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Decision No. 91733 MAY 6 1980

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Antelope Valley Water Co. for authority to abandon its rights, privileges, and obligations to furnish water service to its Avenue E Lancaster area, Los Angeles County, and Morse area, Kern County.	)	Application No. 58734 (Filed March 9, 1979)

Gibson, Dunn & Crutcher, by Raymond L. Curran, Attorney at Law, for applicant.
Knapp, Grossman & Marsh, by Thomas A. Doran, Attorney at Law, for Angela Bongiovanni, protestant.
Robert M. Mann, for the Commission staff.

O P I N I O N

Applicant, Antelope Valley Water Company (Antelope), requests authority to abandon its certificate of public convenience and necessity and to be relieved of its obligation to furnish water service in its Avenue E and Morse service areas located near Lancaster, California. Applicant states that: (1) it is not presently providing water service in either area; (2) public convenience and necessity do not now require service in these two isolated desert areas; (3) it hardly seems reasonable to require it to continue to stand ready to offer water service in these remote and totally undeveloped areas for the sole purpose of offering property owners an opportunity to speculate on the future value of their property; and (4) subject to Commission approval, it is ready and willing to donate what remains of the systems to some entity or individuals, to be held in public trust for the benefit of the property owners.

Protestants state that: (1) they purchased lots in the service areas in reliance on applicant's statements to the Department of Real Estate of the State of California that it would supply domestic water service; (2) applicant's predecessor in interest received contributions of pumping plant and advances from the developers to construct distribution systems in exchange for the promise that water service would be provided by a public utility; (3) if applicant's request to decertify is granted, their property will become worthless; and (4) since applicant entered into the transaction in the expectation that it could profit from the sale of water to purchasers of property, it should not be allowed to renege on its obligation.

Alternatively, protestants argue that if applicant's request to decertify is granted, then applicant should be ordered to: (1) donate all utility plant originally entrusted to it (pumps, pressure pump and tank, storage tank, mains, and well site) or replacements to a mutual water company or public entity since this would avoid unjust enrichment to applicant and yet relieve applicant from an apparently uneconomic service area; (2) compensate purchasers of property who bought in reliance on applicant's promises of water, compensation to be based on the present difference in market value between property with and without water; and (3) return to protestants the $14,500 they "contributed" to the system.

Notice of applicant's plan to decertify the service areas was given to property owners in the Morse area by letter dated December 7, 1978 and property owners in the Avenue E service area by letter dated February 28, 1979. The Commission received several letters of protest and public hearing on the matter was held before Administrative Law Judge B. Patrick in Los Angeles on December 17, 1979. Notice of hearing was mailed to all property owners of record. The matter was submitted on February 20, 1980 upon receipt of briefs.

Orig. Agenda Clerk

Testimony for applicant was presented by C. M. Brewer, chief executive officer and chairman of the board of Antelope. Testimony for protestants was presented by property owners Anne Hadley, Hope Gentry, and Felicia Kosik, and by developer of the Avenue E service area, Angela Bongiovanni, who was represented by counsel.

History

Antelope was organized in 1956 by William N. Taylor who remained in control until 1966 when Dominguez Water Corporation (Dominguez) acquired all the common stock of Antelope. Since that time, Antelope has been operated as a division of Dominguez.

Avenue E Service Area

This area, which is also known as Record of Survey No. 2346, consists of a parcel of land 100 acres in size divided into 40 two and one-half-acre parcels. This property was developed by Andrew Bongiovanni and his sister, Angela Bongiovanni, in 1957. In order for the Bongiovannis to sell their lots, they contributed certain pumping equipment, including a well, and advanced $14,500 to Taylor who in turn installed a distribution system and organized a public utility water company certificated by Decision No. 54854 dated April 16, 1957. The $14,500 amount was subject to a refund agreement and the Bongiovannis accepted Taylor as the sole obligor. Since the time period (20 years) for making refunds lapsed, the refund agreement is no longer in issue.

Morse Service Area

This area, which is also known as Tract or Record of Survey No. 2012, consists of a tract of land 160 acres in size divided into 60 parcels. This tract was developed by Margaret Morse in 1958. Taylor, who had by this time formed Antelope, undertook, subject to a refund agreement, to construct a distribution system. By Decision No. 57232 dated August 26, 1958,

applicant was authorized to assume Taylor's obligations for facilities installed in the Morse area. Refunds are not in issue since the time period (20 years) for making refunds lapsed.

History of Water Service in the Areas

(a) Morse Service Area

No request has ever been made for water service from any of the owners of the 60 parcels in that tract nor has any water service ever been rendered by applicant in that area.

(b) Avenue E Service Area

Water service was provided to one of the parcels which was used by the Bongiovannis for a real estate office after the service area was certificated in 1957. Service to that one parcel continued, for a number of years at least, but it is certain that by 1966, the time when Dominguez acquired the stock of applicant and took over its operation, that service had terminated and no water service was being furnished.

Since 1966, no applications for water service have been received nor has applicant rendered any water service in the Avenue E service area. Late in 1978 Hope Gentry, owner of one of the lots in the Avenue E service area, inquired about water service. Her testimony shows she had no immediate need for service but was concerned about her investment. Applicant responded that it was not in a position to serve. This inquiry prompted applicant to seek decertification of the service areas.

Present Condition of Water Facilities

C. M. Brewer testified that when Dominguez took over the ownership and operation of Antelope in 1966, there was evidence that a complete water system had been installed in the Avenue E service

area and that the well site in the Morse service area had been improved with a well, tanks, and pump housing. Brewer further testified to the fact that over the years the pressure tanks from those two sites had been sold by applicant and that one of the storage tanks had been moved to another location within applicant's service area. Brewer said that he had no knowledge as to what had happened to any pumping equipment or other related facilities which may have been installed by Taylor at the time applicant had been certificated.

Turning to the question of the cost of refurbishing or replacing the systems, Brewer stated that a recent survey of the two service areas showed that the remaining facilities located there have suffered substantial damage and vandalism and that applicant would not be able to render water service in either of the areas without expending substantial sums of money. He estimated the cost of refurbishing the pumping system at approximately $19,500 for each service area. He was unable to say how much it would cost to refurbish the distribution system. He estimated the annual revenue requirement at $6,560 per system. Additionally, Brewer was unable to state whether or not there is an adequate supply of water in the wells or, if so, whether it is of a quality which would be allowed to be used for domestic water service under today's public health standards.

Discussion

The issue before us is whether a public utility has an obligation to continue to stand ready to serve, unlimited as to time, a service area which has no consumers and is no longer viable when the only interest to be protected is that of the property owners whose property values could be diminished by the absence of a public utility water system.

Applicant contends that Commission Resolution No. M-4708 dated August 28, 1979 supports decertification of unviable or marginally viable service areas. We disagree with applicant's broad interpretation and should explain that while the resolution does set forth the Commission's general policy on Class D water utilities, it is not an inflexible rule. The question of viability of a water utility is decided on a case-by-case basis (Decision No. 91332 dated February 13, 1980 in Application No. 58763).

Protestants contend that Resolution No. M-4708 is not controlling since it does not cover the facts in the case before us, i.e., decertification on petition of the utility. While we agree with protestants that Resolution No. M-4708, paragraph (c), does not specifically mention decertification, it does set forth three tests for viability as follows:

(1) Proposed revenues would be generated at a rate level not exceeding that charged for comparable service by other water purveyors in the general area;

(2) The utility would be self-sufficient, i.e., expenses would be supported without their being allocated between the proposed utility and other businesses; and

(3) Applicant would have a reasonable opportunity to derive a fair return on its investment, comparable to what other water utilities are currently being granted.

Applying the above tests to the evidence before us, it is quite clear that the Avenue E and Morse service areas are not viable systems and are not likely to become reasonably viable in the foreseeable future because the evidence shows that: (1) there is no need for service now or in the immediate future; (2) there are no immediate prospects of development; and (3) the costs of refurbishing the systems are excessive and it will not be possible to render service at compensatory rates which are reasonable.

Protestants argue that: (1) it is a fundamental principle of law that a public utility cannot abandon its duty to serve its dedicated service,[1/] and (2) utilities have been compelled to deliver water even though it would impose a financial hardship.[2/] They also argue that even if a water utility has failed to maintain its equipment and ceases to function, that does not excuse it from domestic water service obligations within its dedicated service area.[2/] We have reviewed the cases cited and conclude that they are not on point since they deal with rights of consumers to water service. We are not deciding the rights of consumers in the case before us, since the record is clear that the utility has no consumers and is not likely to have any in the foreseeable future.

1/ Brewer v Railroad Commission (1922) 190 Cal 60; Franscioni v Soledad Land and Water Company (1915) 170 Cal 221; Leavitt v Lassen Irrigation Co. (1909) 157 Cal 82.

2/ Pacific Water Co., D.57705, A.40260 (1958).

Protestants also cite the case[3/] of a utility which was ordered to provide water service to complaining parties over the protest of the utility, the evidence showing that the utility had made representations to complainants that water service would be available and that complainants acted in reliance thereon. We have reviewed the case cited which involved a proposed subdivision to serve 190 additional dwelling units in the city of Petaluma and the issue was the ability of the utility to serve because of insufficient water supply. Here again the controversy involved present and prospective consumers who had a need for water supply. We therefore conclude that this case cited by protestants is not on point.

There was a suggestion in some of the written protests filed and from protestants testifying in person at the public hearing that they believed that applicant should have a continuing obligation, unlimited as to time, to maintain the facilities which were installed or to stand ready to provide the facilities required to render service. We agree with applicant's argument that it is unreasonable to expect applicant, having undertaken to render water service in an area, the development of which was clearly speculative, should be required to continue to expend considerable sums of money for more than 20 years in order to be ready to render service in the event that the development was eventually successfully completed.

Turning to protestants' contention that if the Commission grants decertification, the purchasers of property who bought in reliance on applicant's promise of service should be compensated for diminution in the value of their land, we have to point out that for many years it has been the policy of this Commission

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3/ California Water Service Co. (1956) 55 Cal PUC 285.

that all risk of developing a water distribution system for a residential subdivision should not be borne by the utility and its customers. This is reflected in Decision No. 64536 dated November 8, 1962 in the investigation of the Water Main Extension Rule. Therefore, since the risk is placed on the developer, it is axiomatic that a purchaser of a lot, whose rights as a consumer have not vested, has no better claim against the utility than the developer from whom the purchase was made.

Protestant Bongiovanni's argument that applicant be required to return the $14,500 "contributed" has no merit. The money was advanced to applicant under a 20-year, 22 percent of revenue refund agreement. Since no revenues were generated and the 20-year period lapsed, the Bongiovannis are not entitled to any refund. This reflects the application of the Water Main Extension Rule referred to earlier, which places substantial risk on the developer.

Protestants have suggested that it would be inequitable to allow applicant to be relieved of its obligation to render water service in this area after the developer and, at least indirectly, the ultimate purchasers of the property had provided the funds for the facilities with which to render such service. Such an argument overlooks the fact that the developer and the property owners have already benefited from the payment of such funds. Applicant for many years held itself in readiness to render water service to them and they had no need for such service because they chose not to develop their property. No suggestion has been made by any protestant or property owner that applicant was not ready, willing, and able to render water service during the early years of its certification. This was demonstrated by the fact that, as Angela

Bongiovanni testified, there was water service rendered to one of her parcels after applicant had been certificated to serve the area. It would be difficult to suggest a fixed period of time for which it would be reasonable to expect applicant to hold itself in readiness to serve, but we believe that a period of more than 20 years is clearly unreasonable.

Findings of Fact

1. There are no consumers taking water service in either service area.

2. There has been no request for water service since Dominguez took over applicant water company in 1968.

3. There is no evidence of development occurring within the service areas in the foreseeable future.

4. No present or future need for water service in either service area has been demonstrated.

5. Both water systems have been vandalized, are dilapidated, and will require large expenditures if they have to be refurbished.

6. Because of the large expenditures required to refurbish the systems, water service cannot be rendered at reasonable rates which are compensatory to the utility.

7. The Avenue E and Morse service areas cannot support a viable water system at the present time or in the foreseeable future.

8. Applicant has no duty to indefinitely continue to maintain facilities to serve a speculative development which has no consumers either presently or in the foreseeable future.

9. The Commission's own policies favor the decertification of unviable systems serving no consumers.

10. Applicant's request to abandon its certificate of public convenience and necessity should be granted.

11. Applicant may abandon the pumping and distribution systems and well sites.

12. Applicant is ready, willing, and able to transfer and assign all of its interest in the remaining water production and distribution facilities in each of these areas, without cost, to some entity designated by the Commission such as a property owners' association, a mutual water company, a public district or the individuals, or their successors, who made the facilities available to applicant, to be held in public trust for the benefit of the property owners in each of these areas.

13. If there is a need for domestic water service in one of these areas at some future date, the transfer and assignment of these remaining facilities will enable the then owners of the land in each area to cooperate and create some entity, whether public or private, to renovate the facilities and to provide whatever additional facilities may be required so that the owners of the land in these areas will be able to obtain water service.

Conclusions of Law

1. A water utility does not have a continuing obligation, unlimited as to time, to maintain facilities which were installed and to hold itself in readiness to serve a speculative development which has no consumers and where no present or future need for water service has been demonstrated.

2. Public convenience and necessity do not now require water service to be provided to the Avenue E and Morse service areas.

3. The application should be granted.

O R D E R

IT IS ORDERED that:

1. After the effective date of this order, applicant, Antelope Valley Water Company, is authorized to abandon and discontinue water service in its Avenue E and Morse service areas and to cancel tariffs for service therein.

2. Applicant is authorized to abandon the remaining water facilities, including the wells and well sites, so as to relieve applicant of the continuing obligation to pay taxes on these facilities.

3. If the authority herein granted is exercised, applicant shall, within thirty days thereafter, notify this Commission in writing of the date of such discontinuance of service and of its compliance with the terms of this order.

4. Within thirty days after the date of this order, applicant shall notify in writing each and every property owner of record affected by this order that:

(a) It has abandoned water service in accordance with the authorization granted herein.

(b) It is ready, willing, and able to transfer and assign all of its interest in the remaining water production and distribution facilities in each of the service areas, without cost, to some entity designated by the Commission such as a property owners' association, a mutual water company, a public district or the individuals, or their successors, who made the facilities available to applicant, to be held in public trust for the benefit of the property owners in each of these areas.

Applicant shall file with this Commission a certified statement that such notice has been duly given, within ten days thereafter.

5. Upon due compliance with all of the foregoing requirements of this order, applicant shall stand relieved of all further public utility obligations and liabilities in Record of Survey Nos. 2012 and 2346 in connection with the operation of the public utility water systems herein authorized to be abandoned and service therefrom discontinued.

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

Dated MAY 6 1980, at San Francisco, California.

President

Commissioners