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ORIGINAL

Decision No. 86677

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

GARY J. NEAR, individually and as a representative of all persons similarly situated,

Complainants,

vs.

PARADISE ESTATES WATER CO. also known as the West Marin Water Company, a California Corporation; David S. Adams & Sons Inc., a California Corporation; DOUGLAS G. ADAMS; Does One through Ten,

Defendants.

Case No. 9916
(Filed May 13, 1975)

Harvey M. Freed, Attorney at Law, for Gary J. Near, and Gary J. Near, Attorney at Law, for himself, complainant.
Graham and James, by Boris H. Lakusta and Jamie O. Harris, Attorneys at Law, for defendants.
Thomas C. Hendricks, Attorney at Law, for the County of Marin, interested party.
Freda Abbott, Attorney at Law, for the Commission staff.

O P I N I O N

Complainant in this case is Gary J. Near (Near) who resides in Paradise Ranch Estates (the subdivision) located near Inverness and who, ostensibly, is a representative of all persons similarly situated living in the subdivision who have an interest in the subject matter of the complaint.

Defendant David S. Adams & Sons, Inc. (Developer), a California corporation, is the developer of the subdivision and owns and operates a water system which furnishes domestic water service under the name of Paradise Estates Water Co. (Paradise) to Near and 84 other customers in the subdivision. No certificate has been issued by the Commission for the construction of the water system and Developer has never had any tariffs on file with the Commission.

Defendant Douglas G. Adams (Adams), an individual, is vice-president of Developer and a partner with his brother in a real estate brokerage firm (the partnership).

Defendant West Marin Water Company (West Marin), a California corporation, was promoted by Adams and some of Adams' relatives with the intention of having West Marin take over the ownership and operation of Developer's water system. To date West Marin had conducted no business.

Near requests that the Commission find defendants to be a public utility within the meaning of Sections 216, 241, and 2701 of the Code; that the Commission roll back the increased rates charged for water service to the flat rate of $2.75 per month as originally established for the water service in 1952; that the Commission order defendants to refund by way of reparations to the users of the water service all monies paid by the users in excess of $2.75 per month; and that the Commission issue an interim order prohibiting defendants from cutting off water service to those who have declined to pay the increased rates and to immediately restore water service to any user whose water service was cut off for refusal to pay the increased rates. Near also charges that the retroactive application of the rates is in violation of well-settled principles of public utility law.

Defendants contend that the water service is not a public utility operation but rather a private service which furnishes water to residents of the subdivision as an accommodation on a private contract basis and hence is not subject to Commission jurisdiction.

In Decision No. 84459, effective May 20, 1975, in response to the complaint, the Commission issued an interim order requiring defendants to cease and desist from terminating water service to any of their water customers in Paradise Ranch Estates and prohibiting defendants from charging rates for water service any higher than those rates in effect on the effective date of the decision, namely, $6 per month plus 90¢ per 100 cubic feet of water used. At the request of Developer, the Commission amended Decision No. 84459 by Decision No. 85815 by deleting the requirement that defendants cease and desist from terminating water service to any of their water customers for failure to pay their water bill covering any full bill billing period subsequent to May 20, 1975. Seven days of hearing were held on the case, ending December 4, 1975, before Examiner Pilling at San Francisco.

Developer's water system currently serves water to 85 customers and has a potential of 220 service connections. It charges each of its customers a flat monthly rate of $6 plus a quantity rate of 90¢ for each 100 cubic feet used. The nearest water supplier is the North Marin Water District (North Marin) which serves customers about one-half mile south of Paradise's service area. Inverness Water Company (Inverness) provides water service in Inverness approximately two miles north of the Paradise service area, the intervening area being State and National Park land. The Commission staff witness who investigated the system testified that Developer's source of water supply is five wells at two sites. Production capacity is between 25,000 and 30,000 gallons per day.

The system has one holding tank on top of a hill and five storage tanks located at various elevations on the hillside. Tank No. 5 is used only for water storage for fire suppression purposes and has a capacity of 15,000 gallons. The distribution system consists of 10,250 linear feet of 4-inch diameter dipped and wrapped steel pipe and 16,400 linear feet of distribution main smaller than 4-inch diameter pipe. Water samples are taken and analyzed by personnel of North Marin Water District. The latest test results show the water quality is good though the County of Marin will not issue a water supply health permit for the system because a previous supplemental water source used by the system, which caused all the water in the system to become contaminated and resulted in a "boil water" order, still has the potential of being inadvertently connected back to the system. Additionally, Developer has not proved to the satisfaction of the county that Developer's current water sources are ample to serve its present customers.

Ten residents of the subdivision, including complainant, appeared and gave testimony in support of the complaint. Five such witnesses were original homeowners in the subdivision who testified that they dealt with Adams in connection with the purchase of their lots; that they were assured by Adams that ample water was available through his family's water company to service the lots and it would be routinely provided; that no mention was made to them by Adams that water was to be furnished as an accommodation only; that Adams made no mention to them that there was any restrictions on the use of the water to be supplied to them; and that they would not have purchased the lots if they had been informed that water was to be furnished to the lots as an accommodation only. The other five resident homeowner witnesses bought houses already built. Three of these witnesses bought their homes through the previous owners who told the witnesses that water was made available by the Adams family for the premises and made no mention of any restriction on the use of

water nor mention that water was supplied as an accommodation only. Of the remaining two homeowner witnesses, one bought a home through Adams who, so the witness testified, in talking about water service with the witness, made no mention about any restriction on the service and made no mention that the water was furnished as an accommodation only. All the resident homeowner witnesses became residents of the subdivision when water charges were a flat $2.75 per month. The homeowner witnesses appearing in support of the complaint testified variously that in using Developer's water service they experienced severe water outages and shortages in 1972, continued discoloration of the water, high sedimentation rate, foul odors, inadequate water pressure, and overpowering smell of chlorine. Several witnesses attributed their becoming ill to the poor quality of water.

The Director of Environmental Control of Marin County, who is responsible for enforcing state and local laws relating to water quality and safeness within the county, testified that in 1969 he was instrumental in getting the County Health Officer to issue a boil-water order to users of Developer's water service because bacteriological samplings of the water indicated that Paradise's water was not fit to drink due to the high coliform count, apparently the result of Developer's drawing water from contaminated open surface water sources. He stated the boil-water order is still in effect principally because the pipes connecting the contaminated source to the system are still in place, despite Adams' promise to cease using the contaminated source. Of four water samples taken by his department during 1974 two samples show unsatisfactorily high coliform count. He stated that because of the frequent water outages experienced by the system, some time in 1972 the county declared a moratorium on issuing building permits in the subdivision. Since August 1974, Paradise has experienced no water outages. As late as June 1975, he received complaints on the brown color of the water.

Early in June of 1973, Developer, under the signature of Adams, gave written notice to Paradise's customers that Developer "has in the past furnished water only on an accommodation basis and will do so only on that basis." In August of 1973 the county of Marin and certain homeowners in the subdivision secured a temporary injunction against Developer requiring Developer to provide water of sufficient quality and quantity to the residents, restricting Developer's right to sell further property in the subdivision and vicinity, and ordering certain water system maintenance requirements, water purity reports, and contingency procedures for water shortage emergencies. The injunction remains in effect.

For a period of over 20 years Developer charged each customer a flat rate of $2.75 per month. At some time after April 1, 1974, Developer increased the rate to $6 per month retroactive to April 1, 1974. These rates were subsequently increased at some time after October 1, 1975, to $7 per month retroactive to October 1, 1975. Meters were then installed and the rate was set where it now stands at $6 per month plus 90¢ per 100 cubic feet of water used. Many of the customers have refused to pay the increased rates until they get what they consider to be satisfactory water service.

Adams testified that Paradise's operations commenced some time in 1952 when lot sales in the subdivision started. Adams stated that Developer did not intend to operate the water system except temporarily. The subdivision public report states that water for the subdivision was to be supplied by Inverness, then a public utility, to a distance of no greater than 1,000 feet from the Point Reyes-Inverness Highway and that water for lots which could not be served from those mains would have to be developed by the purchaser at his own expense. Inverness assisted Developer with the planning and initial installation of the water system and recommended a charge of $2.75 per month, patterned after the rate then being charged by Inverness.

Sale of the lots in the subdivision proceeded at a pace much slower than expected, causing Inverness to at first hesitate to take over the system with so few customers and finally withdraw from the venture altogether.[1] Adams testified that Developer at various times has attempted to get North Marin to take over the system, to have a water district formed to operate the system, and to get the customers to form a mutual water company to operate the system, all without success; and West Marin was incorporated to take over the Developer's operation as a possible alternative to these unsuccessful attempts.[2] Adams stated that since the injunction was secured against Developer it has brought two new wells on line and an existing well was deepened. It has installed three chlorinators, a new 25,000-gallon storage tank, 85 customer water meters, and 6 tank meters. Adams stated that the 1972 water outages were due to a hard-to-find break in a main and when the break was located, the main was replaced with between 400 and 500 feet of new main. Developer's attempt to obtain water rights in nearby Fish Hatchery Creek as an additional source of water for its system was denied by the State Water Resources Control Board in Decision 1458, dated July 15, 1976. Adams testified that the water service operation has always lost money and is losing money under the present rates.

1/ The Inverness system is now owned and operated by a water district.

2/ West Marin has requested that the water operations and facilities be transferred to West Marin in Application No. 55727, hearings on which have been postponed at the request of West Marin. West Marin stated in its application that upon approval of the transfer, West Marin would operate the system as a public utility.

Adams testified that his current yearly expense to operate the water system is approximately $14,000. The Commission staff estimated the yearly operating revenue of the system under current rates to be $8,721 and the yearly expense to be $8,094. Adams testified that the staff's estimated yearly expenses were grossly understated. Adams stated that every two weeks a sample of water is taken from the system and given to the North Marin County Water District to check for bacteria and that during 1975 no unsatisfactory bacteria count was found. Water samples to determine chlorine residual are taken daily by Adams or an employee of Developer.

Introduced into evidence on cross-examination of Adams were copies of nine written agreements and deposit receipts covering the sales of property within the subdivision made by Developer to various individuals (Exhibits 38 through 46) on which were remarks about various utility services. Following is an extract of each agreement or deposit receipt showing the year in which the document was signed and the handwritten or typewritten reference to water service appearing on the document:

Year Signed	Remarks as to Water Service
1955	"Water to be supplied by Inverness Park Water Company or David S. Adams as a public utility."
1955	"Water to be supplied by public utility."
1956	"Water to be supplied at public utility rates by D. S. Adams, his heirs or assigns."
1960	"Water for household use to property line."
1960	"Water for household use to property line."
1967	"Seller agrees to install water...at no cost to purchaser."

Year Signed	Remarks as to Water Service
1968	"Seller agrees to provide domestic water..."
1970	"Water for domestic purposes to be supplied by seller with no cost of buyer except $25 hook up charge."
1971	"Paradise Estates Water Co. will provide water for domestic purposes to the above-described property."

The Commission staff witness determined that, from flow figures furnished by Developer, the source of water is adequate for the existing customers but that additional water supply is necessary before additional customers can be connected to the system. He also determined that at the time of peak use customers along the 2-inch distribution mains receive inadequate volume and/or pressure created by the high friction losses in the long 2-inch diameter water mains. These high friction losses cause the water to flow into lower tanks, instead of to the customers. To correct this problem, the staff witness recommends that Developer install valves in the system so that at times of peak use the flow of water to the lower tanks is shut off.

Discussion

Developer seeks to avoid Commission jurisdiction under a claim that Developer is, or was, a private water company furnishing water under contract to lots within the subdivision, citing Dillon Beach Company (1927) 30 CRC 76 in which the Commission found under somewhat similar circumstances that respondent Dillon Beach Company was not a public utility; that Developer has not dedicated its facilities to public use; and that Developer furnishes water only as an accommodation to its customers.

The facts are not in dispute that Developer owns and operates a water system and furnishes water for compensation to 85 customers. Section 2701 of the Public Utilities Code, which describes the water companies over which the Commission has jurisdiction, reads, in part as follows:

> "2701. Any person, firm or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system within this State, who sells, leases, rents, or delivers water to any person, firm, corporation, municipality, or any other political subdivision of the State, whether under contract or otherwise, is a public utility, and is subject to the provisions of Part 1 of Division 1 and to the jurisdiction, control, and regulation of the commission, except as otherwise provided in this chapter."

Developer thus meets the statutory definition of a public utility water company unless its operations are governed by other provisions of the Code. Nowhere in the Code is a "private water company", as Developer styles itself, defined or recognized as such and we deem the term to be illusory. The fact that Developer restricts its service only to those lots within the subdivision has no bearing on its utility status. The subdivision is merely the adopted service area in which Developer holds itself out to render service, a practice similar to that engaged in by all other public utility water companies.3/ Developer presented no evidence of the contracts it enters into with each of its customers. The evidence does show, however, that Developer charges each of its customers the same water usage charge and when the charges are increased all charges are brought up to the same level, this indicates that Developer was not dealing with its customers on an individual basis but on a group

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3/ By Commission General Order No. 96-A, Rule II.A(4), public utility water companies are required to make tariff filings of maps of their service areas.

basis as required of a public utility. Complainant entered into evidence nine agreements of sale or deposit receipts covering the original sale of nine lots by Developer on which there were remarks concerning how each of the lots was to be supplied with various utility services, including water service. Section 2712 of the Public Utilities Code reads:

> "2712. 'Whether under contract or otherwise' as used in Section 2701 is not to be construed as authorizing a contract by a person or corporation defined in this chapter as a public utility which in anywise deprives the State or the commission or other competent authority of power to regulate the rates and service of any such public utility."

Under Section 2712 we are not required to abide by agreements of a developer to furnish water appearing in a land sale contract as governing our jurisdiction to regulate or not to regulate public utility water service and we do not do so in this case. In the Dillon case, supra, such agreements found their way into deeds given by the developer to purchasers of its subdivided lots. On this account the Commission held that the developer, the Dillon Beach Company, was not a public utility. To the extent that Dillon may have been understood to mean that covenants in deeds and land sale agreements covering all lots sold in a subdivision in which the subdivider-developer promises to furnish water to the lots so sold or deeded renders the subsequent water service a nonpublic utility service, Dillon is overruled. Developer's operations have been those operations described in Section 2701, hence Developer's operation is a public utility service.

While Developer may have expected that another would take over the water service in the subdivision, still it undertook to supply the public with water. Written evidence of its intent is set out in six of the written sales agreements and deposit receipts in evidence. Testimony of homeowner witnesses also attest to that intent.

The 85 connections served by it are clear proof that it did in fact undertake to supply water. Hence, the subject services and facilities have been and are dedicated to public use.

Developer's contention that it has been supplying water as an accommodation is without merit. Since 1952, Developer has been engaged in the commercial enterprise of selling lots comprising Paradise Ranch Estates. An integral part of that commercial enterprise is the furnishing of water for compensation to the lots which Developer sells.

The complaint did not attack the reasonableness of the increased charges. Rather, the complaint contends that the increased charges were and are unlawful because Developer did not adhere to any of the procedures required of a public utility to establish its charges and that the increases were retroactively applied. On these bases Near requests that the Commission order Developer to make reparation of all charges paid by the customers in excess of the flat rate of $2.75 per month.[4/] The requested refunds amount to over 75 percent of the operating revenues collected by Developer for the two-year period covered by the statute of limitations (Section 736 of the Code). Assuming we have the authority to grant complainant's request, the financial drain would seriously impair the efficiency of the service and could be fatal to its continued operation and lead to its abandonment—a result adverse to the interests of the system's customers since no alternative water service is available and they do not want to operate the system as a mutual water company. For this reason, we deny Near's request to order reparations, except as to the retroactive portion of any rate increase as it stemmed from an unjust form of rate assessment. We will let the present rates stand.

4/ The $2.75 monthly charge, like all other charges made by Developer, was established by Developer independently of any tariff publication covering the charge—a method proscribed by Section 532 of the Code.

Near requests that we declare Developer, Paradise Estates Water Co., the partnership, Adams, and his brother to be a public utility. Since Developer owns and operates the system, Developer alone is the public utility. Near also requests that we order those persons and entities not to transfer ownership or control of the system to any other person or entity. Such an order would be superfluous in view of Sections 851 and 854 of the Code which render void any transfer or encumbrance of utility property or transfer of ownership or control of a utility without Commission approval.

Findings

1. Developer owns and operates a water system which it has dedicated for public use for the delivery of water within the subdivision.

2. Developer delivers water to approximatley 85 customers within the subdivision.

3. Developer receives compensation for delivering water to it customers within the subdivision.

4. In delivering and selling water, Developer uses the name and style of Paradise Estates Water Co.

5. Developer's water service operation meets the definition of a water corporation set out in Sections 241 and 2701 of the Code and is a public utility as defined in Section 216 of the Code.

6. Developer, under any name, has not had and does not have a tariff on file with the Commission as required by Section 489 of the Code.

7. Since the inception of Developer's water service in 1952 Developer has raised its charges several times, twice on a retroactive basis, without approval from the Commission.

8. Near requests that the Commission order Developer to refund by way of reparations all charges for water service in excess of the originally established charge of $2.75 per month paid by Developer's customers.

9. Such refunds would amount to in excess of 75 percent of Developer's operating revenues for the period allowed by the statute of limitations.

10. Developer's water service operation in the past has been unprofitable.

11. The payment of the requested refund would place the operation in such financial straits that its continued operation would be doubtful.

12. No alternative water service is available to Developer's customers, and Developer's customers do not want to operate the system as a mutual water company.

13. The interest of Developer's customers in the maintenance and enhancement of quality of their present water service would be adversely affected if the Commission were to order Developer to refund the monies as requested in the complaint.

14. Developer's overall water service has improved since its system was upgraded as the result of a court order and is now reasonably adequate.

15. Need exists for the installation of valves in the water system so that at times of peak use the flow of water to lower tanks is shut off.

16. Need exists for the development of plans and financing to replace the undersized mains in the system.

17. Adequate water at source exists to serve Developer's customers, but an additional water supply is necessary before more customers can be connected to the system.

18. The retroactive assessment of additional charges by a public utility is an unjust practice.

Conclusions

1. Developer should be declared to be a public utility subject to the jurisdiction of the Commission and to the applicable provisions of the Code.

2. Developer should be ordered to file tariffs as required by Section 489 of the Code.

3. Reparations should be granted to the extent set forth in the following order.

4. Developer should be prohibited from adding customers to its water system in excess of its present 85 customers until it secures an additional source of water.

5. Developer should be ordered to install valves in the system so that at times of peak use the flow of water to lower tanks is shut off and to develop plans and financing to replace the undersized mains in the system.

O R D E R

IT IS ORDERED that:

1. David S. Adams & Sons, Inc. (DSA&S, Inc.), a corporation, also known as Paradise Estates Water Co. is declared to be a public utility subject to the jurisdiction of this Commission and to the applicable provisions of the law.

2. DSA&S, Inc. is authorized and directed to file, within thirty days after the effective date of this order, the schedule of rates attached to this order as Appendix A, a tariff service area map clearly indicating the boundaries of the service area to include Paradise Ranch Estates, appropriate general Rules Nos. 1 to 20, inclusive, and copies of printed forms to be used in dealing with customers. Such filing shall comply with General Order No. 96-A, and the tariff schedules shall become effective on the twentieth day after the date of filing.

3. DSA&S, Inc. shall prepare and keep current the system map required by Section 1, paragraph 10.a of General Order No. 103, and shall file two copies of such map with the Commission within one hundred and eighty days after the effective date of this order.

4. For the year 1975, DSA&S, Inc. shall apply a depreciation rate of 3 percent to the original cost of depreciable plant. Until review indicates otherwise, DSA&S, Inc. shall continue to use this rate. DSA&S, Inc. shall review its depreciation rates at intervals of five years and whenever a major change in depreciable plant occurs.

Any revised depreciation rate shall be determined by: (1) subtracting the estimated future net salvage and the depreciation reserve from the original cost of plant, (2) dividing the result by the estimated remaining life of the plant, and (3) dividing the quotient by the original cost of plant. The results of each review shall be submitted promptly to this Commission.

5. DSA&S, Inc. shall file with this Commission, within one hundred and twenty days after the effective date of this order, a report setting forth in detail a determination of the original cost, estimated if not known (historical cost appraisal), of the properties used and useful in providing water service, and also the depreciation reserve requirement applicable to such properties. The report shall designate which items are supported by vouchers or other like documentary evidence and which items are estimated, and it shall show the basis upon which any such estimates are made.

6. DSA&S, Inc. shall, within sixty days after the effective date of this order, install valves in the system, so that at times of peak use the flow of water to the lower tanks is shut off.

7. Until further order of this Commission, DSA&S, Inc. shall limit service to those customers presently being served.

8. DSA&S, Inc. shall file, within one year, a plan to replace the undersized water mains in the distribution system.

9. Within ninety days subsequent to the effective date of this order, DSA&S, Inc. shall refund to any of its past or present water customers the retroactive portion of any rate increase assessed and collected by DSA&S, Inc. with interest at 7 percent from the date of collection.

10. Water service customers of DSA&S, Inc. owing sums to DSA&S, Inc. for water service rendered prior to the effective date of this order shall not be considered in arrears in their payments until after ninety days subsequent to the effective date of this order.

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11. The complaint in all other respects is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 23rd day of NOVEMBER, 1976.

President

Commissioners

I will dissent in writing
William Symons Jr.

I concur in part and dissent in part
Vernon L. Sturgeon

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APPENDIX A

Schedule No. 1

METERED SERVICE

APPLICABILITY

Applicable to all metered water service.

TERRITORY

Paradise Ranch Estates and Vicinity.

RATES

	Per Meter Per Month
Service Charge:	
For 5/8 x 3/4-inch meter	$6.00
Quantity Rate:	
All water consumed, per 100 cu.ft.	$0.90

The Service Charge is applicable to all metered service. It is a readiness-to-serve charge to which is added the charge, computed at the Quantity Rate, for water used during the month.

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COMMISSIONER WILLIAM SYMONS, JR., Dissenting

I dissent to that part of the decision which directs the water company to make reparations of certain so-called retroactive rates. This position is supported by the Commission staff and the hearing examiner's draft decision.

In point of fact, the existing rates which are higher than those subject to reparations are adopted by the Commission as just and reasonable. No one seriously doubts that the utility has operated at a loss for many years.

The Commission sets rates prospectively and historically has refused to indulge in reparations in cases similar to the instant case when after unauthorized rate increases, a higher level of rates has been determined to be reasonable. It has simply adopted the existing rates for application in the future.

Reparations are an extraordinary equitable remedy properly applicable in cases of established overreaching by a utility. There is no such evidence herein and therefore no justification whatsoever for their imposition.

San Francisco, California
November 23, 1976

/s/ William Symons, Jr.
WILLIAM SYMONS, JR.
Commissioner