

ORIGINAL

Decision No. 92180 .. SEP 3- 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

KENNETH R. TUNSTALL,

Complainant,

vs.

CALIFORNIA WATER SERVICE COMPANY,
a California corporation,

Defendant.

Case No. 10842
(Filed March 21, 1980;
amended March 28, 1980)

William G. Fleckles, Attorney at Law, for
Kenneth R. Tunstall, complainant.
McCutchen, Doyle, Brown & Enersen, by
A. Crawford Greene, Attorney at Law, for
California Water Service Company, defendant.

O P I N I O N

Statement of Facts

In response to a request from Northern California Savings & Loan Company (Northern California), owner, and with Harrod Homes (Harrod), developer of an 80-home subdivision named Vista Del Rio (Vista), for design and construction of a quality subdivision water system in Vista, California Water Service Company (Cal-Water) on October 22, 1979 filed Application No. 59225 with this Commission for a certificate of public convenience and necessity to construct that system and for authority to deviate from its filed Rule No. 15, Main Extensions, in regard to that certificate.

Meanwhile Alisal Water Company (Alisal), a small neighboring Salinas public water utility, learned of Cal-Water's application, and desiring to serve the area itself, on November 20, 1979 filed a timely protest to Cal-Water's application, following this on December 6, 1979 with its own application, No. 59320. Much of the engineering on Alisal's application was prepared by a licensed civil engineer, Kenneth R. Tunstall, then Alisal's consultant.

The two utilities proposed fundamentally the same installation, except that Alisal's was somewhat more utilitarian, and, through proposed use of in-house labor and forbearance to charge for overhead and profit, was estimated to cost less. Following two days of public hearing in Salinas, the consolidated matters were submitted on December 28, 1979.

Early in January 1980, the developers, with considerable money invested and facing accelerating costs and interest rates as well as additional delays as the consequence of Alisal's unexpected intervention, determined to go ahead and do the installation of the underground piping portion of the overall water system project themselves. Accordingly, using Cal-Water's specifications and plans and leaning heavily upon Cal-Water for advice, they, late in January, privately solicited bids from selected area subcontractors. Among those seeking to bid were West Valley Construction Company (customarily used by Cal-Water for its work), Granite Construction, Central Coast Pipeline Construction Company (Central Coast) (Central Coast previously had done work for both Alisal and Harrod), and Robert T. Adcock, president and general manager of Alisal. At \$125,000 Central Coast got the job and began work the first week of March 1980, using Cal-Water's specifications and plans.

During the period the underground piping was installed, Cal-Water had various of its field personnel including its general foreman on the noncontiguous jobsite much of the time, taking measurements and observing the work, with the expressed intention of preparing for Cal-Water a set of "as built" drawings against the eventuality that Cal-Water would ultimately be called upon to operate and become the owner of the system.

Shortly after work began Adcock learned from his stepson (who worked as a laborer on the Vista job for Central Coast) that Central Coast had started the installation. By personal visits to the site Adcock confirmed the information, and also formed the opinion that Cal-Water's personnel were doing more than merely observing and that they were in some instances covertly supervising. About the same time Tunstall learned that Central Coast was doing the underground work. After conferring it was agreed between Adcock and Tunstall that the latter (now a director of Alisal as well as its consultant), in his capacity as a Cal-Water ratepayer in the Salinas District, would at Alisal's expense file a formal complaint before the Commission, directed against Cal-Water under provisions of Section 1006 of the Public Utilities Code for engaging as a utility in construction work without having secured a certificate of public convenience and necessity. It was also determined that Tunstall would try to obtain a cease and desist order to halt Cal-Water's participation. On March 21, 1980 this complaint was filed before the Commission. An amendment to the complaint was filed on March 28, 1980. By this time the installation of the facilities, except for service cocks and related fittings, not scheduled to occur for another two or three months, was completed.

In its answer filed on April 16, 1980, Cal-Water denied that it or its employees had been engaging in "construction or supervisory" activities on the Vista project. Cal-Water did admit to having had personnel regularly visit the jobsite, but asserted that their activities were limited to taking reasonable steps to confirm that the underground facilities installed by Central Coast were being installed in accordance with the plans and specifications Cal-Water had originally provided Northern California as part of its contract to do the installation. Assertedly, the purpose of the numerous visits to the project was to measure and verify so as to obtain accurate "as built drawings". Thus, if the certificate were ultimately awarded to Cal-Water it would know precisely where the by-then backfilled underground installations were. Cal-Water pointed out that nothing prevented Alisal from taking the same precautions.

A duly noticed public hearing was held before Administrative Law Judge John B. Weiss in San Francisco on April 25, 1980 and concluded on May 13, 1980, at which latter time the matter was submitted.

On June 3, 1980 the Commission issued Decision No. 91857 in Applications Nos. 59225 and 59320. By that decision we awarded the certificate of public convenience and necessity for the Vista project to Cal-Water and denied Alisal's application.

Discussion

By this complaint Tunstall sought an ex parte Commission order commanding Cal-Water to cease and desist from all construction work on the Vista project and to refrain from such activities pending a decision by the Commission in the then still undecided consolidated matter of the Cal-Water and Alisal applications. Under provisions of

Section 1702 of the Public Utilities Code, Tunstall has standing to bring this complaint; and under the provisions of Section 1006 of the same Code, the Commission has jurisdiction to issue such an order. However, the order requested is an extraordinary remedy and while it is within our discretion to enter it, usually we are loath to do so unless some substantial or irreparable injury would result to the complainant's interest were we not to do so. In the instant case such did not appear to be the situation to the Administrative Law Judge. Accordingly, he correctly determined to go to hearing.

Objectively speaking, it appears that Cal-Water's "construction and supervision" participation in this project necessarily must have been limited in nature and minor in extent. We are aware from the consolidated record in Applications Nos. 59225 and 59320^{1/} that it is Cal-Water's long-term policy and practice not to perform its own construction work. It bids such work out and West Valley Construction Company does most of its underground work. But in the complaint it is asserted that the project owner and developer, Northern California, concerned over delay, itself contracted the work out, not to Cal-Water or to Cal-Water's usual subcontractor, West Valley Construction Company, but to another construction company, Central Coast. We are not unaware that Northern California leaned heavily upon Cal-Water for advice and assistance in selecting a contractor. Nonetheless, the contract went to a contractor associated previously with Alisal, but never with Cal-Water. Central Coast began installing the underground components of the water system the first week of March 1980, using the plans and specifications Cal-Water originally had supplied to Northern California.

^{1/} See Volume 1, page 23 of the transcript in that consolidated matter.

The complaint alleged that Cal-Water's personnel "supervised and inspected" Central Coast's work and furnished some valve covers and vehicles in its activities. The declarations attached to the complaint indicate that "on a number of occasions" Cal-Water's personnel had visited the site to supervise and inspect. From this it is evident that the degree of supervision and inspection participation by Cal-Water, if it occurred, at most was necessarily ephemeral rather than constant. Absent some details, photographs of a company pickup truck with a compressor hitched to it and photographs of valve covers^{2/} prove nothing. Finally, the complaint was not filed until March 21, 1980, and by then it was obvious to the Administrative Law Judge that the underground installations were already substantially completed. The subdivision was not a large one, and the site and soil are not difficult. For these reasons we agree with the Administrative Law Judge that these circumstances provided nothing sufficiently exigent to require an ex parte order.

At the hearing^{3/} there was nothing adduced to change our opinion, and now that Decision No. 91857 issued June 3, 1980 awarded the certificate of public convenience and necessity to Cal-Water, the complaint itself becomes moot. Accordingly, it will be dismissed.

2/ Indeed, there is nothing that we are aware of that would have prevented Northern California from using Cal-Water's valve covers in any case.

3/ The evidence at the hearing showed that Cal-Water's participation was directed toward obtaining accurate "as built drawings" of the installed underground facilities. Once the piping had been backfilled, this would not be possible. Under the circumstances, Cal-Water's activities in having its personnel repeatedly visit the site and take measurements, and offer suggestions, appear to be reasonably prudent. Despite Alisal's last-minute intervention, at that point there was still an excellent chance

(Continued)

Findings of Fact

1. Northern California is the owner, and with Harrod, developer of an 80-homesite luxury subdivision southeast of Salinas.

2. At Northern California's request, on October 22, 1979 Cal-Water applied to the Commission for a certificate of public convenience and necessity to install and operate a public utility water service in Northern California's Vista project noncontiguous to Cal-Water's Salinas District territory.

3. On November 20, 1979 Alisal protested Cal-Water's application and thereafter on December 6, 1979 itself filed for a certificate to install and operate the Vista system.

4. Following hearing in December 1979 the consolidated Cal-Water and Alisal applications were submitted for decision.

5. Impatient at mounting costs and the delays occasioned by Alisal's intervention, Northern California determined to make the installation itself, and leaning heavily upon Cal-Water for assistance in selecting a contractor, went ahead and contracted the underground piping installation in Vista to Central Coast.

6. The first week of March 1980 Central Coast began installation work at the Vista project.

7. As work progressed Cal-Water had its Salinas District's general foreman regularly visit the Vista site to offer advice, make measurements, and prepare "as built drawings."

3/ (Continued)

that Cal-Water would receive the certificate and inherit the system. And nothing prevented Alisal from making its own measurements and developing its own "as built drawings" concurrently with Cal-Water had Adcock wished to. We find Adcock's expressed reticence to make "as built drawings" strangely at odds with his willingness (as evidenced in his approach to Roy Harrod) to undertake the subcontracted construction work itself while the Commission decision on his application was pending.

8. Nothing prevented Alisal from doing the same had Adcock chosen to do so.

9. Complainant Tunstall, a director of Alisal and Alisal's consultant engineer, learned that Cal-Water regularly had personnel visit the Vista site.

10. Adcock was aware of events through his stepson, a Central Coast employee engaged on the Vista work, and from Adcock's own personal Vista site visits.

11. On March 21, 1980 Tunstall filed the instant complaint seeking an ex parte order requiring Cal-Water to cease and desist from its activities at the Vista site.

12. By March 21, 1980, the underground installation by Central Coast was substantially completed.

13. Under the circumstances, there was nothing unlawful in Cal-Water's activities at the Vista site, and these activities were reasonably prudent.

14. There was no substantial or irreparable injury to Tunstall's interest shown.

15. By Decision No. 91857 issued June 3, 1980 in Applications Nos. 59225 and 59320, the Commission awarded the certificate of public convenience and necessity to construct and serve the Vista subdivision to Cal-Water.

Conclusions of Law

1. Under these circumstances, issuance of an ex parte cease and desist order would not have been in order.

2. The complaint should now be dismissed as moot.

O R D E R

IT IS ORDERED that the complaint is dismissed as moot.
The effective date of this order shall be thirty days
after the date hereof.

Dated SEP 3 - 1980, at San Francisco, California.

John E. Suran
President
Thomas L. Sturgeon
Michael D. Howell
Clayton J. Pridemore
Samuel J. Jensen
Commissioners