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JUN 25 1997

Decision 97-06-097 June 25, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

South Fork Estates,

Complainant,

vs.

Pacific Bell (U 1001 C),

Defendant.

ORIGINAL

Case 91-09-049
(Filed September 18, 1991)

Bourdette & Partners, by Andre P. Gaston, Attorney at Law, for South Fork Estates, complainant.
Raissa Griffin and Nelsonya Causby, Attorneys at Law, for Pacific Bell, defendant.

OPINION

Statement of Facts

In 1990, the Far West Development Corporation was the developer of a real estate project called South Fork Estates on an approximate 300-acre tract of land in the Three Rivers area of Tulare County, a rural area 30 miles to the east of Visalia and Highway 99. The developer had retained the engineering and planning firm of R. L. Schafer & Associates to prepare plans and specifications for the project which was to provide sites for custom built homes. Subsequently, Richard L. Schafer became the sole owner of South Fork Estates.

Approximately half of South Fork Estates is developable, with 97 acres across the northern border and 47 acres on the southeast corner undevelopable because of elevation and slope problems. The project was planned for three phases. Phase One included 50.25 acres with 36 lots, of which eight lots are one acre or less (22%). Phase Two included about 60 acres with 36 lots. Phase Three contemplated 50 acres with 35

lots. The vast majority of all the lots in the project exceed an acre in size. A mutual to be owned by the lot owners was to provide water service; Southern California Edison Company would provide electric service; Continental Television would provide cable TV; and Pacific Bell (Pacific) would provide telephone services. In mid-1991, the developers asked Pacific to provide undergrounded line extensions to and into Phase One.

Under Pacific's tariffs, if a real estate project qualifies as a "Subdivision," the utility pays the cost of the extensions; if it does not, the developer must advance the estimated cost. Pacific considers that a development is a "subdivision" if, within the entire development, there are reasonable prospects that within three years there will be at least one telephone per acre.[1]

In this instance, comparing the number of lots with the number of acres in Phase One, the remote rural location of the development 30 miles outside of Visalia, the custom home nature of the development, and the continued depressed economy and real estate market in the entire area, Pacific's Visalia office concluded that while there was a definite plan of development under way, reasonable prospects did not exist that within three years, Phase One would attain 50 permanent lines to meet the density requirement of the utility's tariff. Accordingly, as developments which are not expected to meet the density requirement are required under Pacific's tariffs[2] to advance the estimated costs, on July 5, 1991, the Visalia office of Pacific wrote the developer to inform it that the South Fork Estates project had been classed as a real estate development, and that as to Phase One the developer would have to advance the total estimated cost of $19,631.82 for construction of lines to and into the Phase One area.

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[1] The definition of "Subdivision" is under Rule 1 of Pacific's filed Tariff (see Schedule CAL PUC No. A.2.1.1; 2nd Revised Sheet effective 11/22/90.)

[2] All new real estate developments in their entirety not satisfying the density requirements for a subdivision are under Rule 15 of Pacific's filed Tariff (see Schedule CAL PUC No. A.2.1.15C.4.a. and b; 3rd Revised Sheet effective 1/04/89).

On July 15, 1991, the developer in a letter to Pacific conceded that "although the aggregate of the 36 lots totals 50.25 acres (excluding county roads) and as a total does not provide an overall 'density of at least one per acre'," he nonetheless opined that the development was a subdivision, and met the test of a reasonable prospect within the next three years for five or more telephone lines. The developer asserted that the development also was considered a subdivision by the State Department of Real Estate and Tulare County. As time was of the essence for completion of the common utility trench, South Fork Estates tendered the $19,631.82 advance under protest, stating it would refer the issue to the Commission.

That same day, July 15, 1991, South Fork Estates' Schafer wrote to then Commission President Eckert, asking that the Commission change Pacific's Tariff definition of "Subdivision." The Consumer Affairs Branch responded, informing Schafer that a utility's tariff could not be changed so informally, but would require a formal proceeding for consideration, and enclosed appropriate forms.

On September 18, 1991, South Fork Estates filed Case 91-09-049 and asked that the intent of Rule 15 be clarified; that South Fork Estates be determined to be a "Subdivision," and that Pacific be required to refund the $19,631.82 deposit paid earlier under protest by South Fork Estates.

Pacific's answer stressed that line extension tariffs were promulgated to allow the utility to recover its costs in providing costly installations to speculative rural areas, and were written to contemplate the entire development when determining whether the density requirement was met. Pacific asked for dismissal in that the complaint alleges no violation of law or Commission order; and that to grant exemption from the utility's tariff would constitute a preference.

Following an interregnum Pacific again moved to dismiss the complaint, either for lack of prosecution, or in the alternative under the summary judgment standard in that the complaint failed to present any triable issues as to any material facts. At this point, now having engaged legal counsel, South Fork Estates filed its opposition to the motion to dismiss, and subsequently amended that filing so as to include in its complaint its deposit claim on Phase Two. Citing *Santa Margarita v. Pacific Bell* (1993) 51

CPUC2d 482, the developer asserted that a triable issue of material fact existed as to the propriety of Pacific having required deposits for Phases One and Two. It asserted that the developed portion of Phase One (with nine lots aggregating approximately 11.93 acres developed with 16 service lines in use) satisfied the density requirement of Pacific's tariff, thereby qualifying the entire development as a "subdivision."

A duly noticed evidentiary hearing was held in San Francisco, on December 3, 1996, before Administrative Law Judge (ALJ) John B. Weiss. Each party was represented by counsel. Each party provided a witness; Richard L. Schafer, sole owner of South Fork Estates, testified for the developer, and Edward Pablos, Pacific's Headquarters Technical Director for Tariffs, testified for the utility. Following submission of concurrent closing briefs on January 17, 1997, the matter was submitted for decision.

Discussion

The basic issue in this proceeding is whether or not the South Fork Estates project at the time of the developer's application to Pacific for service qualified as a "Subdivision" pursuant to Pacific's filed tariffs. A public utility's tariffs filed and accepted by the Commission have the force and effect of law (*Dollar-A-Day Rent-A-Car System v. Pacific Tel. & Tel. Co.* (1972) 26 CA 3d 454), and their provisions are binding as well on the utility (*J. Richard Co. v. San Gabriel Valley Water Co.* (1951) 50 CPUC 545).

The definition of what constituted a "Subdivision" under Pacific's filed tariff appeared as part of the utility's Rule 1 (the tariff sheet was: Schedule CAL PUC No. A.2.1.1.; 2nd Revised Sheet 27, effective 11/22/90). The definition read:

> "SUBDIVISION
>
> Improved or unimproved land under a definite plan of development where it can be shown that there are reasonable prospects within the next three years for five or more non-temporary main telephones and PBX trunk line terminations, at a density of at least one per acre."

This tariff definition had its origin in the Commission's undergrounding investigation, Case 8209, begun by the Commission in 1965 and insofar as the matter of new

construction was involved, resulted in Decision (D.) 76394 (1969) 70 CPUC 339. In that proceeding, the Commission determined to adopt "density" as the proper criterion on which to base undergrounding rules in residential subdivisions. The decision ordered communication utilities to file proposed revisions to their line extension definitions and schedules applicable to underground extensions to conform to those set forth in Schedule B of the order. Underground extensions within new residential subdivisions were required to be constructed at the cost of the utility if they met the density requirement (and Pacific by Advice Letter 15820 filed September 28, 1990, complied and the definition appearing above was accepted by the Commission and became effective November 22, 1990).

But for line extensions within real estate developments unable to satisfy the density requirements to qualify as a "Subdivision," another rule and treatment applies. By Advice Letter 15482 filed November 21, 1988, and accepted by the Commission to become effective January 4, 1989, Rule 15 became effective for Pacific. (The Tariff Sheet was: Schedule CAL PUC No. A2.1.15.C.4.a and b (as relevant here), 3rd Revised Sheet 100 effective 1/4/89).

The relevant part of Rule 15 reads:

"4. To and within new real estate developments in their entirety which do not satisfy the density requirement for a subdivision, line extensions will be constructed as in 1. Through 3. preceding, provided:

"a. The applicant will pay in advance the estimated total cost of the Utility's construction. Any difference between the amount advanced and the actual cost shall be advanced or refunded, as the case may be, within 30 days after the actual cost is determined by the Utility. This adjusted advance, excluding any payment required by 3.b. preceding and the cost set forth in 1.b., 2.c. and d. and 3.a. preceding is refundable as provided following.

"b. When, within the first three year period after completion of the Utility's construction, the subdivision density requirement has been met, the Utility will refund the refundable advance in a. preceding. If, at the end of the three year period the subdivision density requirement has not been met, the Utility will refund that portion of the refundable advance proportional to the ratio of the then

> permanent main telephone and PBX trunk line termination density to the subdivision density requirement. No interest will be paid on such advances." (Emphasis added.)

These tariffs are promulgated to contemplate the entire development in determining whether or not the development can meet the density requirements to qualify for "Subdivision" treatment. The fact that a segment of the overall development might meet the density requirement of at least one per acre does not serve to meet the "Subdivision" definition as being applicable to the entire development. To accept South Fork Estates' contention that a segment serves to qualify the development would obviate the distinction between which developments qualify as a "Subdivision" and which do not qualify. As Pacific correctly points out in its closing brief, were we to adopt South Fork Estates' scheme, any real estate project, no matter how large, no matter how speculative, need only have five lines on five acres to qualify as a "Subdivision" and thereby receive line extensions at no cost to the developer. Such an interpretation effectively destroys the line extension tariffs.

As witness Pablos testified, to qualify for "Subdivision," there would have to be a reasonable expectation that within three years Phase One would produce 50 lines in service to yield one per acre. Phase Two would require 36 lines. Here, as of the summer of 1992, there were a total of seven lines to five lots. And even by August of 1996, there were only nine lots receiving service in Phase One. Phase Two had no lines in service.

Tariffs provide a difference between real estate developments and "Subdivisions" for good reason. Prior to *Re Alternative Regulatory Frameworks for Local Exchange Carriers* (1989) 33 CPUC2d 43, which adopted an incentive based regulatory framework applicable to Pacific, traditional cost-of-service regulation (rate base, rate of return) set rates, and utility capital investment required ratepayers having to pay on such investment. Since the 1989 decision, the reason for a difference is to protect Pacific from having stranded investments out in the field. Speculative real estate developments, located distant from communities, are expensive to equip, and tie up capital with a risk of little return, especially in a slow real estate market. South Fork

Estates is an example, and we conclude that Pacific's Visalia office in making a determination that there were not reasonable prospects of 50 lines developing within three years for Phase One, or 36 lines for Phase Two, properly and reasonably required the developer to advance the installation costs for these line extensions.[3]

While strictly speaking, the South Forks Estates' complaint, seeking changes to Pacific's tariffs, did not meet the last paragraph requirements of Public Utilities Code § 1702 to entitle it to be considered, in that it was not signed by "the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and council within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service," in consideration of a misinterpretation of *Santa Margarita*, supra, the ALJ determined to proceed with a hearing.

As there has not been set forth any act of things done or not done in violation of any provision of law or of any order or rule of the Commission, Complaint 91-09-049 will be dismissed.

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[3] South Fork Estates' assertion that *Santa Margarita*, supra, requires a different conclusion does not persuade us. The Rancho Margarita development, with five distinct neighborhood areas involving approximately 2,500 acres of urban area, to be developed in three overlapping rapid and continuous phases (Phase One - December 1, 1985 through August 11, 1986; Phase Two - November 18, 1985 through September 25, 1986; and Phase Three - November 16, 1987 through May 11, 1988), was to be of city sized lots where a one line per acre density is easy to obtain overall. The real estate market was very good with homes being constructed and sales closed rapidly. Less then four years elapsed between the recording of initial Subdivision maps in mid-1985 for Phase One and occupancy in Phase Three in late 1988. The success of the development was virtually assured and there was a reasonable expectation that within the next three years the density requirement of five or more lines for single family and/or multiple family dwellings would be met. Accordingly, in *Santa Margarita*, supra, we determined that Phase Two, at issue there, met the "Subdivision" definition.

Findings of Fact

1. Pacific is a public utility telephone corporation within the jurisdiction of the Commission.

2. The Far West Development Corporation is the developer of 160 acres of an approximate 300-acre tract of land called South Fork Estates 30 miles east of Visalia and Highway 99 in a rural area known as Three Rivers in Tulare County, California.

3. The South Fork Estates development area was proposed to be developed successively in three phases with Phase One of 50 acres with 36 lots; Phase Two of 60 acres with 34 lots; and Phase Three of 50 acres with 35 lots.

4. In mid-1991, the developer applied for installation of line extensions to and into Phase One of South Fork Estates.

5. Comparing the number of lots with the number of acres in Phase One, the remote rural location, the custom home nature of the development, and the continuing depressed general economy and real estate market in the entire area, Pacific's Visalia office concluded reasonable prospects did not exist that within three years Phase One could obtain 50 permanent lines to meet the density requirement under its Tariff Rule 1 to qualify as a "Subdivision," and classed the project as a real estate development under its Tariff Rule 15.

6. Tariff Rule 15 requires the developer to advance the costs of installing undergrounded extension lines to and into a new real estate development which in its entirety does not satisfy the density requirement to qualify it as a "Subdivision" under Pacific's tariff.

7. The developer was required to advance the line extension costs to Phase One, and while under time constraints did so, also determined to seek recourse to the Commission.

8. Phase Two subsequently also failed to have reasonable prospects in Pacific's determination to qualify as a "Subdivision" for the same reasons as Phase One; was classed as a real estate development; and the developer advanced the line extension installation costs again under protest.

9. In September 1990, South Fork Estates instituted this proceeding against Pacific, asking for clarification of the intent of Rule 15; that the development be classed as a "Subdivision," and that the advance be refunded.

10. In subsequent developments, Phase Two was included and a similar request for refund of the advance costs was made, substantially in reliance upon the Commission's 1993 *Santa Margarita* decision also involving Pacific.

11. Unlike the South Fork Estates project, the Santa Margarita three-phase housing portion of the larger project enjoyed a very fast moving real estate market in an existing residential area, small city lots, and excellent prospects for fast build-out, virtually assuring a one line per acre density attainment within three years.

12. As of November 11, 1996, South Fork Estates had only 11 lines in the entire development.

13. Pacific's tariffs were promulgated to contemplate application of density requirements to the entire development.

Conclusions of Law

1. Pacific's Tariff Rule 1 definition of a "Subdivision" does not apply to the line extensions involved in this proceeding.

2. The cost of the line extensions to and into Phase One and Phase Two of the South Fork Estates was and is the responsibility of South Fork Estates.

3. Pacific properly required South Fork Estates to advance the costs of the line extensions to and into Phases One and Two of the South Fork Estates development.

4. The complaint should be dismissed.

ORDER

IT IS ORDERED that Complaint 91-09-049 is dismissed.

This order is effective today.

Dated June 25, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners