ORIGINAL

Decision No. 87304

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PLUMAS-EUREKA ESTATES, a limited partnership, Complainant, v PLUMAS-SIERRA RURAL ELECTRIC COOPERATIVE, INC., a corporation, Defendant.	Case No. 10036 (Filed January 19, 1976; amended May 3, 1976)

Warren A. Palmer, Attorney at Law, for complainant.
Martin McDonough, Attorney at Law, for defendant.

FINAL OPINION

Introduction

The dispute that exists between Plumas-Eureka Estates (complainant), a limited partnership, and Plumas-Sierra Rural Electric Cooperative, Inc. (defendant), a corporation, began over the interpretation of defendant's Rule 15.1 (Underground Extensions Within New Residential Subdivisions).

A dispute also exists between the parties concerning our jurisdiction in the matter.

Summary of Proceedings

The complaint was filed on January 16, 1976, following installation by defendant of electric distribution lines in easements which bisected the rear of back-to-back lots (trench footage) in Units Nos. 3 and 4 of a subdivision being built by complainant, and demand by defendant that complainant deposit an additional amount based on lot-front (street) footage. The complaint in essence requested that the Commission determine, contrary to the

defendant's contention, that actual trench footage rather than lot-front (street) footage should be the measure of construction advances required of complainant for all underground electric distribution lines installed in the subdivision, that such advance be computed on the basis of $3.20 per trench foot or lesser amount per foot times the total actual trench footage of each underground extension, and that a cease and desist order issue against the use of any other measure or computation. (The $3.20 figure was the then-filed tariff charge of defendant.) Defendant filed its answer in late February 1976, denying the allegations of the complaint, and asserting the $3.20 per foot charge as provided in its line extension rules was a rate within the meaning of Section 2782 of the Public Utilities Code, and not subject to the authority of the Commission.

At the time of the answer, the amount of advances demanded as to Units Nos. 3 and 4 because of the difference in interpretation, was $7,228.77, which complainant deposited with the Commission pending final decision. The disputed advance amount as to Unit No. 2 based on the difference between lot-front (street) footage and trench footage was (at a charge of $3.20 per foot) approximately $9,700.

Due to subsequent developments, complainant filed an amendment to its complaint on May 3, 1976, alleging that defendant had advised the Plumas County Planning Department in late January 1976, after receipt of complainant's 1976 Revised Master Plan (its earlier Master Plan was issued in 1973) and EIR, that complainant would have to bear the cost of a 69,000-volt overhead transmission line and substation to be centrally located in the subdivision, such cost being estimated at $100,000, before defendant would serve the subdivision (other than Units Nos. 1, 3, and 4).

The amendment to the complaint further alleged that on April 19, 1976 defendant's counsel advised complainant that it would serve complainant's Unit No. 2 (and other remaining units) only on the following conditions:

> First, complainant advance the cost of enlargement of defendant's Mohawk substation, a separate supply line or feeder line to the subdivision, and an underground supply or feeder line within the subdivision, such cost being estimated at approximately $94,000.
>
> Second, complainant advance the present worth of ownership costs at 12 percent annually for ten years, such present worth being estimated at approximately $103,000.
>
> Third, complainant advance approximately $35,000 (based on lot-front footage) for the underground distribution line to serve Unit No. 2, refundable at the rate of $4.05 per front (street) foot times total front (street) feet, regardless of actual trench footage.

The amendment to the complaint further alleged that defendant's proposals were unlawful and discriminatory, and in violation of defendant's electric line extension rules; that defendant's Rule 15.1.C.3 was violative of Decision No. 76394 and was void; and that, in order to avoid wasteful duplication of facilities and costs, defendant be required to utilize in part existing overhead electric distribution lines in connection with the development of complainant's proposed Unit No. 5. The amendment to the complaint requested a cease and desist order issue to compel defendant to serve complainant's Unit No. 2, and further requested the Commission determine that defendant's Rule 15.1.C.3 is void, approve the complainant's proposed deviation for its proposed Unit No. 5, and further adjudge the defendant and its general manager, A. E. Engel, to be in contempt.

Defendant filed an answer to the amendment to the complaint, denying the material allegations. In addition, defendant asserted its Rule 15.1 was unjust to defendant, that it was required by such rule to obtain Commission approval of deviations therefrom, and that

it proposed to provide electric service to complainant (Unit No. 2 and remaining units) on condition that complainant advance the cost of (1) enlargement of Mohawk substation; (2) feeder lines to and within the subdivision; (3) underground distribution lines in Unit No. 2; and (4) the present worth of ownership costs at 12 percent annually for ten years. The total estimated cost of these facilities and ownership costs was $219,000. The cost of the underground distribution lines in Unit No. 2 was calculated on the basis of actual trench footage (primarily in rear yard easements) times $4.05 per foot. Refunds of such advance payments were to be made on the basis of connected load, i.e., five times the annual revenue billed to a permanently connected consumer for a period of up to ten years.

Three days of hearing were held at Portola, California, on May 11, 12, and 13, 1976 before Examiner Gillanders.

As complainant had sold all lots in Units Nos. 1, 3, and 4, the parties agreed, subject to approval of the Commission, that complainant would deposit in advance the sum of approximately $22,500 with defendant, and defendant would install underground electric distribution lines and services in and provide electric service to Unit No. 2, without requiring a deposit of costs of improving back-up facilities. The purpose of the agreement was to enable complainant to sell lots in Unit No. 2 during the 1976 selling season - spring and summer. The $22,500 was based on $4.05 per trench (actual) foot of line. Refunds were to be made on the basis of permanently connected load, calculated at five times the annual agreed upon revenue for year-round and seasonal electric and gas heated residences for a period up to ten years. The agreement further provided that it was without prejudice to or effect upon the contentions of the parties in this proceeding and was subject to modification by the Commission. Pursuant to such agreement, complainant withdrew its request for an immediate cease and desist order and for contempt.

By Decision No. 86127 dated July 19, 1976 the Commission authorized the interim agreement between the parties so that complainant would be able to sell lots during the 1976 selling season. Due to unforeseen circumstances, complainant was unable to sell lots in Unit No. 2 during the 1976 selling season.

A fourth day of hearing was held at San Francisco, California, on September 22, 1976, and the matter was submitted subject to the filing of concurrent briefs, which were received on February 14, 1977[1/]. A total of ten witnesses testified, and 48 exhibits were received in evidence.

At the final day of hearing defendant changed its position, abandoning most of its demands for advancement of costs of improvement of its facilities outside the subdivision, and proposed as an alternative to the underground feeder within the subdivision that, as a condition to serving Unit No. 2 and the remaining units of Plumas-Eureka Estates subdivision, complainant advance the sum of approximately $103,500 representing the cost of (1) expanding and relocating existing overhead lines to and within the subdivision to serve all of the units of the subdivision, (2) underground distribution lines to serve Unit No. 2, and (3) ownership costs of 12 percent per annum for ten years discounted to present value (6 percent). With respect to remaining units, defendant proposed in principle that complainant advance the actual cost of underground electric distribution lines, together with present worth of ownership costs discounted in the same manner, to be refunded in the same manner as proposed for Unit No. 2.

1/ Complainant also filed on February 14, 1977 a "Petition to Set Aside Submission, Reopen Case, and Receive New Documentary Evidence Without Further Hearing". On February 17, 1977 defendant filed its response to complainant's petition.

In lieu of such advances, defendant proposed that complainant would have the option of furnishing a letter of credit in form satisfactory to defendant for either construction or ownership costs or both. Defendant further proposed that underground distribution lines (except for Units Nos. 2, 3, and 4) be installed in and along the front (street) of the lots so that trench and front footage would be the same, and regardless of the location of other utility lines, such as water and telephone.

On November 23, 1976, by Decision No. 86659, the Commission approved a stipulation between the parties whereby the disputed sum of $7,228.77, theretofore deposited with the Commission by complainant, and representing the difference between total actual trench footage installed in Units Nos. 3 and 4 of the subdivision, and total footage of property fronting on streets within said units (lot-front footage), calculated at defendant's filed tariff charge of $3.20 per foot, was deposited in a responsible savings and loan institution in an interest-bearing account. The deposit, with accumulated interest, was to be disbursed and paid in accordance with a final decision in this proceeding.

Jurisdiction

Complainant argues as follows:

> "It cannot be questioned that the Commission possesses the power and authority to regulate the defendant (Public Utilities Code, Section 2783), except as to establishment of rates, the borrowing of money, and the disposal or encumbrancing of its property (Public Utilities Code, Section 2782). Such authority includes the regulation of line extensions, overhead and underground, and the granting of deviations from the underground line extension rules established by the Commission by its Decisions Nos. 76394 (70 CPUC 339 (1969)), 77187 (71 CPUC 134 (1970)), and 81620 (75 CPUC 321 (1973)).

"The defendant has questioned the authority of the Commission, in light of Section 2783 of the Public Utilities Code, to regulate the charge per foot presented in its tariffs to be advanced by developers for underground extensions within new residential subdivisions, to be refundable or nonrefundable dependent on the circumstances. However, the exhibits and testimony in this proceeding, as well as the defendant's request for deviations, manifest an inconsistency in its position. ...in exempting the establishment of rates, the legislature never intended to and did not exclude such charges as refundable or nonrefundable line extension advances from Commission regulation. The term rates, by its very nature, applies to the consumption of energy by customers of the utility, and not to such advances, which are charges exacted from the developer as an integral part of line extension rules and bear no direct relationship to the consumption of energy." (Emphasis added.)

According to defendant:

"Sections 2782 and 2783 of the Public Utilities Code, added by Statutes 1975, chapter 451, provide as follows:

'2782. The commission shall have no authority to establish rates or regulate borrowing of money, the issuance of evidences of indebtedness, or the lease, assignment, mortgage, or other disposal or encumbrance of the property of any electrical cooperative.

'2783. Except as otherwise specified in this chapter, every electrical cooperative is subject to the provisions of Part 1 (commencing with Section 201) of this division.'

> "By its answer to the original complaint, paragraph 3, and the amended complaint, and in colloquy with the Examiner, defendant has contended that the requirements for advances in aid of construction are rates within the meaning of section 2782, and are consequently not subject to Commission jurisdiction."

Public Utilities Code Section 210 states:

> "210. 'Rates' includes rates, fares, tolls, rentals, and charges, unless the context indicates otherwise. (Stats. 1951, Ch. 764.)"

We can find no direct California authority as to whether or not an advance required for construction of facilities is a rate, but in view of Section 210 the result seems clear. A charge for construction of facilities by an electrical cooperative is a rate over which, by action of the Legislature, we no longer have jurisdiction. However, we do have jurisdiction over the conditions that bring about such charges as such authority was not expressly taken away by the language of Section 2782.

Sections 489 and 490 of the Public Utilities Code state:

> "489. Under such rules as the commission prescribes, every public utility other than a common carrier shall file with the commission within such time and in such form as the commission designates, and shall print and keep open to public inspection, schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service. Nothing in this section shall prevent the commission from approving or fixing rates, tolls, rentals, or charges, from time to time, in excess of or less than those shown by such schedules.

> "490. The commission may from time to time determine and prescribe by order such changes in the form of the schedules referred to in this article as it finds expedient, and may modify the requirements of any of its orders or rules in respect to any matter referred to in this article."

In disposing of this matter we will order certain changes in the tariff filed by defendant in order that such tariff will properly reflect the matters subject to our jurisdiction.

Issues

The issues raised by the requests for relief not resolved and subject to our jurisdiction can be summarized as follows:

1. How should the advance for Units Nos. 3 and 4 be calculated? Should the proposal of complainant for eliminating this dispute be adopted?
2. As to future units should advances be calculated on the basis of front footage or trench footage?
3. As to future units may defendant condition service to future units of complainant in Plumas-Eureka Estates upon an advance by complainant of the estimated single purpose supply lines required, exclusive of substation costs, plus ownership costs?

Discussion

Issue 1

Units Nos. 3 and 4 are at a stage where a solution fair to both sides can be achieved by following the suggestion of defendant at the hearing:

> "With respect to Units 3 and 4 and the dispute over the sum in the Commission's register the Cooperative proposed to finish the construction work for Units 3 and 4 as soon as the availability of materials which are on order and manpower and weather will permit. This consists of putting the pads and other facilities around the development where the transformers can stand when service is demanded and to adjust the monies on hand to the actual costs to the Cooperative. That is, we ask the Commission that it order paid to the Cooperative the amounts of money spent by the Cooperative on Units 3 and 4 out of the deposit to the extent that those costs exceed the monies paid by the developer."

By adopting this suggestion, the controversy over the proper amount that should have been advanced in mid-1975, now long since stale, can be avoided and both parties should be satisfied that actual cost has been advanced.

Issue 2

Complainant, consistent with its engineering design for Units Nos. 2, 3, and 4, contends all underground utility lines should be installed in joint utility trenches, utilizing rear yard easements where there are back-to-back lots. Defendant proposes to install underground distribution lines along the front (street) of the lots on private property, regardless of the location of other utility lines.

The language of defendant's Rule 15.1, (Exhibit 32) requiring an advance based on "the total footage of property fronting on streets within the subdivision", here called front footage, is in accordance with the rule promulgated by this Commission in Decision No. 76394 in Case No. 8209, as shown in Appendix A, page 2 of 4, of that decision. Defendant's rule was effective January 3, 1970.

According to defendant the language of the rule is clear beyond doubt. Defendant believed then, and now believes, that it is required to calculate the advance on front footage, under Section 532 of the Public Utilities Code, unless a deviation is first approved by the Commission. According to defendant, the applicable law is summarized in Empire West v Southern California Gas Co. (1974) 12 C 3d 805, 809, 117 Cal Rptr, 423, by the California Supreme Court:

> "Section 532 forbids any utility from refunding 'directly or indirectly, in any manner or by any device' the scheduled charges for its services. In addition, a public utility 'cannot by contract, conduct, estoppel, waiver, directly or indirectly increase or decrease the rate as published in the tariff...' (Transmix Corp. v. Southern Pac. Co., 187 Cal. App.2d 257, 264 (9 Cal. Rptr. 741); accord South Tahoe Gas Co. v. Hofmann Land Improvement Co., 25 Cal. App.3d 750, 760 (102 Cal. Rptr. 286)). Scheduled rates must be inflexibly enforced in order to maintain equality for all customers and to prevent collusion which otherwise might be easily and effectively disguised. (R. E. Tharp, Inc. v. Miller Hay Co., 261 Cal. App.2d 81 (67 Cal. Rptr. 854); People ex rel Public Util. Com. v. Ryerson, 241 Cal. App.2d 115, 120-121 (50 Cal. Rptr. 246)). Therefore, as a general rule, utility customers cannot recover damages which are tantamount to a preferential rate reduction even though the utility may have intentionally misquoted the applicable rate. (See Transmix Corp. v. Southern Pac. Co., supra, p 265; Annot. 88 A.L.R.2d 1375, 1387; 13 Am-Jur. 2d, Carriers, §108, p. 650; United States v. Associated Air Transport, Inc., 275 F.2d 827, 833.)" (Emphasis in original.)

Defendant's reliance on the above decision is misplaced. The Commission's Rule 15.1 was not meant to define or limit the area in which facilities must be placed. Front footage was used in the rule because testimony from that era - the late 1960's - revealed that no public utility seriously considered underground construction in any area but the public street right-of-way.

It is interesting to note that as defendant is prohibited from using the public street right-of-way by the Rural Electrification Administration, it is now proposing to install its facilities in right-of-ways just inside the lot line facing the dedicated street right-of-way. Such additional right-of-way on private property does not meet this Commission's policy of utilization of joint trenches whenever possible.

The record shows that defendant has installed its underground distribution lines in Units Nos. 3 and 4 in joint trenches containing water lines, telephone lines, and television cables located in utility easements which bisect the rear of back-to-back lots. Such construction should be the rule in the remainder of complainant's subdivision.

Issue 3

In order to serve future units of Plumas-Eureka Estates, it will be necessary for defendant to reconstruct the supply line from Mohawk Substation, at a cost of about $33,380. Defendant states that it will require complainant to advance this cost and, in addition, to advance the ownership costs, computed at 1 percent a month for ten years, discounted to present value with a factor of 6 percent. This additional cost is equal to $29,481.22.

Complainant argues that B.2 of Rule 15.1 (Exh. 32) requires defendant to supply "any necessary feeder circuits" within the subdivision, and that portion of the supply circuit extending beyond the subdivision boundaries not in excess of 200 feet.

To the extent that B.2 of Rule 15.1 is inconsistent with defendant's proposal, defendant proposes to proceed under Section E.4 of the rule which provides:

> "Exceptional cases. In unusual circumstances, where the application of these rules appears impractical or unjust to either party, the cooperative or developer may refer the matter to the Public Utilities Commission for special ruling or for the approval of special conditions which may be mutually agreed upon, prior to commencing construction."

Since complainant has not yet asked for service for Unit No. 5, it may be somewhat premature to decide what should be done in such a case. Nevertheless, we believe that this is the time to discuss the bitter dispute that exists between complainant and defendant over the provisions of Rule 15.1

The dispute is based on completely opposite views as to what type of development Plumas-Eureka Estates is. The developer insists that it is a lot-type subdivision; that it is not a speculative development; that it is a sound, adequately financed, economically feasible subdivision; and that there is a reasonable certainty of full development within a reasonable time. According to defendant, the determination between a subdivision which is reasonably certain to be fully developed promptly, and the one as to which there is no reasonable certainty of when it will be fully developed, if at all, must be left to the utility. Defendant insists Plumas-Eureka Estates is a speculative lot-type development and that there is no safe basis to estimate when, if ever, the lots will contain dwellings.

Defendant's position is inconsistent. On the one hand it vehemently protests that there will be little or no development of the subdivision, while on the other hand arguing that to supply a few dwellings requires the building of a system capable of supplying the maximum load of a completely developed subdivision. As the record shows that the units presently under development should not be classified as "speculative lot-type" there is no need to grant complainant's petition for reopening this proceeding. It will be denied. When plans for the development of Unit No. 5 are completed the pace of development should be self-evident and the parties should be able to agree. If not, we still have jurisdiction over the matter except as to rates.

There are existing lines in the area of proposed Unit No. 5 which complainant desires defendant to use in serving that unit in place of underground facilities otherwise required. Defendant has no objection to using the overhead facilities if this Commission approves such use. We see no reason not to authorize a deviation for this construction if such construction is done in the manner set forth in the record.

Findings

1. Defendant Plumas-Sierra Rural Electric Cooperative, Inc. is a public utility supplying electric service to rural portions of Plumas, Sierra, and Lassen Counties. Complainant Plumas-Eureka Estates is a limited partnership engaged in developing a real estate subdivision in Plumas County, within defendant's service area, known as Plumas-Eureka Estates.

2. The amounts to be charged by defendant for the extension of service to Plumas-Eureka Estates under Rule 15.1 are rates and not subject to the jurisdiction of this Commission under Section 2782 of the Public Utilities Code.

3. Defendant should be ordered to amend its filed tariff by eliminating therefrom any reference to rates or charges.

4. There is only limited access by the public to the subdivision; the subdivision is already traversed by overhead utility lines; the lots within the subdivision are oversize; the subdivision is surrounded by overhead utility lines in adjacent areas; and undergrounding of feeder lines to and within the subdivision would involve wasteful duplication of facilities and excessive cost.

5. The improvement, enlargement, and relocation of existing overhead feeder lines to and within the subdivision is warranted and justified under the particular circumstances of this case, and the deviation herein authorized and granted from the mandatory underground rules reflected in defendant's filed tariff Rules 15 and 15.1 is not adverse to the public interest.

6. Under the particular circumstances, it is fair and equitable that complainant shall have the option, or if required by local ordinance or land use policy, that all or part of such overhead feeder lines shall be installed underground. In such cases, complainant shall advance to defendant the difference between the actual cost (exclusive of ownership costs) of such underground feeder lines and the equivalent overhead actual costs. Such advance shall be refundable on the connected load basis at agreed upon annual revenues, and shall be subject to deduction for ownership costs as determined by defendant.

7. The use of actual costs of defendant as the measure of refundable advances to be ultimately made by complainant for Units Nos. 2, 3, and 4 and the remaining units of the subdivision, such costs to be refunded on a connected load basis at agreed upon annual revenues for a period of ten years, and to be subject to deduction for ownership costs, is a fair and reasonable deviation from the measures prescribed in filed tariff Rules 15 and 15.1 of defendant.

8. The partial relocation and installation of overhead distribution lines in a portion of proposed Unit No. 5 of the subdivision (approximately 465 linear feet) is warranted and justified, especially in view of the wasteful duplication of facilities and excessive costs that would otherwise result, and the deviation herein authorized for such purpose is not adverse to the public interest.

9. The deviations herein granted are not adverse to the public interest, and it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

10. The oversize lots within the subdivision; the reasonable width of utility easements in the rear yards of back-to-back lots; the improvement of quality in underground installations; and the use of joint trenches for water, telephone, and cablevision lines warrant, justify, and require the installation of underground electric distribution lines of defendant in joint utility trenches in the rear of back-to-back lots in utility easements in Units Nos. 2, 3, and 4 and the remaining units of the subdivision, except in such cases where the defendant can demonstrate it is not feasible.

Conclusions

1. As to Unit No. 2 of Plumas-Eureka Estates, the relationship of the parties is established by the contract between them authorized by Decision No. 86127.

2. As to Units Nos. 3 and 4 of Plumas-Eureka Estates, it is fair and reasonable that defendant shall finish the construction work contemplated within a reasonable time, and shall be entitled to the excess of its actual cost of such construction over the amount advanced to it by complainant, such difference to be paid from the additional monies deposited with Placer Savings & Loan Association by complainant pursuant to Decision No. 86659, and the remainder of such additional monies shall be returned to complainant.

3. Defendant, may not, with respect to Unit No. 5 of Plumas-Eureka Estates, as a condition of service, require complainant to advance, subject to refund, the cost of constructing necessary supply lines from the closest substation to the underground distribution systems in that unit unless it is agreed to by the parties or determined by this Commission that the development rate in the unit places such unit in the category of "speculative".

4. Defendant shall utilize existing overhead distribution lines instead of undergrounding them in supplying service to proposed Unit No. 5.

5. Defendant should place its lines in joint trenches supplied by the developer.

FINAL ORDER

IT IS ORDERED that:

1. Plumas-Sierra Rural Electric Cooperative, Inc., a corporation, is directed to amend its tariff filed with this Commission by eliminating therefrom any reference to rates and charges.

2. Defendant shall finish its work in Units Nos. 3 and 4 of Plumas-Eureka Estates in conformance with Conclusion 2 above.

3. Defendant shall construct its facilities in accordance with Conclusions 4 and 5 above.

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4. Complainant's petition filed February 14, 1977 to reopen the case is denied.

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

Dated at San Francisco, California, this 10th day of MAY, 1977.

Robert Batinovich
President
William Symons Jr.
Vernon L. Sturgeon
Richard D. Gravelle

Commissioners