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Decision No. 91426 MAR 18 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the suspension and investigation on the Commission's own motion of tariff filed by Advice Letter No. 541-W of Southern California Water Company.	Case No. 10731 (Filed April 10, 1979)

Guido R. Henry and Francis E. Lossing, Attorneys at Law, for Southern California Water Company, respondent.
Richard R. Gray, Attorney at Law, for City of Folsom, protestant.

O P I N I O N

The question to be decided in this proceeding is whether Southern California Water Company (SoCal) or the City of Folsom (City) should serve the greater part of a new industrial subdivision known as Sunrise Industrial Park (Sunrise). We hold that, as against SoCal, the City has the exclusive right to serve the area.

SoCal, by Advice Letter No. 541-W filed March 9, 1979, attempted to extend its service territory into that portion of Sunrise not within SoCal's Cordova service area, but contiguous to it. The City protested and we initiated this proceeding. Hearing was held before Administrative Law Judge Meaney on July 3, 1979 and submitted subject to filing of briefs. Temporary facilities are in use pending our decision.

General Description of the Area

Sunrise consists of 177 acres in the unincorporated portion of Sacramento County. Its northern boundary is a track of

the Southern Pacific Transportation Company which runs parallel to and on the south side of Folsom Boulevard. Its western boundary runs south from the track along Citrus Road and Sunrise Boulevard. Its irregular boundary to the east and south follows the Folsom Canal.[1/]

The Sunrise development is about five to six miles, on a straight-line basis, from the developed portion of the City. A mostly undeveloped portion of the City extends in the direction of Sunrise. The closest point of approach of the city limit appears to be at the eastern boundary of Highway 50 as it crosses Folsom Boulevard northeast of Alder Creek (not to be confused with another intersection of these two highways west of Sunrise Boulevard). This point of the City is roughly 3.8 miles from Sunrise.

City Administrator James Erickson testified that the City considered Sunrise to be within its "sphere of influence". A proposal to this effect was submitted to the Sacramento County Local Agency Formation Commission (LAFCO), which had not passed upon it yet. There is no competing "sphere of influence" claimant.

SoCal's Cordova service area is generally adjacent to Sunrise's western boundary, bordering along Sunrise Boulevard and Citrus Road: but at one point the Cordova service area actually extends into Sunrise. (There is no dispute over SoCal's right to serve that portion of Sunrise within the Cordova District.) This is shown in detail in Exhibit 4 and is in the northwest corner

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1/ Describing the exact location of the property with precision is made difficult by the fact that the various maps submitted as exhibits do not readily correlate with each other because they use different coordinates and do not always show the same landmarks. The best starting point is the map in Exhibit 3, the advice letter.

of Sunrise roughly in the area where Citrus Road intersects with Sunrise Boulevard and with Folsom Boulevard. The result is that, of 33 lots in Sunrise, the present Cordova service area includes all of lots 1 through 4 and cuts through parts of (from north to south) lots 5, 30, 28, 27, 32, 33, 35, 15, 14, and 13 at various angles. A comparison of the configurations of the lots, on the one hand, and the service area boundary, on the other, demonstrates that the lots are subdivided with no reference whatever to the boundary. The Cordova service area occupies about one-fourth of the Sunrise subdivision.

The Folsom Division (the former Folsom service area of SoCal) extends from the eastern boundary of the Cordova Division to, and including the developed portion of the City (see Exhibit 1).

Prior to 1966 the voters of the City decided that it should operate its own water system. The City petitioned the Commission to fix just compensation for SoCal's Folsom Division (Application No. 46026, a copy of which was received as Exhibit 11). The City and SoCal negotiated a settlement and submitted an agreement (Exhibit 8 in this proceeding). The Commission approved it in Decision No. 71889 dated January 24, 1967 (Exhibit 13). The entire Folsom Division, both inside and outside the City, was transferred to the City.

Legal and Contractual Issues

The parties raise several contentions in order to claim that each is entitled to serve the area as a matter of law. Much of the argument surrounds paragraph 8 of the agreement, which reads:

> "Buyer [City] will not sell or deliver water for resale or use within the boundaries of the Cordova Division of Seller [SoCal] as it existed on December 11, 1963, except to Seller or its assigns; and Seller will not

> sell or deliver water for resale or use within the boundaries of the Folsom Division of Seller as it existed on December 11, 1963, except to Buyer or its assigns."

SoCal first contends that paragraph 8 is part of a private agreement and therefore is not binding on the Commission. This contention is the result of removing certain language in the agreement and in Decision No. 71889, which approved it, from context and does not warrant detailed discussion.

Nor is it sensible to argue that the agreement is simply private because the Commission cannot "create a water service area for Folsom" (SoCal's opening brief, page 11). It is true that we cannot directly create a municipal water district, but it is within our power, and even our duty, to limit the service areas of investor-owned water utilities when necessary so that adjoining publicly owned water systems may develop in an orderly fashion and so that, in the overall area, the public is best served. (Ventura County Waterworks District v Public Util. Com. (1964) 61 Cal 2d 462; 29 Cal Rptr 8; Suburban Water Systems (1974) 77 CPUC 313, 315-317.) It was in this role that we approved the agreement in Decision No. 71889.

Cases cited in SoCal's brief[2/] to the effect that the agreement should be considered merely private are obviously not in point. All of them concern agreements not approved by the Commission, and there are other dissimilarities from the case now before us.

2/ California Electric Power Co. v Southern California Edison Co. (1957) 55 CPUC 420; Meadow Valley Lumber Co. v Pacific Gas and Electric Co. (1950) 50 CPUC 270; Mary K. Wohlford (1917) 12 CRC 505.

SoCal then makes two additional contentions on why, as a matter of law, it should be allowed to serve all of Sunrise: (1) that Sunrise is located entirely within SoCal's present certificated area; (2) even if it is not, the part of Sunrise which is outside the service area is contiguous to the served area and therefore SoCal may extend service into it.

We consider arguement (1) to be insubstantial, as can be seen from a review of the entire agreement and Decision No. 71889.

The second argument deserves discussion. Under Public Utilities Code Section 1001, a certificated utility may extend service into "contiguous" territory which was "not theretofore served by public utility of like character", without securing a certificate for such extension. The argument is that if it is assumed that Decision No. 71889 removed the Folsom service area from SoCal's service territory, then it is not served by any other public utility and is contiguous to SoCal's Cordova area.

This contention is untenable. We deal here with areas of service, not necessarily whether plant has been installed at a particular point. The Folsom service area was formerly SoCal's; it contracted to sell all its interests in it to the City. The provisions of Section 1001 concerning extension into unserved contiguous areas were not intended to include such a situation. (Cf. National Communications Systems, Inc. (1971) 72 CPUC 238.) Here, the territory was "theretofore" served by a "public utility of like character" - SoCal itself, which sold its interests. Were we to rule otherwise, the result would be that Commission approval of the SoCal-City agreement would be largely meaningless, since SoCal could gradually invade the territory piecemeal by providing service to new "contiguous" developments.

SoCal lastly argues that its service proposal is superior to the City's and that if the Commission agrees, it has the power

to modify the agreement since it would be in the public interest to do so. The City counters by arguing that this is true as to an agreement between two utilities under our jurisdiction, but not when one party is a municipality. Since the assets were transferred to a public entity, in this case, a municipality, they have vested in the City (so the argument runs) and the Commission may not lawfully make any modification which interferes with the vested rights of an entity not under its regulatory jurisdiction. SoCal's answer to this is its previously discussed point that we did not create a service area for the City.

We believe the City has raised an important issue, but without recognizing its real significance. The point is not whether one of the parties is a city or a regulated public utility, but rather whether the Commission can issue an order which has the effect of retransferring a portion of property rights sold, in a sale approved by the Commission, to the seller, without just compensation to the buyer. The question answers itself: such an order would be confiscatory and would violate the buyer's constitutional rights[3/] to just compensation.

We have said we agree with SoCal that the City did not acquire an exclusive service area by order of this Commission.[4/] Our order did have two effects, however. First, SoCal's service area

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3/ U.S. Constitution, 5th Amendment; California Constitution, Article 1, Section 19. In this connection we note that a city is a municipal corporation, and a corporation is legally a "person". Even assuming some limitation on the constitutional rights of a municipal corporation, a city, under modern principles of "standing", can claim such rights on behalf of its citizens, taxpayers, and bondholders.

4/ For example, a mutual water company could be formed within the former Folsom service area, at least if it were outside the corporate limits of the City.

was restricted; second, and central to the point under discussion, it approved the SoCal-City agreement. That agreement is styled "Agreement for the Purchase and Sale of Certain Assets of Folsom Division of Southern California Water Company." Article 3.05, a condition precedent to SoCal's obligation to sell, reads:

> "The obligation of Seller [SoCal] to sell the Property to Buyer [City] is subject to the conditions precedent that such sale be authorized by the Commission and that Seller be relieved of its duties as a public utility with respect to the Folsom Division and such obligation is further subject to the condition that the Purchase Price be delivered to Seller at the Closing."

Ordering Paragraph 4 of Decision No. 71889 relieved SoCal of such obligations, and the sale was then consummated. The consummation must be taken to have been accomplished in accordance with another condition precedent in the agreement, the very next paragraph of it, Article 3.05(a), which reads:

> "The obligations of each of the parties hereunder to consummate the purchase and sale contemplated hereby are subject to the condition precedent of the effectiveness of such an order or orders of the Commission as are required by law to authorize the sale of the Property to Buyer as herein contemplated."

That the agreement did not include language transferring the exclusive right to sell water from SoCal to the City is understandable; as SoCal points out, we could not make such an order since we lack jurisdiction to establish a service area for a publicly owned water system. However, as part of the arm's-length bargaining which resulted in the sale, the agreement includes SoCal's being "relieved" of its duties to furnish water to the area. The history of the steps leading to the agreement, and to the Commission's decision approving it, does not reasonably permit

us to interpret this "relief" as the mere exchange of a compulsory obligation on SoCal's part to serve its former Folsom Division for the right to invade it voluntarily at a later date.

Most importantly, it must be assumed that part of the purchase price of $825,000 was in consideration of SoCal's relinquishing its right to distribute and sell water in the area. Such a relinquishment is certainly of more than nominal value to the City, since, while the City may not have any exclusive right to expand into the area, (see footnote 4), the threat of competition from an existing public utility in the immediate area is removed. The agreement contains no apportionment of the purchase price by various categories, but the whole agreement makes it plain that SoCal intended to sell its entire right, title, and interest in its former Folsom Division to the City.[5/]

With this analysis, we conclude that SoCal received valuable compensation from the City for, among other things, relinquishing its right to sell and distribute water in its former Folsom Division, and that the City acquired, for valuable consideration, the right to expand into the area and sell and deliver water therein without competition from SoCal. We further conclude that an order of this Commission allowing SoCal to reenter the territory, without compensating the City for such reentry, is violative of the City's constitutional rights.

The City did not approach the argument concerning the jurisdiction of the Commission to allow reentry from this standpoint; therefore we have no evidence before us on the value

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5/ There are certain particular exclusions set forth in Section 1.02 of the agreement, none of which encompass any right of SoCal to continue to sell water in all, or any portion of, the territory.

of the area (to the City for water service purposes) which SoCal proposes to serve. Reopening the case to hear such evidence is not in the public interest because the developer of Sunrise is anxious to know who is to serve water to the area in question so that he may proceed with the development (temporary facilities have been completed and are in use), and, in any event, such an issue is not encompassed by an investigation and suspension proceeding such as this one.

Our conclusion as to the issue presented in this case is that SoCal may not serve the area for which it filed the advice letter in Exhibit 1. This being the case, we need not analyze the competing service proposals of SoCal and the City.

Two final points of law require discussion. Based on certain testimony of the City Administrator, SoCal contends that the City intends to misuse its right to sell water in the area via the device of controlling land use development by denying water service for land use developments it disfavors, which are outside the city limits but inside the service area. SoCal is not an aggrieved party regarding such a possibility and may not raise the issue in this proceeding. (Liberty Warehouse Co. v Burley Tobacco Growers Cooperative (1927) 276 US 71; Hanson v Denckla (1957) 357 US 235.)

SoCal also argues that under Northern California Power Agency v Public Utilities Commission (1971) 5 Cal 3d 370, 96 Cal Rptr 18, the SoCal-City agreement, at least as to paragraph 8, quoted previously, is an "unlawful agreement to divide markets and an unlawful covenant not to compete". (SoCal's opening brief, page 25.)

We first observe that there was no challenge to Decision No. 71889, and we believe that after consummation of the sale and

a lapse of 12 years (and there being no showing of fraud or duress) the parties are estopped from denying the validity of the agreement and the effectiveness of the Commission's order approving it.[6/] (See also Article 3.05 of the agreement, quoted previously.)

More importantly, however, SoCal misapplies the principles of Northern California Power. In that case, a regulated utility subject to our jurisdiction applied for a certificate to authorize construction and use of geothermal power units. Northern California Power Agency contended that the contracts between the utility and certain manufacturing companies violated state and federal antitrust laws (which the utility denied). The Commission declined to make findings on such an issue. The Supreme Court annulled the Commission's order, holding that we should take antitrust considerations into account in determining whether a contemplated project will advance the public interest. The Court discussed approvingly language in Northern Natural Gas Co. v Federal Power Commission (D.C. Cir. 1968) 399 F. 2d 953 to the effect that although the Federal Power Commission was "not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is bound to weigh antitrust policy." (33 F. 2d at page 958; footnote omitted.) The California Supreme Court reasoned that the alleged

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6/ Cf. Northern Cal. Assn. to Preserve Bodega Head & Harbor, Inc. v PUC (1964) 61 Cal 2d 126; 37 Cal Rptr 432, which held that a party which fails seasonably to seek judicial review of a Commission decision cannot cure such failure by the device of a series of late-filed petitions to reopen and for rehearing with respect to the denial of reopening, basing its right to review on the latest decision, when the party, in fact, seeks review of the earlier decision.

antitrust problems connected with the utility-manufacturer contracts were within the framework of the application and should have been considered.

Northern California Power cannot, however, be stretched to require us to overlook our specific constitutional or statutory duties, or stretched even further to the point of overthrowing the basic concept of substituting state-regulated monopoly for free competition in the utility field. This Commission is directly charged with the regulation of investor-owned water utilities, including the structure of their service areas.[7/] One of the features of that regulation, from its inception, has been the determination that direct competition in the same geographic area between two utilities of the same type (regardless of whether one of them is publicly owned) is wasteful and counterproductive due to the large plant investment and other factors such as the need for excessive physical facilities in a given area, and, therefore, that regulated monopoly should substitute for such competition. (Pacific Gas and Electric Co. v Great Western Power Co. (1912) 1 CRC 203; Oro Electric Power Co. (1913) 2 CRC 748; cf. Suburban Water Systems, supra.) It follows that if this Commission, in the exercise of its authority, can determine the boundaries of a service area of a public utility water company under its jurisdiction, it may approve an agreement, after due consideration, between a city and a water utility which fixes those boundaries, notwithstanding that there are, necessarily, "monopolistic" features to such an agreement in the form of specific service territorial limitations.

7/ California Constitution, Article XII; Public Utilities Code, Section 1001. See also Sections 1002-1006, 241, 701, 702, 761, and 762. (Citations relating to rates, tariffs, and certain other subjects not included.)

Furthermore, and contrary to SoCal's assertions, agreements such as the SoCal-City document are not (at least if approved by the Commission) "restraints of trade" violative of the antitrust laws. The federal courts have repeatedly held that the prohibitions of the Sherman and Clayton acts do not extend to trade-restraining acts done pursuant to a state-imposed scheme of regulation designed to substitute for competition in a specific area. (Parker v Brown (1943) 317 U.S. 341; Schwegman Bros. v Calvert Corp. (1950) 341 U.S. 384, 389; Allstate Ins. Co. v Lanier (4th Cir. 1966) 361 F. 2d 870; Washington Gas Light Co. v Virginia Electric Power Co. (4th Cir. 1966) 438 F. 2d 248; Gas Light Co. of Columbus v Georgia Power Co. (5th Cir. 1971) 440 F. 2d 1135; cert. den. 404 U.S. 1062 (1972); cf. Terminal Warehouse Co. v Pennsylvania R. Co. (1936) 297 U.S. 500, 513-514; United States v Navajo Freight Lines (D.Colo. 1972) 339 F. Supp. 554; appeal dism. sub nom. Garrett Freight Lines, Inc. v United States (1972) 405 U.S. 1035).

In sum, the California Supreme Court, in Northern California Power, did not forbid this Commission from taking action which in a private context might be unlawfully monopolistic; rather the court held that we must weigh opposing evidence and arguments before doing so, to determine whether any such action is in the public interest. In this case we have done exactly that.[8/]

8/ Evidence on the competing service proposals was admitted at the hearing and consumed a major portion of the hearing time.

In so doing we have determined that legal problems exist which require us to sustain the City's right to serve the area in question without competition from SoCal, and therefore we do not reach the issues relative to the competing service proposals.

Findings of Fact

1. Sunrise consists of 177 acres in the unincorporated portion of Sacramento County, located as described in this decision under the heading "General Description of the Area".

2. The former Folsom service area of SoCal (Folsom Division) included the incorporated portion of the City and extended generally westward several miles into the unincorporated portion of Sacramento County, contiguous, in part, to the Cordova service area of SoCal (Cordova Division). The boundary between the divisions passes through Sunrise as shown in Exhibit 4.

3. Because the City voted that it should operate its own water system, it petitioned the Commission in 1966 to fix just compensation for SoCal's Folsom Division (Application No. 46026). While this application was pending, the City and SoCal negotiated a settlement (Exhibit 8 herein) which the Commission approved in Decision No. 71889 dated January 24, 1967 (Exhibit 13). The sale of the property was thereafter consummated.

4. In entering into the agreement, SoCal intended to sell, and the City intended to buy, all SoCal's right, title, and interest in its former Folsom Division, except for certain particular exclusions set forth in Section 1.02 of the agreement.

5. SoCal received valuable compensation from the City for relinquishing its right to sell and deliver water in its former Folsom Division, and the City acquired, for valuable consideration, the right to expand into the area and sell and deliver water therein without competition from SoCal.

Conclusions of Law

1. The SoCal-City agreement was approved by the Commission and is not simply a private contract between the parties.

2. The provisions of Public Utilities Code Section 1001 concerning extension of a public utility's service into unserved "contiguous" territory were, and are, not intended to apply to a situation in which a public utility sells its interests in such territory and later attempts to serve all or part of it.

3. While we have jurisdiction to modify agreements such as the SoCal-City agreement, we may not do so if the modification will result in denial to one or more parties of their constitutional rights.

4. Modification of the SoCal-City agreement, or any other order which would permit SoCal to serve and deliver water within the territory of its former Folsom Division, would deprive the City of its property without just compensation, unless full evidence of valuation is taken, upon which we could base a finding of just compensation to be made by SoCal to the City as a condition precedent to SoCal's authority to reenter part of its former Folsom Division and serve and deliver water therein.

5. No such evidence was offered, and it is not in the public interest to continue or reopen proceedings in this case to take it, because the issue is beyond the scope of an investigation and suspension proceeding and because it would be unfair to the developer of Sunrise to encounter further delay.

6. The SoCal-City agreement, approved by this Commission after due consideration, is not violative of federal or state antitrust laws, and our approval thereof is not contrary to the principles of Northern California Power Agency v Public Utilities Commission (1971) 5 Cal 3d 370, 96 Cal Rptr 18.

O R D E R

IT IS ORDERED that:

1. Southern California Water Company's Advice Letter No. 541-W is permanently suspended.

2. This proceeding is closed.

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

Dated MAR 18 1980, at San Francisco, California.

President

Commissioners

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.