

Decision 93525 OCT 6 1981

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PAUL K. MONTGOMERY,
Complainant,

vs.

JAMES WATER COMPANY, INC., a
corporation, and B. CLINTON
JAMES,

Defendants.

Case 10815
(Filed December 21, 1979)

Paul K. Montgomery, for himself, complainant.
John R. Dean, Attorney at Law, for defendants.
Robert M. Mann, for the Commission staff.

O P I N I O N

Background

In 1949 Bert James, doing business as James Water System, constructed a well and installed a water system to serve family properties in the resort city of Kernville, in Kern County. His son, B. Clinton James (James), subsequently took over the management and operation of the water system. Several parcels of land originally owned by members of the James family have been sold and in some cases resold and split. Water service is being provided to a 45-space trailer park, 4 stores, and 12 residences owned by family members which they lease or occupy, and to 5 residences, an 8-unit motel, and a Masonic Lodge on all or portions of the sold-off parcels.

Articles of incorporation for James Water Company (JWC) were certified by the Secretary of State of the State of California on January 12, 1979. James testified that: "The purpose of incorporating was to protect me against suit because these people have threatened to sue me, and I have a lot of investments, and I wanted to isolate that part of the business so if I ever were sued that I wouldn't be jeopardizing all of my properties" (RT 60), and that no corporate meeting had been held--"just me and my wife are on it." James has used other corporate names for JWC.^{1/}

JCo.'s 1979 California Corporation Franchise Tax depreciation schedule itemizes water system assets of \$12,949, including land at \$200 and a depreciation accrual of \$687.

Summary of Complaint

The complaint alleges that (a) JWCI is a privately owned utility, owned and operated by James for profit, (b) JWCI is not a mutual water company or a water district, and (c) JWCI (formerly James Water Co.) has been doing business for profit as a public utility for a number of years. Complainant Montgomery requests this Commission to declare JWCI to be a public utility subject to Commission rules and regulations. Montgomery states he is a property owner and has been a customer of JWCI for 33 months.

^{1/} The answer to the complaint and the appearance at the hearing were made in the name of James Water Co., Inc. (JWCI). Federal and state income tax returns for 1979 for the James Water Corp. (JCo.) were signed by B. C. James, president.

Answer to Complaint

JWCI agrees that it is not a mutual water company or a water district. JWCI denies Montgomery's allegations on its status and profitability and denies that Montgomery is its customer.

James alleges that he owns a water supply not otherwise dedicated to public use and primarily used for domestic or industrial purposes by him or by his family. JWCI alleges that "a portion of the water supply is sold or delivered to neighbors as a matter of accommodation only," and that "no other source of water is equally available to the neighbors." JWCI requests the Commission to declare it to be a private business and not a public utility subject to the jurisdiction, control, and regulation of the Commission.

Hearings

After notice, a public hearing before Administrative Law Judge Levander was held on June 9, 1980 and submitted subject to the receipt of late-filed exhibits, points and authorities, and briefs. JWCI filed late-filed exhibits and incorporated its points and authorities in its brief.

Testimony for Complainant

Montgomery testified that when he purchased a house in Kernville in 1977 on Buena Vista Drive (also known as James Road), the prior owner informed him that James supplied water to the residence. Exhibit 1 consists of 19 checks signed by Mrs. Montgomery to Clint James or to the James Water Company which were deposited to the accounts of Clinton James, B. Clinton James, and B. Clinton James Sierra-Way Shopping, or were cashed by Clint James.

After moving in, Montgomery found the water service to be unsatisfactory, particularly in summer months. He made numerous complaints to James, including a call in June or July 1978, after his water supply went out. At that time, James said "he was not obliged to supply me water and that he may, in fact, cut my water off." Montgomery then complained to the Kern County Health Department (HD). Montgomery testified that after the HD investigation, a criminal complaint was filed against James for his failure to supply water and he believed another charge was filed relating to the inadequate system. After pretrial discussions he agreed to dismiss the criminal charges if James agreed to bring his water system up to water supply standards within 30 days. In that 30-day period "James did have in a new pressure system and water pressure tank and had installed larger water lines," and water pressures increased.

After the improvements had been completed, James sent Montgomery a letter increasing his water bill from \$10 to \$25 per month beginning on July 1, 1979 (see Exhibit 3).

Montgomery moved to another city and rented his Kernville residence. He assumes that his tenant paid \$25 per month water bill for four to five months and he knows that his wife's parents, Mr. and Mrs. Ramey, who live in his residence, are paying \$25 per month for water service.^{2/}

^{2/} Ramey Trucking checks, Exhibit 2, made out to the James Store for water, are in excess of \$25 per month.

Mrs. Hope testified that (a) she purchased her property in 1964 from Mr. Hutchinson (who purchased it from James) and remodeled a building into a residence, which was occupied by her family in 1965; (b) when Hutchinson owned the property, he made monthly payments to James for water service; (c) in 1964 James agreed to supply water to her for \$5 per month; (d) her water bills increased to \$19.50 for three months in 1974, to \$30 for three months in 1978, and to \$25 per month in 1979; (e) the water service provided by James was intolerable from the time she moved in until after the above-mentioned system improvements were installed; and (f) service is good at this time, except when a plumber cuts off service for a short period of time.

Staff Testimony

Mr. Mann, a senior utilities engineer, prepared a report (Exhibit 6) based on his investigation of the services provided by JWCI. His testimony describes JWCI's service area, water distribution system, customers served, and rates. JWCI's system contains: a well, a submersible pump and motor, and a hydropneumatic tank located on the south side of Sierra Way adjacent to James's trailer park, a booster pump and storage tank on the north side of Sierra Way, and approximately 10,000 feet of distribution mains, three inches or less in diameter. JWCI's service area is adjacent to and east of the service area of Kernville Domestic Water Company (KDWC) and adjacent to and west of the service area of a mutual water company.

He testified that many of JWCI's water system facilities have been replaced; that the 1979 replacements appear to provide water service acceptable to JWCI's customers; but that those facilities do not meet the minimum water system standards contained in the Commission's General Order 103 because:

(a) there is only one source of supply, (b) there is inadequate water storage, (c) the source of supply is not metered, (d) pipeline sizes are inadequate, and (e) there is no provision for fire protection on the system.

Mann concludes that JWCI is a public utility water company supplying water to individuals and charging for water service. He notes that JWCI increased its flat rates in July 1979. He recommends that:

- a. JWCI be declared to be a public utility water company and be ordered to file rules and regulations, maps, and forms prescribed by the Commission.
- b. JWCI file original cost documents together with accrued depreciation, or provide this Commission an original cost appraisal and estimated depreciation of its water facilities.
- c. The flat-rate water charges that were being charged by this utility prior to July 1979 be authorized by this Commission.
- d. These rates remain in effect until new rates are set by the Commission based on a review of original cost data, operational and maintenance expenses, and of the adequacy of service rendered. He indicated that future rates could be higher than those now charged.

He further recommends establishment of charges to the James's residential and commercial properties and the metering of water services to reflect differences in water use. In order to provide fire protection service, some of JWCI's existing pipelines would have to be increased in size to at least six inches in diameter, or there would have to be an increase of available storage, or KDWC would have to extend a fire main into the JWCI's service area, with Commission approval.

Mann's conclusion that JWCI is a public utility is based upon Sections 216, 240, and 241 of the Public Utilities (PU) Code.^{2/}

^{2/} "216. (a) 'Public utility' includes every...water corporation, ...where the service is performed for or the commodity delivered to the public or any portion thereof.

"(b) Whenever any...water corporation...performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such...water corporation...is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.

"(c) When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality or other political subdivision of the state, which in turn either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof, such person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

* * *

"240. 'Water system' includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures, and appliances, and all other real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use.

"241. 'Water corporation' includes every corporation or person owning, controlling, operating, or managing any water system for compensation within this State."

James's Testimony

James testified that his father sold property to Mr. Hutchinson, a family friend. James's father verbally agreed to let the Hutchinsons obtain water service for two lots off of his system. He claims that initially no charges were made for providing water service and he subsequently received monthly payments to help pay water system electric bills. James is now being paid, on a flat rate basis, for water service by five residential users and by a motel. He provides water to a Masonic Lodge without charge. James testified that when the property for the 8-unit motel was sold, he agreed to provide a temporary water supply for the property and the buyer agreed to drill his own well. The property has changed hands. No well has been drilled for the motel and James still provides water for the motel. He initially testified that he did not establish separate charges for water service to his tenants. However, he later admitted that he had received separate payments of \$10 per month from one of his tenants.^{4/} He allocates a portion of the rental income of the properties served from his system and transfers funds for family water use to operate and maintain the water system.

James denies having made a profit off of the water system and claims that he spent approximately \$20,000 for system replacements and operations in a two-year period. Replacements were made after he inspected one of the 2-inch water lines in his system and found it to be nearly plugged shut.

^{4/} These payments were discontinued about July 1979 when the tenant received a rent increase.

During a flood in 1966 the water supply to the eastern portion of the water system served by KDWC was cut off. James provided an emergency water supply to that utility without compensation. The interconnection between the two systems has been cut by the new owners of KDWC.

JWC Argument

Bert James established a water system to serve his properties. His son owns JWC which supplies water to his properties, to four single-family residences, and a motel. Possibly 95% of the water is used on James's properties. Initially, a residence and the motel property were sold by James and the owners hooked onto James's water system "as an accommodation" and for a long while paid nothing for water. The motel owner was supposed to but never has drilled his own well. James never kept the water system as a business and had no desire to be in the water business. He never applied for certification of his system. He has never served water outside of his property and of the five parcels he sold.

JWC further argues that:

a. Its incorporation does not make it a public utility.

(McCullagh et al. v The Railroad Commission of the State of California (1922) 190 Cal 13.)

b. James's property has not been dedicated to public use. The water system primarily serves James's property and the remaining service of surplus water is to property sold by James. JWC cites the following portions of Allen v Railroad Commission (1918) 179 Cal 68:

"Our constitution and our statutory definitions [of public utilities] must be construed as applying only to such properties as have in fact been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto."

c. The only time James attempted to serve the public was when floods washed out other lines. In Loyalty Warehouse Corp. (1968) 68 CPUC 39, the Commission states:

"The test to be applied in determining whether property has been devoted to public use is whether or not the owner holds himself out, expressly or impliedly, as furnishing service to the public as a class or a limited portion of it as distinguished from his holding himself out as serving or ready to serve only particular individuals."

d. In Rogina v Mendocino State Hospital (1954) 53 CPUC 108, the Commission states:

"One who sells only surplus water is not subject to jurisdiction of the commission."

JWC requests that the complaint be dismissed because JWC is not a public utility and should not be declared one.

Discussion

Public Utility Status

Montgomery owns a residential property provided water service by James. When Montgomery occupied that residence he paid James and received substandard water service. The current occupants of that residence are his relatives. Montgomery provided uncontested testimony that James was charging them for water service. Montgomery sponsored another witness now receiving water service from James for compensation. Montgomery has brought valid issues before the Commission and has status to file his complaint even though he is not presently a customer of James. Furthermore, the Commission is not required to dismiss complaints because of the absence of direct damage to the complainant (see PU

Code Section 1703). We are liberal in viewing the construction of complaints due to our desire to pinpoint and rectify genuine grievances (Utility User's Assistance League v P.T.&T. Co. et al., Decision (D.) 60612 dated August 23, 1960 in Case (C.) 6333). A public utility water company sells water to the public. The exception JWC/James tries to fall under is that of PU Code Section 2704.^{5/} To be successful in that defense, the defendants must show the water delivered is either surplus or is delivered to neighbors as an accommodation when no other water supply is equally available to them. The defendants do not fall under the exception of Section 2704. First, KDWC operated a water system adjacent to James's system and James did not demonstrate that KDWC would not extend to serve the property James was developing and selling. Second, James's water that was delivered was not surplus: this is evidenced in that when faced with legal action because of inadequate water service, James sought to improve the system and incorporate, rather than viewing his delivery as an accommodation with surplus water.

Given that no Section 2704 exemption from public utility status exists, is James/JWC a public utility?

James and/or his father sold parcels of land for development. The marketability of these parcels was affected by the availability of water service. James and/or his father

^{5/} "2704. Any owner of a water supply not otherwise dedicated to public use and primarily used for domestic or industrial purposes by him or for the irrigation of his lands, who (a) sells or delivers the surplus of such water for domestic or school district purposes or for the irrigation of adjoining lands, or (b) in an emergency water shortage sells or delivers water from such supply to others for a limited period not to exceed one irrigation season, or (c) sells or delivers a portion of such water supply as a matter of accommodation to neighbors to whom no other supply of water for domestic or irrigation purposes is equally available, is not subject to the jurisdiction, control, and regulation of the commission."

provide water service for compensation. This service is public utility water service as defined in PU Code Sections 216 and 241. James/JWC supplies water for compensation to five residences and to an 8-unit motel, and provides free service to a lodge. Through JWC, the James family supplies water to its 45-space trailer park, to 12 residences, and to 4 stores. Since JWC does not measure consumption of the system's users, the actual percentage of total water deliveries to the James family properties cannot be accurately determined, but if one unit is assigned to each motel unit, trailer space, store, or lodge, then James owns 81% of the units supplied water. James also established and then discontinued separate charges for water service to one of his tenants. This separate charge was incorporated as an additional rental charge at about the time notices of the July 1, 1979 water rate increases were sent out.

James continues to supply water for compensation through his water system, JWC, to successive owners of property sold by him. There is no precondition for those customers to obtain water service.

Defendants seem to contend they had no intention of being or becoming a public utility. We very recently addressed this issue, which has arisen many times over the years, in Perrotta v Jones D.93419, issued August 18, 1981 in C.10849:

"Years ago, the California Supreme Court in Del Mar Water etc. Co. v Eshleman (1914) 167 C 666, 680 stated 'Even a constitutional declaration cannot transform a private enterprise or a part thereof into a public utility and thus take property for public use without condemnation and payment.' Consequently, definitions of public utilities contained in the PU Code must be construed as applicable only to properties as have, in fact, been dedicated to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto (Allen v Railroad Commission (1918) 179 C 68, 69). But dedication can be manifested in

many different ways, and Section 2704(c) cannot be applicable in a water supply situation where at least some of the recipients take water, not as an accommodation, but rather as a matter of right. Such a system has become one 'otherwise dedicated to public use'. In the situation at bar, some of these neighbors purchased their properties from Humfeld with the availability of water a named inducement to purchase (for example, Faltersack, Weeks, and Jones). In his turn, Jones too has sold land using the availability of water as an inducement (for example, Rupert and Rumph). The principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite general public, or a portion of that public, which has a legal right to demand and receive service (Story v Richardson (1921) 186 C 162). The fact that the owner of the water system may have entertained a different intention is of no consequence, for when land is sold to members of the public coupled with the inducement of water service, and the seller continues to furnish water services to the land purchasers for compensation, there has been a dedication to the public use (Rose v Campbell (1961) 58 CPUC 734). It matters not what the understandings or agreements with the other customers provide, it is a public utility (In Re The Summit Group (1967) 67 CPUC 7). Furthermore, once dedicated to public service, subsequent attempts to confine operations to strictly private agreements to supply water will not deprive the Commission of jurisdiction (Boiseau et al. v Lovola Water Co. and Los Altos Country Club Properties, Inc. (1929) 32 CRC 548)." (Pages 9-10, mimeo. decision.)

Regardless of what James's or JWC's intentions were or are, the fact remains water is sold for compensation. What may have evolved as a means of marketing James's land has resulted in public utility conduct and, accordingly, dedication. We conclude the defendants are a public utility water company.

James's Transfer to JWC

This brings us to the issue of exactly who is the public utility entity, James or JWC (since JWC was formed without Commission authorization). James incorporated, forming JWC, expressly to not

subject his personal assets to exposure resulting from operating the water system. It appears JWC may be thinly capitalized to provide good service. However, JWC's articles of incorporation were certified by the Secretary of State in January of 1979, almost 12 months before this complaint was filed. We will take the public utility entity as we find it the date the complaint was filed and recognize JWC as the entity under our jurisdiction and regulation. However, we place James and JWC on notice that if the corporate entity is not adequately capitalized and does not discharge its obligation to provide adequate service, we may look to James, as the sole shareholder and alter ego of JWC to enforce the provision of adequate service.

JWC's Rate Level

The staff recommends that JWC's rates be rolled back to the level preceding the July 1979 increase. The rationale is that the rate for James's rental properties is too low, making others bear a disproportionate burden in contributing to JWC's revenue requirement. Thus, in essence, staff contends the existing rates are discriminatory and unlawful.

JCo's (or JWC's) 1979 income tax returns show gross revenues of \$6,515 and income deductions of \$6,621, including depreciation expense of \$687. Half of the 1979 revenues recorded by JCo. were based on old rates and the other half on its new rates (which were 150% higher^{6/} than its old rates). Annual gross revenues at the old rates would total \$3,723 and would total \$9,307 at new rates. If James/JWC had obtained \$10 for each residence, motel unit, trailer perk space, lodge, and store connected to his

^{6/} The rates charged to JWC's residential customers were increased from \$10 to \$25 per month. This analysis assumes a similar percentage increase for other sales or fund transfers for water service.

system, he would have collected \$9,000 for 1979. James testified that he was paying \$25 per month for the water used in his home and was transferring money from his rental revenues to meet the expenses of running the water system. It is apparent, however, that the monthly amounts James is transferring for service to his rental properties is far less than \$10 per month. Revenues of \$9,000 would have met 1979 operating expenses and would have provided a return on James's utility plant. The July 1, 1979 rate increase shifts a disproportionate amount of the system's revenue requirement to James's utility customers and discriminates in favor of his tenants.

The amount of water used per unit will vary from the average use (e.g. the use of the laundromat supplied from the system would be above average). A metered rate schedule, as recommended by the staff, would bring revenues per customer into better balance with water use.

We must adopt staff's recommendation to restore JWC's rates to the levels prior to July 1979 in order to eliminate discriminatory rates, which are unlawful. We will not direct a refund of the difference between pre- and post-July 1979 rates because there was not an order making the rates subject to refund, and the economic effect on JWC could be dire. However, JWC should expeditiously, by advice letter filing, get its rates in nondiscriminatory form. In doing this, JWC should file rates for service to the Masonic Lodge and James's family members equal to that of other customers.

JWC's System Potential

The system improvements in place are capable of providing satisfactory pressures, but additional funds are needed to bring the system up to the Commission's minimum standards. James does not believe that any expansion of JWC's service area is possible. JWC's water utility operations are not likely to be self-supporting. Therefore, it would be desirable for James/JWC to request the larger

established KDWC to install a main extension to serve James's customers. If KDWC agrees, this transfer could be accomplished by the filing of a joint application in which James asks to be relieved of his public utility obligations and KDWC agrees to provide service in James's service area. An alternate solution would require a joint application in which KDWC requests authority to extend a main into James's service area primarily for fire protection purposes. This main might also be used to meet James's alternate supply and storage problems. Another alternative would require James to file a plan prepared by a registered civil engineer to bring his system into conformity with the provisions of General Order 103.

Other Compliance Requirements

Unless a joint application with KDWC is filed with the Commission within 90 days of the effective date of this order, JWC must file original cost data and the derivation of the reserve for depreciation on his utility plant (based on the straight-line remaining life method) and to file a plan prepared by a registered civil engineer to add another source of supply, provide adequate storage, meter JWC's customers, and to provide adequate fire flow. The improvement plan should be accompanied by cost estimates and a scheduling plan for completion of the work within three years. JWC must secure Commission approval for further rate relief. Compliance with this decision is a prerequisite for seeking further rate relief.

Findings of Fact

1. James/JWC owns and operates a water system in Kernville, California.
2. James/JWC provides water service for compensation through a utility system to five residences and a motel, and provides water service without compensation to a Masonic Lodge on properties formerly

owned by members of the James family. James/JWC also provides water service to a 45-space trailer park, 4 stores, and 12 residences owned by James and/or by members of his family.

3. Rentals on properties leased by members of the James family include water furnished from JWC's system. Prior to July 1, 1979 James charged one tenant \$10 per month for water service, which was equal to the residential rate then charged.

4. James's customers filed a criminal complaint in municipal court because of the inadequate quality of water service being provided by James.

5. James settled the case by agreeing to make repairs and additions to his water facilities. He made certain improvements and improved service to his customers.

6. The present facilities do not meet the minimum requirements of General Order 103.

7. James set up a corporation and transferred his water system assets to the corporation, JWC.

8. Complainant Montgomery owns a residence supplied with water from James's/JWC's water system. He lived in the residence and paid James for water service. Montgomery's relatives live in his house and pay James for water service.

9. The service area of KDWC, a public utility, is adjacent to James's service area.

10. James/JWC does not provide surplus water to the complainant as an accommodation.

11. There is another source of water available to those served by James/JWC (e.g. KDWC).

12. The public utility water rate increase put into effect by James on July 1, 1979 was not approved by the Commission, and the rates place a disproportionate revenue requirement burden on customers not members of James's family or affiliated with James.

Conclusions of Law

1. Montgomery has standing to file the subject complaint.
2. James is providing water service for compensation, not as an accommodation to neighbors with no other water supply available, and is therefore a public utility.
3. James is not providing surplus water as an accommodation to his neighbors.
4. JWC should be ordered to file the rates in effect prior to July 1, 1979, including the rates charged for service to James's family properties, and to file rules and regulations, maps, and forms prescribed by the Commission. A \$10 monthly flat rate should be filed for service to the Masonic Lodge.
5. JWC should be ordered to file original cost documents and the derivation of the reserve for depreciation on his utility plant (based on the straight-line remaining life method).
6. JWC should be ordered to file a plan prepared by a registered civil engineer to add another source of supply, to provide adequate storage, to meter his customers, and to provide adequate fire flow. The improvement plan should be accompanied by cost estimates and a scheduling plan for completion of the work within three years.
7. Instead of the filings required by Conclusions of Law 5 and 6 JWC should be permitted to work out an agreement and file an application with KDWC to transfer his utility service to KDWC or to have KDWC extend a main into James's service area primarily for fire protection purposes. The fire main might also be used to meet James's alternate supply and storage problems.

O R D E R

IT IS ORDERED that:

1. James Water Company, Inc. (JWC) is declared to be a public utility water company.
2. JWC shall:
 - a. File the rate schedules in effect prior to July 1, 1979 in compliance with General Order Series 96 the day after the effective date of this order and file a \$10 monthly flat rate for service to the Masonic Lodge and rates for service to properties owned by members of his family. The revised schedules shall apply to service rendered on or after the date of the tariffs, which is the date of filing.
 - b. File a service area map, appropriate general rules, and sample copies of printed forms used for customer service in compliance with General Order Series 96 the day following the effective date of this order. The tariffs shall become effective 5 days after filing.
 - c. Prepare, keep current, and file with the Commission 2 copies of the system map required by General Order Series 103 within 90 days after the effective date of this order.

3. JWC shall make the filings with the Commission's Hydraulic Branch described in Conclusions 5 and 6 or the alternate filing described in Conclusion 7 within 90 days after the effective date of this order.


This order becomes effective 30 days from today.

Dated October 6, 1981, at San Francisco, California.

JOHN E. BRYSON
President
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

I dissent:

We do have some discretion to determine whether or not dedication occurs. Here I believe the question is closer than as stated in the decision: furthermore, regulation of this utility will never be successful where we have vexatious relationships between customers and owner and where the size of the operation compels a financial failure.


RICHARD D. GRAVELLE
Commissioner

I certify that this decision was approved by the above Commissioners today.


John E. Bryson