kurwitz had only partially complied with the standby source of supply requirement. The staff stated that:

"...full compliance will not be effected until both sources of supply have been interconnected to fulfill the requirement that a standby source be provided in case of failure of a single source, in order that customers will be assured of a reasonable and adequate supply of water."

On June 23, 1975, Kurwitz attempted to perfect his compliance with D.67298 and D.81917 by submitting a copy of a contract calling for the installation by Gerald Carmichael Construction Co., Inc. of 1,400 feet of 6-inch pipe, apparently to connect the two wells, at a cost of \$6,891.90. A letter dated April 9, 1980, from Gerald Carmichael states that he prepared the bid, but it was never returned to him. He has no knowledge whether the interconnection was made or not.

On October 29, 1979, BL&E and the Big Lagoon Park Corp., a mutual water company, jointly filed A.59244, seeking authority for BL&E to transfer its standby well to Big Lagoon Park Corp. The correspondence in that file indicates that a few months after contracting to have the two wells interconnected Kurwitz was killed in a traffic accident. BL&E is now operated by his widow, Sheila Kurwitz.

The subject standby well is the sole source of supply to 75 residential customers dwelling on lands owned by Big Lagoon Park Corp. In her letter to the Commission dated June 27, 1980, Sheila Kurwitz represented: that the subject well could not support the customers of both BL&E and Big Lagoon Park Corp; that Big Lagoon Park Corp. had agreed to put in a backup well for BL&E; and that she would apply the proceeds of the sale of the subject well to put in a backup well.

In a report prepared for A.59244 (Exhibit 1) the staff recommended that the application be approved subject to the following conditions:

1. The requirement for a standby source of water would be rescinded;
2. Any expansion of BL&E beyond 25 customers should be subject to Commission approval.

In her letter of October 22, 1980, Sheila Kurwitz agreed to the staff's recommendations. On February 4, 1981, A.59244 was granted by ex parte D.92660. BL&E was authorized to transfer its standby well to Big Lagoon Park Corp. The Commission also ordered that:

"BL&E shall not expand its service beyond 25 customers without first applying to this Commission for approval of such expansion."

In the file for A.59244 is a copy of a bill of sale for the standby well and associated facilities in favor of Big Lagoon Park Corp. and signed by Sheila Kurwitz for BL&E. It is dated

December 30, 1980, before the sale was authorized, but it was transmitted by letter dated September 11, 1981, on the stationery of Western Title Insurance Company. Giving BL&E the benefit of the doubt, it may be that the signed original bill of sale was held in escrow until the transaction was authorized and then delivered by the escrow company to the transferee.

Beyond the interest expressed by the complainants in receiving water service from BL&E we have received letters from the following owners of lots in Big Lagoon inquiring about water service:

William E. Belk
Loritta Zeeb
Charles and Donna Haddock
Frank and Constance Bregante

Service of Process - C.82-07-04

On July 15, 1982, the Docket Office sent a copy of the complaint in C.82-07-04 to BL&E by registered mail. A card returned by the Postal Service shows that the complaint was delivered to Sheila Millsap on August 11, 1982. (Sheila Kurwitz was recently remarried to Ron Millsap.) Attached to the copy of the complaint was a form instructing BL&E to answer the complaint within 30 days after receipt. Copies of Rules 13 and 13.1 of our Rules of Practice and Procedure were also enclosed.

On August 31, 1982, Administrative Law Judge (ALJ) Robert T. Baer sent a letter to BL&E by first class mail enclosing Rules 2 through 8, 13, and 13.1, and the pertinent parts of Rule 88 (Forms) and extending its time to answer to September 17, 1982. The letter was not returned. No answer has been filed.

Service of Process - C.82-08-11

On August 26, 1982, the Docket Office sent a copy of the complaint in C.82-08-11 to BL&E by registered mail. The complaint was returned marked "unclaimed." A copy of the complaint, the Instruction to Answer form, and pertinent sections of the Rules of Practice and Procedure, were personally served upon Sheila Kurwitz Millsap on October 1, 1982, by a member of the staff. A certificate of service is on file. No answer has been filed.

Relief Requested

Both sets of complainants seek an order requiring BL&E to install facilities sufficient to serve more than the 25 customers to which BL&E is limited by D.92660. Our staff has advised the company by letter of November 16, 1982 that General Order (GO) 103 requires two sources of supply, that this requirement may be fulfilled by drilling and connecting another well to the system or by establishing a standby connection to the system of the Big Lagoon Park Corp., and that additional storage would not suffice.

By the same letter staff suggested two possible sources of financing: the Safe Drinking Water Bond Act of 1976 and main extension contracts. Each of these suggestions was explained. The staff also explained how to secure general and offset rate relief.

No action by BL&E has been forthcoming. It has not filed for a general rate increase, although the staff sent it documents providing guidance by letter of February 17, 1982. It has not filed an advice letter seeking offset relief, although the staff sent a recent filing as a sample by letter dated November 16, 1982. So far as we are aware it has not entered into any main extension contracts, although sample contracts were sent to it by letters dated May 21, 1982, and November 16, 1982. Finally, there is no indication that it is seeking financing under the Safe Drinking Water Bond Act.

Authority of the Commission

Public Utilities (PU) Code §761 provides:

"Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are...inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed furnished, constructed, enforced, or employed.

PU Code § 762 provides:

"Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility...ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of...the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order."

Both sections require a hearing before an order is issued. However, where a public utility has received notice yet has failed to answer a complaint stating a cause of action under PU Code §§ 761 and 762, we should find that it has waived its right under the statutes to a hearing before the issuance of the order. (CTA v CPUC (1977) 19 C 3d 240, 245, fn. 7; Civil Code § 3513; People v Workman (1953) 121 CA 2d 533, 535-536.)

This does not mean that BL&E may never have a hearing. If it files a timely application for rehearing under PU Code § 1731 et seq. and Rules 85, 86, and 86.1 of our Rules of Practice and Procedure, and explains why it did not respond to the complaints we would consider granting that application. In any event we must hold a hearing before we impose fines or imprisonment under our contempt powers (California Constitution, Article XII, § 6; PU Code §§ 312 and 2113.

Relief to be Granted

It is obvious from the above account of BL&E's history that its facilities are inadequate and insufficient to serve more than 25 customers. Moreover, if BL&E's single source of supply should fail, its existing customers would be utterly without water service.

As previously mentioned, GO 103 requires a water utility to have at least two sources of supply. Although we recently authorized

BL&E to transfer a standby well which it had acquired to Big Lagoon Park Corporation, we did so with the understanding from BL&E that the proceeds of the sale of the standby well would be used to put in a backup well to the BL&E system. In the interim we restricted BL&E to serve no more than 25 customers.

Since the date of D.92660 until the present time, BL&E has failed to construct a backup well. Meanwhile, in response to the filed complaints our staff advised BL&E to install another source of supply as required by GO 103. BL&E has failed to respond to our staff and has not communicated further with the Commission.

The responsibility of BL&E to provide adequate service to its customers should not be taken lightly. That responsibility is imposed by law and must be carried out in the manner required by this Commission as set forth in its general orders. We are concerned that, notwithstanding BL&E's prior intention to acquire a backup source of supply, BL&E has taken no action to do so and has been unresponsive to our staff's advice in this regard. BL&E's inaction has, in turn, deprived property owners in its service area of water service they should have received from BL&E.

Accordingly, by this order, we will require BL&E to install a second well or a standby, emergency connection to another water system within five months from the effective date of this decision. This will allow BL&E six full months to comply with this order. We will also require BL&E to report to the Commission within 30 days from the effective date of this decision on what specific efforts BL&E is making to secure the second source of water supply. We expect full and timely compliance with this order. If BL&E has failed to comply with these deadlines we will undertake all necessary proceedings to secure compliance, including contempt and/or receivership proceedings.

Findings of Fact

1. BL&E has had actual notice of the filing of the complaints, either by registered mail or personal service, and has failed to answer them.

2. BL&E has by inaction waived its right to a public hearing under PU Code § 761 and 762.

3. BL&E facilities are inadequate and insufficient to serve more than 25 customers because a single well provides the entire supply to the customers.

4. BL&E facilities are inadequate in that only a single source of supply serves existing customers.

Conclusions of Law

1. GO 103 (VIII)(5) requires that "Each separately operated water system shall have not less than two independent sources of supply."

2. A defendant in a civil action may waive its statutory right to a public hearing by inaction.

3. BL&E should be ordered to provide a secondary source of supply, either by constructing and connecting a new well to its system or by obtaining a standby, emergency connection to a neighboring water system, within 150 days after the effective date of this order.

O R D E R

IT IS ORDERED that:

1. Within 150 days after the effective date of this order B. L. and E. Co. (BL&E) shall construct a new well and connect it to its system or shall obtain a standby, emergency connection to a neighboring water system.

2. Within 30 days after the effective date of this order BL&E shall report to the Commission on its efforts to secure a second source of water supply.

3. The Executive Director shall cause a certified copy of this order to be personally served upon Sheila Kurwitz Millsap on behalf of BL&E.

4. To the extent set forth in Ordering Paragraph 1 the complaints are granted.

This order becomes effective 30 days after the date Sheila Kurwitz Millsap is served with a copy.

Dated MAY 12 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

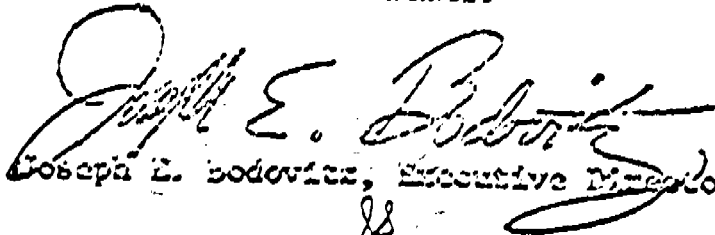
VICTOR CALVO

PRISCILLA C. GREW

DONALD VIAL

Commissioners

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


Joseph E. Bobovic, Executive Director