

Decision 98-09-044

September 3, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation and
Suspension on the Commission's Own
Motion of Tariff Filed by Advice Letter
Nos. 287 and 287-A of San Jose Water
Company in Santa Clara County.

(I&S)
Case 97-08-004
(Filed August 1, 1997)

ORIGINAL

ORDER GRANTING LIMITED REHEARING OF
DECISION 98-05-057

In D.98-05-057, we approved a new raw water tariff for the San Jose Water Company (SJWC). SJWC previously supplied only potable and recycled water. SJWC's proposed retail price for the raw water is \$487.09 per acre foot (AF). This is SJWC's \$557.09 potable water rate less \$70.00 for a treated water surcharge. Additionally, the proposed tariff requires the customer to provide all facilities needed to transport the raw water from its source to the point of service.

SJWC filed Advice Letter (AL) 287 to establish the new tariff for raw water service on June 18, 1997. A protest was thereafter filed by the Garcia Development Company (Garcia) contending that the proposed rate was unreasonable. On February 23, 1998, we held an evidentiary hearing. We issued D.98-05-057 accepting AL 287 as filed on May 21, 1998.

An Application for Rehearing of D.98-05-057 has now been filed by Garcia. We have reviewed this Application for Rehearing as well as the Opposition filed by SJWC. In its Application for Rehearing, Garcia alleges four legal errors by the Commission: (1) The Commission improperly relaxed the burden of proof and thereby exempted SJWC from the Public Utilities Code section 451 requirement of proving the reasonableness of the proposed rate; (2)

The Commission acted inconsistently by referencing a recycled rate in setting a raw water rate; (3) The Commission incorrectly considered facts outside the record when it utilized figures from SJWC's last rate case; and (4) Absent the figures from the last rate case, there was insufficient evidence to support the adopted rate. As discussed below, we conclude that a limited rehearing is warranted on the third error alleged by Garcia. Garcia's other allegations of error are without merit.

Garcia's first argument is that we erroneously relieved SJWC from its burden of proof. Garcia notes that under Public Utilities Code section 451, SJWC was required to prove that its proposed rate was "just and reasonable." Re Alco Water Service (1992) 44 C.P.U.C.2d 403, 413. Garcia contends that the SJWC failed to prove the reasonableness of its proposed rate.

More specifically, Garcia contends that SJWC failed to prove the very basis for the proposed rate. Garcia argues that the proposed rate is unreasonable without proof that existing customers will actually switch from potable water to raw water service. SJWC set the proposed rate so that raw water customers contribute the same amount to its fixed costs as potable water customers. (See Exhibit 1, "Raw Water Metered Service Tariff," p. 2.) SJWC maintained that the proposed rate was therefore reasonable because it prevented existing potable water customers from abandoning their obligation to support SJWC's fixed costs by switching to raw water service. *Id.*

Garcia argues that the record does not even support an inference that existing customers will switch services. Garcia points to our Finding of Fact 3 which states that "the record in this proceeding does not support a finding as to how likely it is that current potable customers might switch. . . ." Although 42 potential switching customers were identified in the record, Garcia argues that there was still no evidence that switching services was economically feasible for these customers. Garcia claims that we erroneously resolved our doubts about the

evidence in favor of SJWC. Garcia cites Re Gibbs Ranch Water Co. (1994) 56 C.P.U.C.2d 468, 474, which held that "any doubt" about the evidence is to be resolved against the party who bears the burden of proof.

SJWC objects that Garcia is applying the burden of proof for a rate increase case. Similarly, SJWC disputes Garcia's characterization of this matter as a "rate increase." (See Garcia Application, p. 1, 7.) SJWC emphasizes that this is an entirely new tariff, and existing customer rates are not being increased. On this basis, SJWC distinguishes the Alco and Gibbs Ranch cases cited by Garcia. SJWC notes that both cases involved rate impacts on existing customers. SJWC claims that Garcia's position would subject SJWC to an "extraordinary burden." SJWC, for example, cites testimony from Garcia's own expert that it would be "burdensome" to determine which customers would switch services. (2/23/98 Trans. 38:18.) SJWC also refers to Garcia's burden of proof arguments as "unfounded." SJWC argues that there is "no logic" behind Garcia's argument about proving customers will switch services. SJWC explains that there can be no certainty about customers switching services until the tariff is published and its terms made known. SJWC suggests that the proposed rate should suffice as long as it is not discriminatory.

We did not relax and/or exempt SJWC from its burden of proof under Public Utilities Code section 451. Garcia cites no authority for its proposition that SJWC was required to conclusively prove customers would switch from potable water to raw water. Under Public Utilities Code section 451, SJWC was only required to prove that its proposed rate was just and reasonable. SJWC cited our policy of defining a reasonable rate as one which distributed the cost fairly among customers and yielded a fair rate of return. (See Exhibit 1, "Raw Water Metered Service Tariff," p. 2.) SJWC thus maintained that the proposed rate was

reasonable because it protected remaining potable customers from unfairly absorbing fixed costs when potable customers switched to raw water.

Garcia's expert witness, Mr. Czahar, agreed that potable customers switching to raw water "would impose a cost on the other [remaining potable] customers." (2/23/98 Trans. 54:10-11.) Although read into the record by Garcia's expert witness, a SJWC data response identified 42 potential switching customers. The response stated that SJWC had "confirmed to itself that the City of San Jose has 42 services. . . this certainly has the potential to become a raw water service when such service can be made available." (2/23/98 Trans. 38:3-13.) Further, Garcia's own expert acknowledged that it was "simply impossible for the Commission to tell, at this point in time, if any other potable customer will take service under AL 287. . . ." (See Exhibit 3, Czahar Testimony, p. 7.) Hence our cautious approach to rate setting did not necessarily equate with resolving an evidentiary doubt in favor of SJWC.

Second, Garcia contends that we made an erroneous finding in support of the proposed rate. SJWC maintained that it priced the raw water higher than recycled water to promote the State's policy of encouraging the use of recycled water. (See Exhibit 1, "Raw Water Metered Service Tariff," p. 6.) Garcia cites our finding that we could not determine SJWC's "precise recycled rate." (D.98-05-057, p. 8.) Garcia also cites our finding that the proposed rate fell "midway between recycled and potable" rates. *Id.* at p. 8-9. Given that the recycled rate was undetermined, Garcia questions how we could know where the proposed rate fell in relation to the recycled rate. Garcia argues that the two findings are inconsistent and therefore erroneous. Garcia adds that it was erroneous for the Commission to even reference a recycled rate in setting a raw water rate. Garcia notes that the raw water rate is cost-based unlike the recycled water rate.

Our findings are neither inconsistent nor erroneous. We made a finding that the "precise" recycled rate could not be determined. However, we also made a finding that SJWC's pricing method and the tariff nonetheless "assure[d]" that the raw water would not be priced below recycled. (D.98-05-057, p. 9.) Additionally, we did not err in referencing the recycled water rate. We simply referenced the recycled water rate in the context of the State's policy for promoting its usage. There was no cost based comparison of the recycled and raw water rates. Rather, we "examine[d] San Jose's proposed raw water quantity price independently of recycled water. . . ." *Id.* We noted that if the raw water was priced above the recycled water, there would still be a financial incentive for SJWC customers to purchase recycled water. We thus concluded that the proposed rate would encourage the use of recycled water in accordance with the State's policy.

Garcia's third argument is that SJWC failed to prove that the proposed rate actually reflected the costs of providing raw water service. Garcia notes that SJWC had been directed to submit an exhibit to support its proposed raw water rate, including the costs of service. (1/12/98 Trans. 5:17-25.) Garcia cites our comments that the exhibit submitted by SJWC contained "speculative and arbitrary figures" and that the calculations were "problematic" as well as "puzzling and inappropriate." (D.98-05-057, p. 10-11.) Garcia thus concludes that the exhibit failed to satisfy SJWC's burden of showing the reasonableness of the proposed rate.

Related to the above argument, Garcia's fourth argument is that we then erroneously satisfied SJWC's burden by performing an extra-record cost of service analysis with figures from SJWC's last rate case. Absent our cost of service analysis, Garcia contends that there was insufficient *record* evidence to support the reasonableness of the proposed rate. Garcia cites the "well-established

rule of law" that the Commission "must predicate its decision upon the lawful record of a proceeding." Southern California Gas Co. (1952) 51 C.P.U.C. 533, 534. Garcia concedes that we may officially notice SJWC's last rate case. Garcia, however, argues that Rule 64¹ of the Commission's Rules of Practice and Procedure prohibits the Commission from taking official notice in a manner which impairs "substantial rights" of the parties. Garcia objects that its substantial rights were impaired when it was denied any opportunity to challenge the figures or how the Commission utilized the figures.

SJWC disputes that Garcia's rights were impaired when the Commission employed figures from the last rate case. SJWC references the official notice provisions of Rule 73. SJWC argues that official notice of the rate case necessarily includes the supporting figures. SJWC also questions how Garcia can claim prejudice when its own expert reviewed the figures from the last rate case in preparation for his testimony. (2/23/98 Trans. 35:18-23.)

Irrespective of SJWC exhibit, we may officially notice SJWC's last rate case as record evidence in support of the reasonableness of the proposed rate. Rule 73 provides that the Commission may take official notice of "such matters as may be judicially noticed by the State of California." Matters that can be judicially noticed include court decisions, records in state court as well as official acts of the legislative, executive and judicial departments of the state. (See Evidence Code section 452(a)-(h).) The Commission, for example, has officially noticed its prior orders on utilities' tariffs and yearly depreciation applications. (See In the Matter of the Application of Pacific Bell Etc. [D.94-12-003, p. 6] (1994) 57 C.P.U.C.2d 572, 575; Westcom Long Distance, Inc. v. Pacific Bell, et al. [D.94-10-061, p. 10] (1994) 57 C.P.U.C.2d 120.)

¹ All further rule references are to the Commission's Rules of Practice and Procedure.

Nonetheless, we require due process in the exercise of our broad powers of official notice. This includes affording both notice and a hearing to the parties. The Commission has not taken official notice in situations where the parties did not have an opportunity for rebuttal. (See Re Regulation of Cellular Radiotelephone Utilities [D.92-10-026] (1992) 46 C.P.U.C.2d 1, 6) Similarly, the Commission has declined to take official notice of documents created after the close of the proceeding. (See Re Pacific Bell [D.92-07-072] (1992) 45 C.P.U.C.2d 109, 116.)

Accordingly, due process requires that Garcia be afforded notice and an opportunity for hearing concerning the figures from SJWC's last rate case and our raw water cost of service analysis. Garcia did not receive notice before or during the hearing of any intent to officially notice or otherwise utilize figures from SJWC's last rate case. Similarly, Garcia was not afforded a hearing to respond to how the rate case figures might be utilized.

Rehearing is therefore granted and limited to evaluating the reasonableness of the proposed rate based on figures from SJWC's last rate case. From those figures, it shall be determined whether the proposed rate will yield the necessary utility revenue to provide a fair rate of return and adjustments made, if necessary.

IT IS ORDERED that:

1. The Application for Rehearing of D.98-05-057 is granted. Rehearing is strictly limited to evaluating the reasonableness of the proposed rate based on the figures from SJWC's last rate case. From those figures, it should be determined whether the proposed rate will yield the necessary utility revenue to provide a fair rate of return and adjustments made, if necessary.

2. The Executive Director shall provide notice of this rehearing to all parties in the manner prescribed by Rule 52 of the Commission's Rules of Practice

and Procedure. Rehearing shall be held at such time and place and before such Administrative Law Judge as is designated herein.

3. In all other respects, the Application for Rehearing is denied.

This order is effective today.

Dated September 3, 1998, at San Francisco, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners

ALJ/LTC/jac

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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on the Commission's Own Motion of Tariff Filed
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**(I&S)
Case 97-08-004**

NOTICE OF REASSIGNMENT

Please be advised that Investigation and Suspension Case 97-08-004 is being reassigned from Administrative Law Judge (ALJ) James C. McVicar to ALJ Maribeth A. Bushey for purposes of handling the rehearing ordered in D98-09-044.

Dated September 8, 1998, at San Francisco, California.

/s/ LYNN T. CAREW

Lynn T. Carew, Chief
Administrative Law Judge