

ORIGINAL

Decision No. 86867

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

WINTON WATER COMPANY, INC.,

Complainant,

v.

YOSEMITE GLASS COMPANY, BUD RAYMOND,
HOWARD McCULLOCH,

Defendants.

Case No. 10009
(Filed November 25, 1975)

Schreiner and Sperry, by Samuel A. Sperry, Attorney
at Law, for Winton Water Company, Inc., complainant.
Warren A. Palmer, Attorney at Law, for Yosemite Glass
Company, Bud Raymond, and Howard McCulloch, defendants.
Cleo D. Allen, for the Commission staff.

O P I N I O N

On November 25, 1975, Winton Water Company, Inc. (Winton) filed a complaint against Yosemite Glass Company, Bud Raymond, and Howard McCulloch (defendants). The complaint alleges that:

1. Defendants are operating a public utility water system in the certificated area of Winton without having obtained a certificate of public convenience and necessity from this Commission, and
2. Defendants are installing water mains parallel to existing water mains of Winton and plan to provide water service to a new subdivision developed by defendants for which Winton has filed to include in its certificated service area.

The complaint requests the Commission to order defendants to cease and desist furnishing water service to areas for which Winton holds a certificate of public convenience and necessity and that defendants cease and desist maintaining and furnishing water service through mains being laid by defendants parallel to the water mains of Winton.

Defendants filed an answer to the complaint on January 8, 1976 in which all allegations were denied. In the answer, defendants contended that water is being furnished as a matter of accommodation to neighbors to whom no other supply of water is equally available and that because Winton refused to furnish proper and adequate water service, the Commission lacks jurisdiction over the defendants pursuant to Section 2704 of the Public Utilities Code.

Public hearings were held before Examiner Banks at Merced on May 27 and 28, 1976. The case was submitted on May 28, 1976 subject to filing of concurrent briefs 30 days after receipt of the transcript. The briefs and the transcripts have been received and the matter is now ready for decision.

Subsequent to filing the complaint, the Commission staff made a field investigation of Winton. The staff determined that the subdivision in question is wholly within the filed service area of the complainant and that defendants have not filed an application to obtain a certificate of public convenience and necessity to operate as a public utility. The staff concluded that defendants are providing or holding themselves out as being able to provide utility water service in the service area of the complainant as shown in the tariffs on file with the Commission and that to permit the defendants to persist in their operation would be against the Commission's long-standing policy against service area fragmentation. The staff recommended that the cease and desist order be issued.

In 1973, complainant and defendants entered into a main extension contract whereby defendants were to provide and install mains, service connections, fire hydrants, a well site, a well, and a small stand-by tank and pump in the Winton Manor Subdivision (Winton Manor) for an estimated maximum cost of \$25,000, refundable under the 22 percent, 20-year refund rule of the complainant. The

complainant was to provide public utility service to Winton Manor. The main extension contract was modified by an oral agreement, the terms of which are in dispute. The parties agree that the oral modification provided that defendants were to purchase a larger tank than was originally contemplated and the complainant was to refurbish it prior to providing water service to Winton Manor. The disagreement is whether defendants were required to complete the well prior to complainant's refurbishing the storage tank.

Pursuant to the main extension contract, the defendants installed the mains, fire hydrants, and service connections. No well was drilled. In 1973 complainant interconnected its system and furnished water service at its tariff rates to Winton Manor. Due to the dispute and constant complaints from customers of Winton Manor, the defendants drilled a well and installed a storage tank and pump on the lot that was supposed to be used by complainant to service Winton Manor. On September 2, 1975 defendants disconnected Winton Manor from complainant's system and commenced serving the lot owners in Winton Manor from a new well at a monthly rate of \$5.

On November 10, 1975, the complainant filed an action in the Merced County Superior Court for an injunction to restrain defendants from providing water service to Winton Manor lot owners, for breach of the main extension contract, and for damages.^{1/}

The complainant avers that the only issue to be resolved by the Commission is whether or not the defendants are operating as a public utility in the certificated area of complainant and that raising the issue of the quality of service in 1973-1975 and arguing ancillary issues is nothing more than a diversionary tactic on the part of defendants. The complainant also claims that service

^{1/} When the action in Superior Court was filed the defendants in agreement with complainant ceased collecting the monthly charge.

problems would be nonexistent had the defendants installed the well to serve Winton Manor pursuant to the main extension contract. In addition, it is alleged that defendants sought a main extension contract from the complainant in order to obtain local approval of their final subdivision report.

The defendants contend that Winton Manor is not within the authorized or certificated service area of complainant and that the interconnection of complainant's system with the Winton system and the service provided thereby was temporary in nature, not dedicated to public use and in violation of complainant's filed tariffs.

At the hearing and in their brief, defendants argue that the main extension contract executed February 8, 1973 is invalid and unlawful because it was an unlawful deviation from the utility's filed tariff schedules; that the contract is unenforceable and invalid under contract law; that the contract was never executed; that the service performed by the complainant in 1973-1975 was temporary in nature and that the physical interconnection of defendants' and complainant's water systems was illegal; and that it is beyond the physical and financial ability of the utility to serve Winton Manor.

The defendants' argument regarding the validity of the main extension contract is not persuasive. During the 1973-1975 period when complainant was furnishing water to Winton Manor, both parties performed as though a valid contract existed. It was after agreement could not be reached on whether the storage tank purchased by defendants should be refurbished by complainant before the well drilling commenced and after this complaint was filed that defendants asserted that a valid contract did not exist. The oral amendment to the contract though not performed does not render the contract void and unenforceable.

In addition, defendant Bud Raymond testified that he furnished the estimate for Winton to include in the main extension contract. The figure furnished included all water mains, service connections, fire hydrants, a well, a pump, and a well site. His understanding was that his costs were to be refunded pursuant to Commission approval. Mr. Raymond stated that the disagreement began when complainant's vice-president failed to refurbish the storage tank he purchased to supply Winton Manor.

With respect to the deviation from the utility's filed tariffs and the Commission's general orders, we note that such deviation was with the full knowledge of the Commission staff, as testified to by staff witness Allen, with the hope of strengthening a small utility in order that satisfactory service be afforded complainant's customers.

We also disagree with defendants' citation of Decision No. 80108, Antelope Valley Water Company, 73 Cal PUC 485, for the proposition that the mere filing of a service area map does not confer operating rights on a utility and that in such a situation the utility acts at its peril.

In Antelope Valley the applicant sought a Commission finding and order that certain real property was not within the service area of Antelope Valley. In that decision we stated that:

"...the filing by a utility of a tariff service area map or description, and the acceptance thereof by the Commission, does not have the effect of making uncertificated, contiguous territory described therein part of the utility's service area. While such map or description may disclose the utility's intention to serve an area, the area itself does not actually become part of its service territory until it has been physically interconnected to the utility's system or a valid main extension agreement has been executed between the utility

and the owner of the land involved. The effect of filing such a map is to indicate, until it is modified or withdrawn, the utility's intention to dedicate service to the area in accordance with applicable provisions of law and the utility's tariffs." (Emphasis added.)

Further, that decision found that Antelope Valley's water system was not physically interconnected to the disputed service area and there was no main extension agreement.

The facts herein are undisputed. The parties entered into a main extension contract and the facilities were physically interconnected. The hearing disclosed that the parties disagreed over the refurbishing of the larger storage tank and drilling a well to furnish water to Winton Manor. It was after the defendants drilled a new well, installed a larger storage tank, and disconnected complainant's facilities and this complaint was filed that defendants decided the main extension contract was void and unenforceable.

Based on the foregoing, we are of the opinion that the requested cease and desist order should issue.

Findings

1. Winton holds a certificate of public convenience and necessity to operate as a water utility in the town of Winton, County of Merced.
2. On October 2, 1975 Winton filed with the Commission a tariff map which showed its service area to include the area known as Winton Manor Subdivision Units 2, 3, and 4.
3. Defendants are the developers of Winton Manor.
4. Defendants do not possess a certificate of public convenience and necessity to operate as a water utility.

5. Winton and defendants, by Howard McCulloch, entered into a main extension contract on June 27, 1973 whereby Winton was to furnish public utility water to Winton Manor through water mains and service connections to be installed by defendants.

6. The main extension contract provided that defendants were to install facilities to be used to provide public utility water service. The cost of the installed facilities, to be treated as an advance subject to refund, was not to exceed \$25,000. A well and pump were to be supplied by defendants. Complainant commenced furnishing water service to lot owners in Winton Manor in 1973.

7. During the 1973-1975 period the complainant provided service to Winton Manor.

8. The main extension contract was modified by oral agreement which provided that defendants were to purchase a larger storage tank to serve Winton Manor and complainant was to refurbish the tank.

9. Complainant and defendants could not agree on who was to perform first under the oral modification.

10. In April 1975 defendants commenced installation of a well. On September 2, 1975, after completion of the well, water service from Winton was terminated by defendants' physical disconnection of complainant's service.

11. Until the defendants terminated service from Winton the service area of Winton was interconnected with Winton Manor.

Conclusions

1. The Commission has jurisdiction over the issue raised in this proceeding.

2. The filing of a tariff service area map or description for an area contiguous to the utility's certificated area which is interconnected with the utility's certificated area and for which a main extension contract has been executed has the effect of making the area a part of the utility's certificated area.

3. Winton Manor is located in the Winton certificated area.
4. The requested cease and desist order should be issued.

O R D E R

IT IS ORDERED that:

1. Defendants Yosemite Glass Company, Bud Raymond, and Howard McCulloch shall cease and desist from furnishing water service to persons within the area known as Winton Manor Subdivision Units 2, 3, and 4.

2. Further, said defendants shall cease and desist laying, maintaining, or furnishing water through pipes or lines laid for the Winton Manor Area.

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

Dated at San Francisco, California, this 18th
day of JANUARY, 1977.

Robert Belmont
President
William A. Brown, Jr.
James L. Sturgeon
Leonard Moss

Commissioners