bh alt.

Decision No. 88252

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DAVID E. PARKER,

Complainant

vs.

APPLE VALLEY RANCHOS WATER COMPANY,

Defendant.

Case No. 9942
(Filed July 11, 1975;
amended August 11, 1975)

ORDER DENYING REHEARING
OF DECISION NO. 87871

A petition for rehearing of Decision No. 87871 having been filed by Apple Valley Ranchos Water Company and the Commission having considered said petition and being of the opinion that no good cause for rehearing has been made to appear,

IT IS ORDERED that rehearing of Decision No. 87871 is hereby denied.

The effective date of the order is the date hereof.

Dated at San Francisco, California, this 13th day of DECEMBER, 1977.

Robert Batinovich
President

I would grant rehearing.
William Symons Jr.

I will file a
written dissent
Vernon L. Sturgeon

Commissioners

COMMISSIONER VERNON L. STURGEON, Dissenting

The Commission today acts to deny the defendant any opportunity to address the legal theory upon which it based its decision against that defendant. I must dissent from this grossly unfair course of action.

The record, as pointed out by the Legal Division, does not support a finding that the defendant impliedly dedicated its service to the public use. The deficiency with regard to this issue was not created by any resistance on the part of the defendant to the litigation of this issue. Nor did the Administrative Law Judge by restrictive rulings prevent the issue from being fully developed on the record. It was the plaintiff who elected not to proceed on such a theory.

Instead, plaintiff's counsel decided to proceed on a theory of discrimination among various applicants for service outside of the defendant's service area.[1/] Examination and argument focused on whether the defendant had afforded equal treatment to all applicants for water service not whether the defendant had impliedly dedicated service to the area specified in Ordering Paragraph No. 1. Even though the ALJ advised plaintiff's counsel that "implied dedication" was the best theory upon which to proceed, he declined.[2/]

1/ In his opening statement plaintiff's counsel introduced his case by stating "It is a case of simple discrimination." (Tr. p. 3)

2/ The record indicates this exchange at p. 6:
ALJ Tante: May I ask do you intend to show that they have in fact dedicated their property to a public use outside of their territorial limitation as filed with the Commission in such manner as that (it) is to an area which includes the parcel owned by Mr. Parker.
Mr. McEvoy: No, I don't think there is a dedication as such.

It appears that plaintiff's counsel needed to do little more than show up to succeed in this matter. Having failed on the theory advanced and litigated at the hearing, the Commission succeeded in finding some other theory upon which to permit his client to prevail.

What does today's decision to deny rehearing portend for future defendants in Commission proceedings? It would seem to require defendants to adopt a "shotgun defense" and formulate defenses not only to the theories of relief embodied in the complaint but for any others that could conceivably come to fruition in the minds of the Commission subsequent to hearing.

The above should not be viewed in any way as questioning the validity of the concept of implied dedication. I signed the original order based on that theory, and I would do so again if the case for implied dedication were made. Since it has been pointed out that that case was not made, at least on the record, I believe rehearing is clearly warranted. That a majority of the Commission does not embrace that view is to me puzzling and disturbing as it must be to future parties to our proceedings.

Vernon L. Sturgeon

VERNON L. STURGEON
Commissioner