

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Jeffrey Young,

Complainant,

vs.

California Water Service Company,

Defendant.

Case 03-06-038
(Filed June 25, 2003)

Jeffrey Young, for himself, complainant.

Francis F. Ferraro, for California Water Service Company,
defendant.

OPINION DENYING RELIEF

I. Summary

Jeffrey Young (Complainant) requests that California Water Service Company (CalWater) be ordered to remove reservations for two water service connections from the connection list established by Decision (D.) 03-03-037 for CalWater's Coast Springs Water System. Complainant contends that the holders of these reservations have no intention of building on their property at this time, the property is outside the utility's service area, and removing the reservations from the list would free up two connections for others who are ready to commence construction.

CalWater responds that in exchange for a utility easement, its predecessor Dominguez Water Company (Dominguez) agreed to provide the two connections at any time upon request by the owners of the property; pursuant to Pub. Util. Code § 1001,¹ it is not required to obtain prior approval from the Commission before extending service into a contiguous area not served by another utility; and, the two connections at issue are properly on the connection list adopted by the Commission in D.03-03-037.

The Commission concludes that Complainant has failed to show that CalWater is in violation of any Commission rules, statutes or D.03-03-037. The complaint is dismissed and this proceeding is closed.

II. Procedural Summary

This complaint was docketed under the Commission's Expedited Complaint Procedure. Pursuant to § 1702.1(a), the matter was categorized as adjudicatory and converted to the regular complaint process by a ruling of the Chief Administrative Law Judge dated July 29, 2003.

On July 31, 2003, CalWater filed a motion to dismiss the complaint pursuant to §§ 1702, 1708 and 1709. We do not reach the motion to dismiss since we will address the complaint on the merits.

An evidentiary hearing on the complaint was held on August 6, 2003 in San Francisco. Concurrent opening briefs and reply briefs were filed by Complainant and CalWater on September 5 and 19, 2003, respectively, and this matter was submitted for decision.

¹ All statutory references are to the Public Utilities Code unless otherwise stated.

III. Statement of Facts

In 1999, CalWater's predecessor Dominguez entered into the agreement with the subject-property owners to provide two ¾-inch connections at any time upon request in exchange for an easement which enabled the utility to replace its existing storage tank with a larger tank and to have legal access to a road leading to the tank and its pipeline. Thereafter, the Department of Health Services (DHS) increased the number of allowable connections for Coast Springs Water System from 220 to 250.

In D.03-03-037, the Commission authorized a three-year moratorium on new service connections above 250 for the Coast Springs Water System. That 250 limit is adjusted automatically to any new, higher level the DHS may later permit. Subsequently, DHS concluded that the Coast Springs Water System could support an additional five service connections for a new limit of 255.

The Commission also authorized procedures for CalWater to implement the moratorium. In particular, CalWater is to maintain an approved service connection list and a waiting list. The "approved list" identifies water services approved under the limit without active meter connections. The "waiting list" identifies applications for water service exceeding the limit.

The Commission has set forth guidelines for CalWater to administer the lists on a going-forward basis. The list guidelines are included as a special condition in CalWater's general metered service tariff. The guidelines apply to all new service connection applications. Among other guidelines, the Commission directed that all future service applications be in writing.

The Commission directed CalWater to begin with an initial approved list, update it for changes and use the resulting list as the basis for moving forward

following the guidelines. That initial approved list was admitted into evidence, without objection, in the proceeding leading to D.03-03-037.

Cynthia Christopher and Geronima Belen (collectively, “the Christophers”) held two connections on the initial approved list and the updated approved list. The Christophers held the two connections pursuant to the 1999 agreement with Dominguez in exchange for the easement discussed above. The Christopher property is a vacant lot contiguous to CalWater’s territory. The Christophers later sold their property to the Monastery, which succeeded to the Christophers’ position on the approved list under the D.03-03-037 guidelines.² Henceforth, we will refer to this property as the Monastery Property.

IV. Discussion

The gravamen of the complaint is that the Monastery Property is outside the filed service area of the Coast Springs Water System. Complainant contends that CalWater has violated Commission rules and is not following D.03-03-037. We address these concerns below.

General Order (GO) 96A

Complainant argues that pursuant to GO 96A, CalWater needs Commission approval before it extends its service area. Complainant relies on the following requirement:

“The utility shall, *before commencing service*, file tariff service area maps for extensions into territory contiguous to its line, plant, or system and not theretofore served by a public utility of like character.” (GO 96A, Section 1E, emphasis added.)

² The D.03-03-037 guidelines provide that “a new lot owner may succeed to the former owner’s approved connection or rank on the waiting list.” (*Id.* at p. 12.)

Complainant's interpretation of the words "before commencing service" in GO 96A is not supported by case law. The law is clear that § 1001 allows CalWater to extend into unserved contiguous areas without Commission approval. (*See, Kern County Land Co., v. Railroad Comm., et al.* (1934) 2 Cal.2d 29, 34.) "While a public utility must receive prior Commission authorization before extending into a noncontiguous area, it does not require Commission authorization to extend into unserved contiguous areas (Second paragraph, Public Utilities Code Section 1001)." (*Benbow Ridge Water Dist. System Assoc. v. Benbow Water Co.*, (1996) 67 CPUC2d 280; also, *see Suburban Water Systems*, D.03-05-078, mimeo., p. 22-23.)

As the Commission made clear in *Re Alisal Water Corp.*, D.94-01-046, (1994) 53 CPUC2d 154, 157, GO 96-A § 1-E does not require Commission approval of extensions into unserved contiguous areas. Commission staff, like Complainant "allege[d] that GO 96-A prohibits extension of service" by Alisal without Commission approval. (*Id.* at 155.) Alisal disputed staff's allegation, stating that it found nothing to indicate that GO 96-A is intended to supersede § 1001. The Commission rejected staff's allegation and agreed with Alisal:

Alisal is correct when it asserts that it does not require Commission approval for an extension into territory contiguous to its system when that territory has not been 'theretofore served by a public utility of like character.' (Second paragraph of Public Utilities Code Section 1001) [citation] (*Id.* at 156.)

The Commission went on to explain that GO 96-A does not supersede § 1001:

The wording of Section 1-E clearly shows its derivation from the second paragraph of the PU Code § 1001. The wording of Section 1-E is consonant with the provisions of the second paragraph of PU Code § 1001. And even were they not

consonant, General Orders of the Commission do not supersede sections of the PU Code. (*Re Alisal, supra*, 53 CPUC2d 154, 157.)

CalWater does not now serve the Monastery Property, and CalWater's commitment to serve the Monastery Property if and when capacity allows does not violate the above quoted requirement of GO 96-A. CalWater's dedicated "service territory consists of (1) its filed map of certified territory, combined with, (2) voluntary extensions undertaken pursuant to Section 1001 of the Public Utilities Code." (*See, Parker v. Apple Valley Ranchos Water Co.*, D.87871, (1977) 82 CPUC 623, 629.) Section 1001 does not require CalWater to seek Commission approval by means of filing a new service area map to voluntarily extend its filed service territory into the Monastery Property. Pursuant to the agreement to provide two service connections in exchange for the easement, CalWater/Dominguez expressly dedicated service to the Monastery Property. Thus, CalWater is required to serve the Monastery Property when called upon to do so. GO 96A does not require CalWater to file a new service area map at this time, but only when infrastructure exists for the Monastery Property's water service to commence.

Section 2712

Complainant argues that however important the basis for the easement agreement was, there is no justification for CalWater/Dominguez to enter into a contract that violates § 2712, which states:

"Whether under contract or otherwise" as used in Section 2701 is not to be construed as authorizing a contract by a ... public utility which in anywise deprives the State or the commission or other competent authority of power to regulate the rates and service of any such public utility.

Complainant contends that by agreeing to give two connections outside the service area, CalWater is attempting to deprive the Commission of the right to approve or reject the extended service area.

We disagree. As discussed above, we hold that CalWater may extend into unserved contiguous areas without Commission approval pursuant to § 1001. The Commission still maintains the right to review CalWater's service area map filing for compliance with GO 96A, GO 103 or any other Commission orders, rules or decisions.

Section 453

Complainant alleges that CalWater is granting a preference to the Monastery Property in violation of § 453. Complainant also objects that CalWater/Dominguez granted the Monastery Property two connections without it "asking" for service.

We find that the two connections reserved for the Monastery Property are in compliance with A.03-03-037, and consequently there is no "preference" in violation of § 453. The prior owners of the Monastery Property did "ask" for service in the easement agreement, and that constitutes a service request for purposes of administering the connection list. Moreover, the written application requirement guideline in the Commission's decision does not apply to the Monastery Property and applies only to "future" or new service requests (D.03-03-037, p. 12).

The 18-Month Limitation

CalWater is required by D.03-03-037 to revoke any previously approved application for service for which the applicant is unable to provide proof of a building permit within 18 months of the acceptance of the application or the date D.03-03-037 was mailed, whichever is later. There is no dispute that currently

the Monastery Property is within this 18-month limitation since D.03-03-037 was mailed on March 17, 2003.

However, D.03-03-037 also states that no applicant on the approved connections list may be allowed to reserve a connection indefinitely (p. 11). Therefore, if the owners of the Monastery Property do not obtain building permits within the 18-month limitation, the two dedicated connections must be removed from the approved connection list, and CalWater would lose its right to the easement. Since it is in the best interest of all Coast Springs Water System's customers that CalWater retain the easement, CalWater would be well advised to timely file a petition to modify D.03-03-037, to exempt the Monastery Property from the 18-month limitation.

V. Conclusion

Complainant has failed to meet his burden of proving a violation of GO 96A, D.03-03-037, § 453 or § 2712. Therefore, the complaint should be dismissed.

VI. Appeal of Presiding Officer's Decision

The Presiding Officer's Decision (POD) was mailed on November 17, 2003. On December 15, 2003, Complainant filed his Appeal of the POD. CalWater filed its response on December 30, 2003. We address the issues raised in the discussion below.

The 18-Month Limitation

Complainant argues that there is no basis for Conclusion of Law 2 that CalWater should file a petition to modify Decision (D.) 03-03-037 to exempt the Monastery Property from the 18-month limitation. Complainant contends that the POD has brought up issues regarding the easement agreement which are

beyond the scope of this case. Accordingly, Complainant believes the section on the 18-Month Limitation should be stricken from the POD.

We disagree. Conclusion of Law 2 pertains to the easement agreement which was received into evidence in this proceeding as Exhibit 9. Complainant also overlooks the fact that: (1) he submitted three hearing exhibits referring to the easement agreement; (2) in closing arguments, he stated that the easement agreement violates Pub. Util. Code § 2712; and (3) in his Opening Brief argued that the easement agreement was unlawful. Conclusion of Law 2 simply notes a potential conflict between, on the one hand, the 18-Month Limitation in D.03-03-037 for the Monastery to submit a building permit or otherwise lose the connections and, on the other hand, the easement agreement's requirement to provide it connections "at any time." Since the Moratorium and the waiting list ordered in D.03-03-037, and the easement agreement are matters clearly within the scope of this proceeding, it is therefore lawful and appropriate for the POD to direct CalWater to file a petition to resolve this potential conflict.

The Moratorium Guidelines Require Owners to Make All Requests for Service

Complainant argues that the POD is erroneous in that it excludes a critical portion of the Moratorium guideline that states:

"Approved connections and spots on the waiting list are to be associated with unserved lots, and only a lot owner may apply for a new service connection to that lot" [D.03-03-037, p. 12 – emphasis added].

Complainant contends that since the owners of the Monastery Property never applied ("asked"), they cannot be on the approved connection list. According to Complainant, these connections cannot be on any list without a request from the owner.

The POD addressed this issue under the Section 453 discussion above, concluding that the prior owners did ask for service pursuant to the easement agreement. Complainant gives no reason to change that conclusion. Further, we note that a new lot owner may succeed to the former owner's approved connection or rank on the waiting list (D.03-03-037, p. 12). Therefore, Complainant's argument that "only a lot owner may apply for a new service connection," which we presume means that the new owners of the Monastery Property were required to submit a written application but did not do so, has no basis or merit. As stated in the POD, Monastery succeeded to the prior owners' position on the approved connection list, only future or new service requests need apply for a connection (D.03-03-037, p. 12).

Effective Use of a Limited Resource

Complainant's argument that the easement agreement provides that the Monastery Property owner "may" request service implies that CalWater has the option to deny service to the Monastery Property if the 250 connection limit has been reached. To the contrary, the easement agreement explicitly requires CalWater to provide two connections "at any time." Therefore, CalWater must be ready to provide specific performance under the terms of the easement agreement when called upon to do so.

Lastly, we reject Complainant's argument that saving two connections for the Monastery Property to the detriment of others on the waiting list, is not an effective use of a limited resource. While Complainant's argument may reflect the view of the next two property owners on the waiting list, it ignores the benefit already received of the 28 additional connections, the result of the easement agreement.

In summary, we conclude that the POD should be adopted as written.

VII. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Bertram D. Patrick is the Presiding Officer in this proceeding.

Findings of Fact

1. The Monastery Property is unserved and contiguous to CalWater's Coast Springs Water System, and § 1001 allows CalWater to extend into such unserved contiguous areas without prior Commission approval.

2. The easement agreement reflects the unequivocal intent of CalWater/Dominguez to voluntarily dedicate service to the Monastery Property.

3. Pursuant to § 1001, CalWater/Dominguez voluntarily extended its filed service territory into the Monastery Property.

4. GO 96-A does not require CalWater to file a new service area map until infrastructure exists for the Monastery Property's water service to commence.

5. Prior to the proceeding leading to D.03-03-037, CalWater had a legal obligation to provide two service connections to the Monastery Property, and these connections had to be provided any time upon request when the owners chose to request service.

6. The two connections to the Monastery Property were properly included in the initial connection list approved by the Commission in D.03-03-037.

7. However, the fact that CalWater was required to provide these two connections "at any time upon request" was not recognized in D.03-03-037.

8. Failure to provide the two connections at any time upon request would cause CalWater to lose its easement in the Monastery Property.

9. It is in the interest of all Coast Springs Water System customers that CalWater retain its easement in the Monastery Property.

Conclusions of Law

1. Complainant has failed to show that CalWater is in violation of any Commission rule, statute or D.03-03-037.
2. CalWater should file a petition to modify D.03-03-037 to exempt the Monastery Property from the 18-month limitation for names to remain on the connection list without a building permit.

O R D E R

IT IS ORDERED that:

1. The complaint of Jeffrey Young against California Water Service Company is denied.
2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.