ALJ/bw *

Decision 93844 December 15, 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ralph W. Bennett, Frances Betty Bennett, Complainants, vs. William J. Han, Barbara Han, Kenneth L. Hill, Carole L. Hill, Defendants.	ORIGINAL Case 10827 (Filed January 28, 1980; amended April 24, 1980)

F. Betty Bennett and Ralph W. Bennett, for themselves, complainants.
Robert S. Louis, Attorney at Law, for Hian Investment Co. and Hope Lane Water Company, defendants.
Kennan H. Beard, Jr., for Del Este Water Company, interested party.
Herbert R. McDonald, for the Commission staff.

O P I N I O N

Complainants receive domestic flat rate water service from a small unregulated water company in Salida, Stanislaus County. The water system is now owned and operated by Mr. and Mrs. Han and Mr. and Mrs. Hill (defendants) as partners. Defendants acquired the system as part of a package with undeveloped real estate; this land is part of a tract which also includes the residences occupied by complainants and six other existing utility customers.

The dispute originally concerned a threatened discontinuance of service. It subsequently came to involve additional questions, namely, whether defendants were subject to our jurisdiction, whether rates charged to complainants were unlawful, and whether the system was lawfully built and acquired.

The original complaint alleged that defendants planned to discontinue service to all of their existing customers. It requested that the Commission restrain them from doing so until and unless they arranged for a satisfactory substitute service. It was alleged that only satisfactory alternative service would be that provided by Del Este Water Company (Del Este), a regulated water utility which has mains in close proximity to the tract in question.

The answer alleged that defendants, once having been informed of the law, no longer planned to abandon the system.

An amended complaint was then filed, charging that defendants had raised complainants' rates after the complaint was filed. Complainants contended that this was either a discriminatory practice aimed at them alone or a rate increase instituted without Commission approval. Reparation was sought. The disputed amount was deposited with the Commission; complainants have made supplementary deposits for the disputed amount in each bill received during the pendency of the complaint.

The amended complaint alleged that defendants' system has been constructed and operated without a certificate of public convenience and necessity. It also alleged that the defendants had not received Commission authority to purchase the system from its prior owner.

The amended complaint further alleged that defendants planned to lay new mains to serve commercial buildings which they were constructing in the vicinity.

The answer to the amended complaint denied that complainants had been singled out for additional charges, that there had been any service discrimination, or that there had been any unreasonable charges for water service. The answer also contended that doubling the complainants' rate was reasonable since they had added a second residential unit to their property.

The answer reasoned that since the rates for complainants' service are allegedly reasonable, no reparation could be awarded. The answer claimed that since the utility has no tariffs on file and is uncertificated, it has no obligation to obtain Commission approval before increasing rates.

Defendants also reasoned that since they have no certificate and no service area map, they could extend or refuse to extend as they saw fit. The answer also suggested the utility's inadequate water supply as a reason for not extending service to all potential customers.

Hearing was held in San Francisco before Administrative Law Judge (ALJ) Gilman on November 12, 1980.

At the hearing the appearances made statements, clarifying or modifying their positions.

The most significant was defendants' attorney's statement conceding that they provide water service to a portion of the public for compensation. He also stated that for complainants and other residential customers, there is no realistic alternative to their water service, unless Del Este were to extend service into the tract. The staff representative argued that defendants' partnership is and has been a public utility subject to this Commission's jurisdiction, and the operations and charges should have been governed by a filed tariff including a service area map.

Defendants pointedly did not offer to abandon their system or waive their right to contest an expansion of Del Este into their service area. They now plan to remain in business as a regulated utility. Their attorney contended that if the existing well were supplemented with wholesale service from Del Este, most existing customers would prefer to continue to deal with defendants, rather than pay the substantial cash advances which Del Este would require to construct a substitute system.

Defendants' attorney stated that the individual household rates have been fixed at $10.50 per month since 1975 and that the defendants have not received any complaints that these rates are excessive. He contended that at existing rates the company will experience a loss of perhaps $600 per year. He proposed that the Commission should use this proceeding to fix a new rate at a higher level, one sufficient to cover all of the company's costs including the costs of this litigation.

He also pointed out that not all the customers are paying for water service and that, as presently constructed, the water system does not permit service to be terminated for nonpayment.

He asserted that complainants are the only customers who own their own residence; the other six existing customers are tenants.

The staff representative recommended to the defendants that they should file tariffs in which the $10.50 per month flat charge is treated as an existing rate for all residential service. He stated that all existing customers would be entitled to notice and opportunity to be heard before the tariffs became operative. He asserted that if and when they sought an increase in flat rates for service to multiple households, the Commission would not normally set such rates at twice the single-family rate. It has, however, authorized such rates at from 1.5 to 1.7 times the single-family level.

The representative of Del Este reported that it has an existing 8-inch main nearby. This main is pumped from both ends and is roughly in the middle of this portion of Del Este's system. The main could easily provide approximately 2,500 gallons per minute (gpm). He pointed out that if service were to be rendered only to the existing residences in the tract, this capacity would satisfy the old requirements of General Order (GO) 103 which did not include fire flow. However, if there are new commercial developments to be served, any utility would have to meet the current county standards, which are very high and might in some circumstances exceed 2,500 gpm.

He stated that Del Este would not object if required to provide retail service to defendants' existing and prospective customers. However, it would not be willing to incorporate any portion of defendants' system into its own plant. Rather, it would insist on providing a complete new system which would have to meet current county fire flow standards throughout the tract. It would expect that the cost of this substitute system to be advanced under its main extension rule. It would also expect defendants to abandon their system and terminate service when the new extension is completed. Del Este would also raise no objection if the Commission instead were to permit defendants to continue to provide retail service and require Del Este to provide wholesale service to them. Under this alternative, defendants would advance the cost of connection between their existing system and Del Este's mains, paying for water consumed at a wholesale rate. The pipes connecting defendants' existing customers to the existing well would remain in service. The connection would be located at a point on defendants' system close to the new buildings, and would be metered. The meter would mark the boundary between Del Este plant and plant owned by defendants.

Defendants have selected the second alternative. This alternative allows them to meet the current fire flow standards for new construction while requiring no cash outlay either by themselves or any of their other customers to upgrade the system directly serving residential customers.

As applied here, the county standards require a second source of supply, i.e., the Del Este connection, a very large (8-inch or more) main connecting that source to defendants' new buildings and a hydrant for each. All of this added plant will be part of defendants' utility system.

Mrs. Bennett offered $1,000 toward complainants' share of the advance required by Del Este's main extension rule. She stated that they would prefer to be served by Del Este.

The staff representative asserted that because of its restricted supply and transmission capacity, the utility should be prohibited from serving any additional customers until the service meets either the fire flow requirements of GO 103 or any higher county requirements. For service to existing buildings, he asserted that the fire flow requirements in existence when the utility was constructed should govern. He did not, however, recommend any specific reconstruction of the plant which serves existing customers.

Defendants' attorney claimed that there was no intent to single out the complainants for a special rate. Rather, he claimed that they are the sole members of a class, since theirs is the only residential property in the service territory which is occupied by two households. While conceding that a doubling of the normal single-family rate may have been excessive, he argued that the utility should be able to charge at least 1.5 times the normal flat rate for a residence occupied by two households, both prospectively and retroactively.

Defendants' attorney stated that they purchased the utility together with certain adjoining, undeveloped property believing that the arrangement with water customers was in the nature of an easement on the undeveloped property. He asserted that the original owner of all of the properties now served by this utility had provided connections to his own well as an accommodation.

He related that defendants became concerned about the system's inability to provide adequate fire protection. They therefore sent out a letter, proposing that existing customers become connected to Del Este's system. He asserted that since they have been informed of their rights and obligations as a public utility, his clients no longer intend to abandon.

He conceded that defendants' predecessor or predecessors should have been made parties to the proceeding. However, defendants elected not to do so because they believed that the predecessors' decision to render utility service was primarily altruistic.

Mrs. Bennett stated that one of defendants' lots, next door to complainants' house, has been built on; defendants now lease it to a commercial tenant. According to her, the tenant was unwilling to rely on defendants' utility system and insisted that defendants dig it a separate private well completely isolated from the utility system. She also related that defendants were in the process of constructing two commercial buildings on two other parcels. These will be served by the utility.

She argued that defendants should have applied the money spent on the private well toward construction of a connection to Del Este. Further, she claimed that defendants should have offered service to a church group which owned a lot nearby and required a substantial advance to help pay for the Del Este connection.

Staff Testimony

The staff representative testified that, if there are no more restrictive county requirements, GO 103's present standards would require a six-inch main and hydrants to provide adequate fire flow to new customers. In addition, the system must be capable of supplying at least 2,000 gpm and have a more reliable or a supplementary source of supply. None of these requirements would apply to mains serving the existing customers.

The existing utility system relies on one well, with no treatment facilities. In the staff witness' opinion, this well is probably adequate for domestic use by six customers. However, it does not provide any alternative source of supply for unanticipated emergencies or drought. The staff witness noted that the 1¼-inch pipe which constitutes the system's "mains" is not adequate for fire flow nor even for normal domestic service. He also noted that the

mains are improperly laid out and that one, at least, is installed underneath an existing building. He stated that the mains are not installed in streets and that the defendants have no formal easements permitting the mains to occupy private property. In his opinion, good utility practice would require replacement and relocation of all mains into the streets or the acquisition of easements.

He noted that Hope Lane and Salida Avenue are dedicated streets. A utility which plans to lay its mains in dedicated streets must comply with county franchise requirements. He noted that some of the customers are located on private roads. To occupy such roads, a utility would require an easement from the owners. He believed that a treatment plant would also be necessary to meet county health requirements.

He recommended that utility management familiarize itself with statutes, standard tariff provisions, and the provisions of General Orders 96-A and 103 which govern water utility operations. In addition he suggested that it should familiarize itself with standard accounting procedures for small water utilities.

He described the difference between the filing of an existing rate in a new tariff and a proposal to increase a rate. He indicated that no increase in rates can be applied retroactively, even though previous rates were unreasonably low. He also noted that some very small water utilities have rates which are adequate to cover only out-of-pocket expenses.

In his opinion, this utility should be permitted to file for a service area covering only the existing customers and the land owned by defendants, with one exception. It could extend to the south for a substantial distance without conflict with Del Este's service territory, or the territory of any publicly owned water purveyor.

He noted that in well-designed utilities, services to residences are either 3/4-inch or 1-inch pipe. For small businesses, 1-inch services are preferred and for larger businesses, at least 2-inch services are normally required.

Complainants' Evidence

Mrs. Bennett testified that complainants would desire to have the main located under their house relocated. However, they are unwilling to provide the company with a free easement. She pointed out that they had offered defendants an opportunity to move the line before defendants had developed and paved their adjoining property for commercial purposes.

She testified that she was concerned about reliability of the single-well supply. She also stated that the pressure on the existing system fluctuates. She related that there are occasions when the fuse on the existing pump blows, causing a service outage.

She testified that she and her husband had converted a building on their property to a residence. The prior use of the building required water service. The building now includes three rooms, including a bath and kitchen, but no laundry. In the near future, they will convert a third existing building to a rental unit.

On cross-examination, she indicated that complainants did not have title insurance when they purchased the property. She testified that complainants' property was purchased from an individual who was the common owner of both the utility and her land and that the pipe under her house had been installed prior to the purchase.

Defendants' Testimony

Mrs. Hill, one of the defendants, testified that the utility was not a corporation and did not conduct business under a fictitious name. She testified that the previous owner of the property and utility did not inform

them of the existence of a water utility. She asserted that the letter to customers was motivated by concern about lack of capacity for fire protection. As soon as defendants were informed that they could not lawfully abandon without Commission approval, they committed themselves to permanent service to existing customers. She claimed that until just before the hearing defendants were unaware that there were multiple residences on any property other than complainants'.

She indicated that the company was not able to collect all the revenues to which it was entitled. There is a high vacancy rate in many of the properties served and the lessors will not pay when the property is not occupied. She noted that the system does not include cutoffs or meters. The utility, however, plans to install either meters or cutoffs on each of the existing services.

She asserted that the application for service by the church was pro forma in order to obtain permission from the county to dig its own well and that it would have preferred to be denied service. She confirmed that the defendants plan to develop the undeveloped property they own in the vicinity as two warehouses. One will use an existing hookup previously used by a residence which has been demolished. The other needs a new extension.

Mr. Hill testified that the permit for the new warehouses is compatible with H-4 zoning which includes auto repairs and storage of volatile materials. However, the blueprint submitted with the permit application indicated that the property would be warehouses with a single lavatory each.

Del Este Evidence

The Del Este representative testified that if a proposed church (not built) had been added to the system, the county fire flow requirement would have increased to at least 2,500 gpm, which in turn would have required a 10-inch main. Without the church on the line, the requirement for general commercial development would be satisfied at 2,000 gpm with an 8-inch main. He also stated that it is the practice of Del Este in a flat rate area to install meters for any dual-occupancy residence.

Discussion

The question of defendants' status as a public utility has been resolved by their admission that they are providing water service to a portion of the public for compensation. Based on that admission, we have concluded that they are subject to all applicable provisions of the PU Code and to our GOs.

Defendants have not sought a certificate. However, by operation of law, they are a de facto public utility

Even assuming that it was necessary for the original tract owner to obtain a certificate under PU Code § 1001 before constructing the system or serving the public, that fact would not enlarge defendants' responsibilities toward the existing customers. There is no established principle of law which makes them responsible for the omissions of a predecessor. Since the question will not affect the outcome of this proceeding, there is no need to make any findings of fact on the issue.

Therefore, even if compliance with PU Code § 1001 (issuance of certificates) would have prevented the design defects in this system, defendants are not to be held responsible for any consequences of the predecessor's acts. This means that defendants' responsibility for replacing substandard plant is no greater than any other utility's responsibility to replace plant which is now obsolete but which complied with all effective standards when installed.

The original owner of the tract transferred the system and undeveloped land to a Mrs. McCormack, who transferred to defendants. Since neither of these transfers was approved by the Commission, it could declare either or both of them void under PU Code § 851, thus resurrecting the public utility responsibilities of one or both of the prior owners. On the other hand, the Commission could apply § 853; a finding under that section that the application of § 851 is not required by the public interest would effectively ratify the sale. None of the parties has requested the application of either section. Furthermore, neither of the prior owners is a party and it would be inappropriate to consider the issue in their absence. Consequently, the issue will not be decided in this proceeding.

Complainants contend that defendants doubled the previous $10.50 per month flat rate in retaliation for filing the complaint. In response, defendants claim that it is reasonable for customers who have two residential units connected to a flat rate service to pay more than single families. They contend that complainants were the only customers known to fit within this category and hence that it was not discriminatory to raise their rates without raising others. Complainants argue that there is at least one other service which serves more than a single residence. Defendants respond that they did not know of this second member of the class.

PU Code § 454 requires a Commission finding before any rate increase can be instituted. Complainants should not be deprived of the protection of this statute on the sole ground that the utility status of the partnership was still in issue when their monthly rate was doubled. In a similar vein, we can find no plausible reason why defendants should be afforded extra-statutory freedom to unilaterally

fix rates during the pendency of a status complaint.[1/] Therefore, the increase is void in its entirety as a matter of law and complainants are entitled to reparation.

Defendants' claim that at least half of the increase was economically justified is irrelevant. The Commission cannot approve a retroactive rate increase (City of Los Angeles v PUC (1972) 7 C 3d 331). Allowing a utility to defend against a reparation claim on the ground that the existing rate was unreasonably low would be a form of retroactive ratemaking.

We have thus concluded that reparation in full would be due even if the increase had been nondiscriminatory. It is, therefore, irrelevant whether defendants intended to single out complainants or whether defendants were aware of other lots with multiple residences.

Defendants argued that all customers' rates will be unreasonably low in relation to projected expenses; that argument may indeed have merit. However, this issue should be raised in a general rate increase proceeding.

1/ Nothing in the Commission's Rules of Practice and Procedure would compel an alleged utility to elect between filing for a general rate increase and defending against a claim that it is subject to our jurisdiction. Both proceedings can be processed simultaneously. If it prevails on the rate matter, it can retain all of any increase granted in the interim, regardless of the outcome of the status dispute.

Complainants charge that defendants should have held themselves out to serve nearby land owned by a church. If the church had complained, we could have decided whether or not defendants should be compelled to provide service. In so doing we would necessarily have decided whether, and to what extent, defendants have dedicated themselves to serve new customers. However, in this instance the church has not complained and it is very doubtful if it would accept service if offered. Therefore, it is not necessary to determine the scope of defendants' existing dedication.

Similarly, we will not consider whether defendants, as a utility, are obligated to serve their own building which is now served by an independent well. It is not inconceivable that the tenants of that building may apply for utility service at some time in the future. However, until and unless there is a complaint from an affected customer, the issue need not be considered.

By letter dated August 1, 1981, defendants informed our staff that the Del Este connection had been completed. Del Este installed 1,250 feet of 12-inch PVC main with three 2-inch services and two new fire hydrants. The approximate cost of the installation was $22,825. Testimony from Del Este and our staff indicates that the 12-inch main should deliver 2,500 gallons per minute, sufficient to meet the fire flow requirements of our GO 103 and the requirements of the Stanislaus County Fire Marshall.

Findings of Fact

1. Defendants provide water service for compensation to a portion of the public.

2. Defendants did not seek or obtain a finding from the Commission that an increase would be justified before increasing complainants' monthly from $10.50 to $21.00 per month. The full amount of the difference is an overcharge; the amount deposited by complainants is $189.00.

3. The Commission has not approved any transfer of the public utility water system to any person or relieved any person of his or her public utility responsibilities with regard thereto.

4. Defendants no longer plan to abandon the system; instead they will use it to provide water service to existing customers and to commercial buildings owned by them and leased out.

5. No potential customer has requested that we order defendants to provide service.

6. The plant serving residential customers is substandard. The question of whether and to what extent to remedy the original flaws in design and layout of the system should not be considered without also considering whether and in what amounts rates would have to be raised to pay for such construction. It is premature to consider that issue.

7. Either of the prior owners might reasonably be expected to oppose an order requiring them or either of them to resume active responsibility for operating a small water utility. They have not received notice.

8. The improvements that defendants are required to make by county fire flow ordinance for the purpose of providing service to their own buildings will connect the system to Del Este's main, providing a reliable year-around second source of supply of much greater capacity than the original well. The high capacity main and hydrant located to serve the new buildings will provide some improvement in fire protection for existing customers.

9. None of the remaining issues concerning system improvements is urgent.

10. Defendants at the time of the hearing had never rendered water service to a commercial building.

Conclusions of Law

1. Defendants' partnership is a public utility and is subject to this Commission's statutory and constitutional jurisdiction over rates and service.

2. Defendants at all time relevant should have been operating under a tariff which states existing rates, charges, and conditions of service. The existing established rate for all domestic service was $10.50 per month.

3. Defendants should not have increased any rate or charge, whether applicable to all of its customers or to a single class of service, without first obtaining a Commission finding that such increase would subsequently be just and reasonable.

4. Until and unless such a finding is made, the increase imposed on complainants was and is void. The Commission has no power to make rates retroactively. Even if we were to find that part or all of the increase was reasonable when instituted, we have no power to make any portion of the increase lawful.

5. The question of whether a rate higher than $10.50 was reasonable at any time in the past is irrelevant.

6. Complainants have no obligation to pay more than $10.50 per month for water service, for all past and future times until and unless the Commission authorizes a rate increase. Defendants should be ordered not to increase rates in the future except as provided by PU Code § 454.

7. Complainants are entitled to a refund of the funds on deposit; defendants are not entitled to any portion of the deposit.

8. The question of what rates will be just and reasonable in the future should be treated in a general rate increase proceeding.

9. No fact pleaded or proven would justify holding defendants liable to correct any of the design defects caused by the failure to seek certification.

10. We should not determine whether a transfer is void under PU Code § 851 in a proceeding in which the prior owner or owners have not received notice and opportunity to be heard.

11. No transfer of the system to defendants could lawfully have been made without the approval of this Commission. The Commission is not required to determine at the present time whether the application of § 853 is or is not necessary.

12. Defendants should be prohibited from terminating service except in accordance with their tariff and from abandoning, disabling, or disposing of the system except with Commission authority.

13. Any rate for service by defendants to commercial buildings is an initial rate.

14. Stanislaus County's fire flow requirements are more stringent than those of GO 103; in such event local standards prevail.

O R D E R

IT IS ORDERED that:

1. Unless they have first obtained permission from the Commission, defendants shall not discontinue water service to complainants, or to any other customer now served by the water system, other than in accordance with the terms of their filed tariff; nor shall they abandon or disable the system except with prior Commission approval.

2. Defendants shall file tariffs within 30 days after the effective date of this order. Such tariffs shall be prepared in accordance with GO 96-A. Once the tariffs have become effective, defendants shall charge and operate as provided therein. The tariffs shall provide flat rate of $10.50 per month for all classes of service rendered on the date this complaint was filed. Initial rates for any new class of service may be established under PU Code § 455. They shall not raise any rate except in accordance with PU Code § 454 and GO 96-A.

3. Defendants shall comply with applicable Commission GOs on and after the effective date of this order.

4. The Executive Director shall refund all moneys on deposit with the Commission to complainants.

This order becomes effective 30 days from today.

Dated DEC 15 1981, at San Francisco, California.

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

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director