

Decision 99-07-014 July 8, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

USDA Forest Service,

Complainant,

vs.

Lukins Brothers Water Company, Inc.,

Defendant.

Case 99-02-021
(Filed February 11, 1999)

OPINION DISMISSING COMPLAINT

Summary

We determine that we lack jurisdiction over the dispute between the parties and accordingly, dismiss the complaint. We grant defendant's motions to dismiss for lack of jurisdiction and for lack of standing to the extent they advance the rationale which forms the basis for our dismissal and otherwise deny the motions.

Procedural Background

USDA Forest Service (Forest Service) filed this complaint against Lukins Brothers Water Company, Inc. (Lukins) on February 11, 1999, after the parties' informal efforts to resolve their differences reached impasse and after Forest Service deposited the amount in dispute for impoundment by our Consumer Affairs Branch (CAB). Paragraph (F)(2) of the standard form complaint asks us to determine whether Forest Service is a customer, establish a tariff rate for a 10" meter and settle how much Forest Service owes Lukins for certain prior deliveries of water by Lukins. The complaint requests an "expedited procedure."

The instructions to answer dated March 1 categorized the complaint as an adjudicatory proceeding. On March 10, the assigned administrative law judge (ALJ) amended the instructions to answer to require Lukins to address several jurisdictional issues and to indicate whether it supported conversion of the complaint to an expedited complaint which would be administered under our expedited complaint procedure (ECP).

On March 31, Lukins filed several pleadings: an answer, motions to dismiss for lack of jurisdiction and for lack of standing and an opposition to ECP designation. Forest Service did not respond in writing to the motions or the opposition but at the prehearing conference (PHC) held on April 16 in South Lake Tahoe, the ALJ heard argument on these pleadings from both parties. The ALJ made an oral ruling at the PHC that because this complaint did not meet the small claims-like ECP requirements set out in Rule 13.2 of the Rules of Practice and Procedure it would not be converted to an ECP. At the conclusion of the PHC, the ALJ determined there was no need for evidentiary hearing and cancelled the hearing set for that afternoon.

Discussion

1. Framework for Jurisdictional Analysis

The CPUC has subject matter jurisdiction over a disputed issue if that issue falls within the scope of the authority granted the CPUC by the California Constitution or the Legislature. Lack of subject matter jurisdiction is a fundamental defect that cannot be waived, nor can the parties confer jurisdiction by stipulation. [National Union Fire Ins. Co. v. Stites Prof. Law Corp. (1991) 235 CA3d 1718, 1724.] Further, "[a] judgment rendered by a court that does not have subject matter jurisdiction is void and unenforceable and may be attacked anywhere, directly or collaterally, by parties or by strangers. [Marlow v.

11.2.1.4
78.1.2

Campbell (1992) 7 CA4th 921, 928.] These fundamental principles are equally applicable to the jurisdiction of administrative agencies like the CPUC.

Here, because the complaint's assertions do not clearly establish our jurisdiction, the ALJ amended the instructions to answer to specifically require information on the applicability of Pub. Util. Code § 1702 (which governs the proper content of a complaint and identity of a complainant) and on the issue of defendant's dedication of utility facilities beyond the border of its service territory. Taken together, the various pleadings and the statements of the parties' representatives at the PHC clarify that this dispute concerns the water utility's continued obligation to provide water to an entity outside its service territory at a rate agreed to under a now-expired, limited term contract. The relevant, undisputed facts follow.

2. Undisputed Facts

Forest Service awarded a contract to Lukins on July 17, 1992, choosing this option over several alternatives available to it in 1992 when its Fallen Leaf Lake Water system failed to meet clean water standards and that water was declared unpotable. Under the contract, which expired on September 30, 1997, Lukins agreed to sell Forest Service 2,170,542 cu. ft. of water at \$1.29 per 100 cu. ft. for one year, plus a meter fee, and granted Forest Service four unilateral extensions of one year each. Forest Service arranged for the construction necessary to interconnect its water system with the Lukins' system and paid for the connection; these facilities, including the 10" meter, are all located on federal land.

Forest Service exercised each of the four annual options under the contract. Thereafter, Forest Service issued a purchase order to Lukins for water, at the same price, for the period October 1997 through April 1998. The parties

disagreement arose toward the end of April 1998 when Lukins sought to increase the rate to Forest Service by 26.41%. Shortly before, by Resolution W-4097 dated April 9, 1998, we had authorized an interim general rate increase for Lukins, subject to refund upon issuance of our final decision in Lukins' pending general rate case application. Our interim order authorized an increase over rates established in 1985 for Lukins' annual flat rate and annual metered rate schedules. Forest Service refused to pay the increase Lukins requested but continued to pay the 1992 contract rate. Ultimately, when the parties could not reach an agreement, Lukins mailed Forest Service a five-day notice of termination for nonpayment. The \$3,197.71 impounded at the CPUC represents the sum allegedly due for charges and late fees Lukins has assessed above the 1992 contract rate.

3. The CPUC Lacks Jurisdiction Over This Dispute

These undisputed facts present several jurisdictional impediments to our review. First, Forest Service is not a customer within Lukins' established service territory entitled to service under the terms and conditions of a CPUC-approved tariff nor has Lukins actually or impliedly dedicated itself to serve Forest Service.

Generally, when a public utility voluntarily extends service into a new area outside its service territory boundaries, its actions constitute a further "dedication" of utility facilities to the public and the utility must accept an obligation to serve all customers in the area. [See, for example, Parker v. Apple Valley Ranchos Water Co. (1977) 82 CPUC 623; San Jose Water Works (1972) 73 CPUC 358.]

However, the terms of the 1992 contract clearly establish that Lukins has not sought to expand the boundaries of its service territory by dedicating its

public utility facilities to provide water service beyond its service territory borders. Instead, Lukins and Forest Service agreed that Forest Service would expand its own facilities, and bear the associated construction cost, in order to take deliveries of water from Lukins for up to five years. These facts are very similar to those noted by the California Supreme Court in Cal. Water & Tel. Co. v. Public Util. Com. – in that case an individual, at his own expense, built the infrastructure necessary to accept water from the utility and agreed to take that water under a temporary, limited-term contract. The court held such facts did not support an implied dedication of service to others outside the utility's service territory. [Cal. Water & Tel. Co. v. Public Util. Com. (1959) 51 C.2d 478, 497.] We have followed this principle when, for instance, a utility has offered temporary, emergency service to an individual whose well ran dry during a drought.

[Clare & Skinner v. Santa Clarita Water Co. (1993) 51 CPUC2d 2.]

76.1.3-3
Forest Service's only claim to "customer" status, therefore, is as an entity served by a CPUC-regulated water utility under a private contractual or quasi-contractual arrangement. Over the years the California Supreme Court consistently has held that the Commission lacks jurisdiction over private contracts between public utilities and individuals. [See Cal. Water & Tel. Co. v. Public Util. Com., *supra*, at 488-489 (Commission cannot modify a public utility's contract or order a public utility to perform a contract, whether modified or unmodified); Atchison, etc. Ry. Co. v. Railroad Com. (1916) 173 Cal. 577, 582 (Commission is not a body charged with enforcement of private contracts).]

The Commission does review private contracts to ensure, for example, that utility management has not agreed to provide service under unreasonably favorable terms and conditions to the contracting individual or entity. Such an agreement, potentially subsidized by customers subject to regulated rates, would indicate management was acting to violate Pub. Util.

Code §§ 451 and 453 which, respectively, prohibit unjust and unreasonable rates and undue discrimination among customers. However, that is not the issue before us here and we conclude we have no jurisdiction to determine the legal or equitable rights and obligations of Forest Service and Lukins under any contractual or quasi-contractual theories.

17.23

Second, we lack jurisdiction to order Lukins to expand its service territory to include Forest Service and then to order a tariff rate for a 10" meter. [See Cal. Water & Tel. Co., *supra*, at 488 (Commission cannot propose terms of contract for utility to enter new territory or order utility to execute and specifically perform such contract); Pacific Telephone etc Co. v Eshleman (1913) 166 Cal. 640, 680 (police power over public utilities extends only to regulation within dedicated use and regulation that exceeds this is void for unreasonableness and may be void as an attempt to take property without compensation).]

751.3.3

42.1.7

4. Conclusion

For the reasons discussed above, we conclude we lack subject matter jurisdiction over the matter in dispute and accordingly, dismiss the complaint. We grant Lukins' motions to dismiss for lack of jurisdiction and for lack of standing to the extent they argue the rationale, articulated above, which forms the basis for our dismissal. We otherwise deny defendant's motions. Because we conclude we have no jurisdiction over this dispute, the \$3,197.71 impounded at the CPUC should be returned to Forest Service. We direct CAB to return the money as soon as practicable after the effective date of this decision.

No Hearing is Necessary

In granting the motion to dismiss, we change the preliminary determination, in the instructions to answer, that this proceeding required a

hearing and make a determination that no hearing is necessary, in accordance with Rule 6.6 of the Rules of Practice and Procedure.

Comments on Draft Decision

The draft decision of ALJ Jean Vieth in this matter was mailed to the parties in accordance with § 311(g) and Rule 7.1 of the Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. Forest Service is not a customer within Lukins' established service territory entitled to service under the terms of a CPUC-approved tariff.

2. The terms of the 1992 contract establish Lukins has not sought to expand the boundaries of its service territory by dedicating its public utility facilities to provide water service beyond its service territory borders.

3. Forest Service's only claim to "customer" status is as an entity served by a CPUC-regulated water utility under a private contractual or quasi-contractual arrangement.

4. The \$3,197.71 impounded at the CPUC represents the sum allegedly due for charges and late fees Lukins has assessed against Forest Service above the 1992 contract rate.

Conclusions of Law

1. We lack jurisdiction to determine the legal or equitable rights and obligation of Forest Service and Lukins under any contractual or quasi-contractual theories.

2. We lack jurisdiction to order Lukins to expand its service territory to include Forest Service and then to order a tariff rate for a 10" meter.

3. We should grant Lukins' motions to dismiss the complaint for lack of jurisdiction and for lack of standing to the extent they argue the rationale,

articulated in this decision, which forms the basis for our dismissal. We otherwise should deny Lukins' motions.

4. The \$3,197.71 impounded at the CPUC should be returned to Forest Service by CAB.

5. In dismissing the complaint, we make a final determination that no hearing is necessary in accordance with Rule 6.6 of the Rules of Practice and Procedure.

O R D E R

IT IS ORDERED that:

1. The complaint is dismissed.
2. The motions of Lukins Brothers Water Company, Inc. (Lukins) to dismiss the complaint for lack of jurisdiction and for lack of standing are granted to the extent the motions argue the rationale, articulated in this decision, which we adopt as the basis for our dismissal of the complaint. We otherwise deny Lukins' motions.

3. The Consumer Affairs Branch of the California Public Utilities Commission shall return to the USDA Forest Service, as soon as practicable after the effective date of this decision, the money impounded in connection with this dispute.

4. Case 99-02-021 is closed.

This order is effective today.

Dated July 8, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners

not in word

~~by~~
*retyped
OK!*