

Decision 97-09-014 September 3, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

National Farm Workers Service Center, Inc., A Non
Profit Corporation,

Complainant,

vs.

Southern Pacific Company, a corporation, and Keene
Water District,

Defendants.

Case 89-06-051
(Filed June 26, 1989;
amended October 3, 1989)

ORIGINAL

Jackson, Tufts, Cole & Black, by William H. Booth,
Joseph S. Faber, and Evelyn Elsesser, Attorneys
at Law, for National Farm Workers Service
Center, Inc., complainant.

Kuhs & Parker, by William C. Kuhs, Attorney at Law,
and Steefel, Levitt & Weiss, by Lenard G. Weiss,
Attorney at Law, for Southern Pacific
Transportation Company, defendant.

McDonough, Holland & Allen, by Craig Labadie,
Attorney at Law, for Keene Water District, defendant.

OPINION

Statement of Facts

Background

Approximately 1876, the Southern Pacific Railroad Company, predecessors to Southern Pacific Transportation Company (SP), constructed an approximate 17-mile water line along Tehachapi Creek between Techachapi and Caliente in Kern County, California. The water line was constructed to provide water for the railroad's steam locomotives using the railroad's main line east of Bakersfield, to serve its maintenance

facilities along the track, and to provide domestic water for its employees in the Keene-Caliente area.

In 1909, John P. Cuddeback (Cuddeback) conveyed to SP certain water rights in Tehachapi Creek and its tributaries and in waters riparian to specified property owned by Cuddeback near the town of Tehachapi. Immediately thereafter, SP in turn conveyed to Cuddeback a perpetual right to use 39,000 gallons per day (gpd) of the waters produced by SP in exercising the water rights previously acquired from Cuddeback.

In 1916, SP drilled and placed into operation a water well near what today is "downtown" Tehachapi.¹ Thereafter, until about 1952 when the springs and streams producing water from the Cuddeback property dried up, ground water from SP's Tehachapi well and water produced from the Cuddeback sources were commingled and conveyed through the waterline.

In 1939, Cuddeback's heirs conveyed a right to receive 20,000 gpd of Cuddeback's entitlement to Kern County in exchange for payment of \$200 per month for 25 years, after which the County was to own the SP assignment with no further payments. And SP provided this water which the County needed for various purposes including operation of the Stony Brook Retreat, a sanitarium in Keene.

In 1952, the County contracted with SP for additional water, when SP would have surplus, as an "accommodation." Their contract was terminable on 30 days' notice with no assignment without SP consent. In 1962, SP gave the County notice that as the Cuddeback source was no longer producing water, SP was no longer obligated to deliver Cuddeback source water. And on June 30, 1967, SP gave the County notice of termination on or before September 1, 1967 of the 1952 SP-County Agreement for sale to County of SP surplus water.

¹ By Tehachapi-Cummings County Water District v. City of Tehachapi (Case 97210 Kern County Superior Court), the Tehachapi Basin water rights were adjudicated. Based on its well extractions from its Tehachapi well, SP was given an allocation of 65-1/2 acre feet per year.

On August 16, 1967, Kern County filed Case (C.) 8673 with the Commission asserting that SP for years had been selling and delivering water to the sanitarium, a fire station, schools, and individuals, and asked that SP be declared a public utility. SP denied the complaint, stating it had operated a private water system, and as an accommodation only, had sold surplus water when available to individuals near its pipelines; but that there was no longer a surplus.

Concurrently with the Kern County complaint, the Commission on its own motion had opened an investigation (C.8674). Both cases were consolidated. After four days of hearing but before submission, with concurrence of all parties, the matters were put on hold pending the outcome of negotiations between SP and a new water district, the Keene Water District. The negotiations, if successful, would resolve the problems and assume continued services.

On February 13, 1969, SP and Keene reached an agreement by which SP would continue service until Keene took over the SP pipeline, water producing, and storage facilities and began operations. (Keene was formed primarily to finance and construct a transmission line to connect to another line to be constructed by another county water district to import California State Water Project water). The County filed a statement not opposing dismissal of its complaint, and SP filed a motion to dismiss both cases. On June 10, 1969, the Commission dismissed both cases (Decision (D.) 75769).

In 1970, the County conveyed the sanitarium property to Edward Lewis (Lewis), including the water rights the County had received from Cuddeback. Lewis leased the property from 1970 to 1978 to the National Farm Workers Service Center (Farm Workers), including the Cuddeback water right, and the Farm Workers operated the property as a housing complex and business center. In 1978, Lewis quitclaimed the property to Farm Workers.

From 1970 to 1981, SP provided water without charge to the Farm Workers. Meanwhile, Keene did not construct the intertie pipeline to the other county water district and did not take over any of SP's service. In March of 1981, SP wrote Farm Workers to state that it was no longer willing to deliver water free of charge to the Farm Workers; that earlier the Cuddeback source relied upon had dried up, and SP's own

Tehachapi well supply was limited by court order and that SP had to limit its sale of surplus water in turn. SP required anyone receiving surplus water through its pipeline to execute surplus water agreements. SP told Farm Workers it would allow a reasonable time for Farm Workers to procure an alternative supply, or would enter into an agreement for the sale of surplus water. The Farm Workers refused to sign SP's water surplus agreement.

In July of 1982, SP filed a complaint against the Farm Workers in Kern County Superior Court (C.179754) alleging that the latter had no rights, title, or interest in SP's water line, and sought injunctive relief and damages. The Farm Workers filed an action in Kern County Superior Court (C.185690) alleging damage to a bridge, roads, trees, and shrubbery (from SP weed control spraying), and wrongful diversion of water.

On August 20, 1986, the Superior Court approved a settlement of both cases, which, as relevant here, provided that the Farm Workers had no right to delivery of any water from the SP pipeline under or pursuant to the 1909 conveyance, the 1939 Cuddeback conveyance to Kern County, the 1970 conveyance to Lewis, the 1978 conveyance to Farm Workers, or the later 1978 quitclaim vis-a-vis the internal Farm Workers transfer of interest. The Settlement further provided that the Farm Workers had no interest in SP's Tehachapi well allocation, or in the SP pipeline. The Settlement further provided that Farm Workers could continue to divert water from the SP pipeline expense free at the rate of 30,000 gpd, until December 31, 1985; and that SP and Farm Workers were to execute a surplus water agreement for delivery of water during 1986 (in a form attached to the Settlement), but that after December 31, 1986, SP would have no obligation to deliver water to the Farm Workers. The amended judgment was entered in C.179754 on August 21, 1986 and recorded on August 26, 1986 in Book 5906 of the Kern County Official Records at page 770.

The Farm Workers drilled their own well and operated it from early 1987 until early 1988 when the well failed. The Farm Workers sought emergency supply from SP and the two parties on August 8, 1988 signed an agreement for SP to sell surplus water as "neighborly accommodation" in light of the Farm Workers' emergency for a 30-day

period. By two amendments, the period of emergency accommodation was extended until December 31, 1988.

In May of 1989, SP found that Farm Workers were still taking water from SP's pipeline, and notified the Farm Workers on May 22, 1989 to contact SP on the matter. Having no response, SP on June 5, 1989 notified the Farm Workers that service would be disconnected on June 28, 1989.

Subsequent Events

On June 26, 1989, the Farm Workers filed C.89-06-051 against SP, seeking a Temporary Restraining Order and a Commission Investigation of the 1969 Commission D.75769. That matter was continued at the request of counsels for both parties. On October 3, 1989, Farm Workers filed its "First Amended Complaint," adding Keene Water District as a respondent, and contending that Keene is a public utility as defined in Public Utilities (PU) Code § 216 and should be required to fulfill its public utility obligations based on the SP-Keene February 13, 1969 Agreement which was the basis for the Commission dismissal of C.8674 by D.75769 (the Kern County complaint).

After stipulated extensions of time for responses, on January 12, 1990, Keene filed both its answer and a Motion to Dismiss as to Keene, asserting that the 1969 SP-Keene Agreement did not serve to make Keene a public utility, and that as Keene was a California water district, the Commission lacked jurisdiction to compel it to serve the Farm Workers' property which was not in the district's boundaries.

On February 7, 1990, SP filed its Answer, alleging that the Farm Workers were estopped to contend it was entitled to water service from SP as a result of the oral stipulations in the Superior Court case in 1985, and SP's fulfillment of its obligations pursuant to that stipulation and the Farm Workers' acceptance of the benefits thereof. SP further alleged that the Farm Workers were barred by the doctrine of res judicata from contending they had any rights for water delivery as the result of the Superior Court judgment in C.179754. SP further asserted that the emergency accommodations in 1988 and 1989 under agreements did not make SP a public utility water corporation.

A duly noticed hearing on the Keene Dismissal Motion followed by a Prehearing Conference (PHC) on the complaint case was conducted in San Francisco on March 16, 1990, before Administrative Law Judge (ALJ) John B. Weiss. After hearing arguments on the dismissal motion, the ALJ concluded that as a governmental entity, established pursuant to provisions of the California Water Code, Sections 34000 et seq., Keene was not a "private" corporation capable of being subjected to the regulatory authority of this Commission under any of the circumstances disclosed in the proceeding; that Keene had dealt with SP, a rail public utility owning a water supply not otherwise shown to be dedicated to the public use; and that Keene had not been a party to the Kern County-SP Superior Court case. Accordingly, the ALJ dismissed Keene as a party to the captioned proceeding. We affirm the ALJ's dismissal.

Passing from the Motion to Dismiss ruling to the PHC on the captioned case, the ALJ stated his concerns that as the pleadings with their numerous exhibit attachments had revealed that the Cuddeback water rights were extinguished around 1952 by an Act of Nature when the sources went dry; that any possible residual claims on that source, or for water from SP's Tehachapi well source or the SP pipeline were extinguished by the Superior Court's judgment in Superior Court C.179754, and that water deliveries thereafter were made either pursuant to emergency surplus water agreements or by the Farm Workers taking water from the pipeline, appeared to preclude further Commission proceedings which if allowed could be regarded as a collateral attack on a final Superior Court decision. The attorney for the Farm Workers asserted there existed a reasonable basis to find a dedication of SP's Tehachapi well after the well was installed in 1916 from sales to other persons over the years following. As such could render SP a water public utility, time was sought to pursue further discovery. SP stated that it had preserved the status quo (except for price increases) since 1969 for the users affected by the Keene-SP agreement of 1969 (users other than the Farm Workers). But as the Farm Workers had been taking about half of SP's Tehachapi well water without payment, it had initiated the suit against the Farm Workers in C.179754 which resulted in the 1986 Superior Court judgment.

It was agreed that time was needed for future discovery before the parties would brief, leading to a possible SP "Summary Judgment" like motion on res judicata grounds based on the Superior Court decision to narrow the issue for future hearing.

Subsequently, SP and the Farm Workers entered discussions seeking a possible resolution involving a local developer and the local County Supervisor. The concept was to ensure development of a firm supply and delivery mechanism in the Town of Keen area while allowing SP to get out of water provision. In late January of 1991, the parties sought more time to continue these discussions and to explore alternatives. They asked that the proceeding be placed on hold and stated that they would thereafter report quarterly on progress. At desultory times since, SP has telephoned, but no specific resolution has been reached, and no word has been received for the approximate last three years.

Discussion

SP's pipeline along its mainline track from Tehachapi to Caliente was constructed in 1876 for railroad purposes, and as an accommodation, to supply domestic water to its employees along the line to whom no other source of supply was available. There was no dedication to serve the general public by these actions. In 1909, the water supply was augmented by purchase of water to be derived from the Cuddeback property, with a reservation by Cuddeback of 39,000 gpd into perpetuity, and further augmented by water from a SP drilled well in 1916 in Tehachapi. SP's allocation of water from this well was limited by an adjudication of the basin.

The Farm Workers' sole "ownership" right to any water to be taken off the SP pipeline was derived from the 1909 Cuddeback reservation of 39,000 gpd from the Cuddeback source conveyed to SP. Of these waters, a right to 20,000 gpd devolved to the Farm Workers through Cuddeback heirs conveyance through Kern County and Lewis. But the Cuddeback source dried up in 1952 and the "ownership" right held by the Farm Workers in reality was terminated by an Act of Nature. The Commission on this record fully agrees with the decision of the Superior Court in C.179754 that the Farm Workers have no right to any water derived out of the 1909 Cuddeback

conveyance and the successive conveyance from the County to Lewis to the Farm Workers.

Any right to receive water from the SP pipeline would have to be based upon a proof that SP's provision of water to the Farm Workers or their predecessors in interest to the property at La Paz near Keene was an action of a water system dedicated to the public. And any such issue must be confined to SP actions in that locale. What operations SP may have or had elsewhere is not relevant to this situation.

It is the Farm Workers' assertion that SP, in addition to providing water via its pipeline for its own industrial and employee needs, has served a hospital, schools, and a fire station, and possibly others, as well as the Farm Workers' property, and that these acts suffice to find that SP pursuant to PU Code § 2701² operates a public utility subject to the Commission's jurisdiction, control, and regulation.

But pursuant to provisions of PU Code § 2704, first enacted in 1951, where the owner of a water supply not otherwise dedicated to public use and primarily used for its industrial purposes, sells or delivers the surplus of such waters for domestic or school district purposes, or 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 purposes is equally available, that owner is not subject to the jurisdiction, control, and regulation of the Commission.

The County operated the property at La Paz as Stony Brook Retreat, a county sanitarium, and SP water was diverted to it from the pipeline before the Cuddeback source dried up, and as an accommodation with SP surplus water after the Cuddeback source dried up, until 1967. Thereafter, as a result of the Keene-SP Agreement, SP was obligated to continue to allow the diversion of its surplus water. But Keene did not take

² PU Code § 2701, as relevant here, provides that any corporation owning, controlling, operating, or managing any water system within this state, who sells or delivers water to any person, firm, corporation, municipality, or any other political subdivision of this State, whether under contract or otherwise, is a public utility, and is subject to the jurisdiction, control, and regulation of the Commission, except as otherwise provided in the PU Code.

over and SP continued until 1981, when following the 1978 sale to the Farm Workers, SP required the latter to take the water under its Surplus Water Purchase Agreement. But for all this period and continuing up until filing of the present complaint, the record shows and we would so find, SP was engaged in the sale of surplus water derived from its Tehachapi well only and thus was exempt from the jurisdiction, control, and regulation of the Commission under the specific conditions of PU Code § 2704.

Despite the passage of time, the parties have not requested that the proceeding be calendared again for hearing, nor has there been any offer of evidence that SP offered water for sale to the general public except of surplus water delivered as an accommodation to neighbors in a difficult arid area where no other reliable source was available, or as an emergency relief measure. None of the quarterly progress reports have been forthcoming, nor have there been any communications for several years.

On July 31, 1997 the ALJ wrote the attorney of record for the Farm Workers to advise that unless by August 13, 1997 the Commission was provided with reasonable assurance of a solid evidentiary basis on which to proceed to hearing in the immediate future, the matter would be processed for dismissal for lack of prosecution.

On August 13, 1997, the Farm Workers' attorneys, Messrs. Booth and Huerta each called the ALJ. The gist of their information was that discussions with Union Pacific (successor to SP) had resulted in a verbal conceptual understanding, and a Farm Workers' proposal whereby Union Pacific would turn the Tehachapi well and the pipeline over to the union, and with financial help from Union Pacific the Farm Workers would relocate the pipeline to Keene. Yet to be resolved were the details and what legal form the recipients would assume to receive and operate the water system. While fruition of this concept could result at some indefinite future time in a withdrawal of the captioned complaint, nothing therein provides any basis to proceed to hearing on the complaint. If an evidentiary basis for the complaint develops, complainants may refile at such time.

For these reasons, the complaint should be dismissed without prejudice for lack of prosecution.

Findings of Fact

1. As a governmental entity established pursuant to provisions of the California Water Code, Sections 34000 et seq., Keene is not a "private" corporation capable of being subjected to the regulatory authority of this Commission under any of the circumstances disclosed in this proceeding.

2. While a railroad corporation subject to the jurisdiction, control, and regulation of this Commission with regard to certain aspects of its railroad operations, SP with regard to the operation of its Tehachapi well and Tehachapi to Caliente water pipeline has not been shown to have operated a system subject to Commission regulation as a water public utility pursuant to PU Code § 2701.

3. While SP constructed and operated the Tehachapi well and its pipeline to service its rail operations and to provide water to its employees in an arid area along the mainline, it also furnished surplus water as an accommodation to neighbors for domestic or school requirements where no other supply of water was available, or to help out in emergency water shortage situations.

4. Although this complaint proceeding was taken off calendar at the request of the parties to allow additional discovery, years have passed without further communication, and no evidentiary basis for a hearing or Commission jurisdiction has been provided.

Conclusions of Law

1. Keene was appropriately dismissed as a party defendant to this proceeding.

2. SP's deliveries of water to neighbors, including employees, schools, a hospital, and a fire station, have been provided consonant with the provisions of PU Code § 2704.

3. As years passed without prosecution of this complaint or communication with the Commission and recent communications provide no evidentiary basis for a hearing or Commission jurisdiction, the complaint should be dismissed without prejudice.

O R D E R

IT IS ORDERED that Case 89-06-051 is dismissed without prejudice for lack of prosecution. The proceeding is closed.

This order is effective today.

Dated September 3, 1997, at San Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners