

Decision **PROPOSED DECISION OF ALJ BUSHEY** (Mailed June 20, 2011)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of CALIFORNIA WATER SERVICE COMPANY (Applicant) (U60W), a California corporation, for authorization (i) to require the current or future owners of the parcels known as the "Trend Homes properties" to pay a \$40,000 developer contribution; and (ii) to reimburse Dwight Nelson with that \$40,000 payment.

Application 08-11-009
(Filed November 6, 2008)

DECISION APPROVING ALL-PARTY SETTLEMENT

1. Summary

This decision approves the proposed all-party settlement agreement.¹

2. Procedural Background

On November 6, 2008, California Water Service Company (Cal Water) filed this application seeking Commission authorization (1) to require the current or future owners of certain real estate property² in Cal Water's Selma District to pay a \$40,000 fee prior to receiving water service from Cal Water, and (2) for

¹ The uncontested settlement agreement is Attachment A to today's decision.

² The original owner of the approximately 62 acre property was Trend Homes, Inc., and Decision (D.) 85-06-132 refers to John Bonadelle as acting on behalf of that corporation. John and Lucretia Emmett are the current owners of the property.

Cal Water to remit that amount to Dwight Nelson. Cal Water stated that pursuant to Ordering Paragraph 8 of Commission D.85-06-132, it was required to file an advice letter when developers of the specified property sought water service from Cal Water. Thus, Cal Water filed its Advice Letter 1843 seeking to impose the \$40,000 fee on the prospective customers (namely, the current owners of the property, John and Lucretia Emmett), and to remit the collected amount to Nelson. The Emmetts protested Cal Water's Advice Letter. The Commission's Division of Water and Audits determined that the informal Advice Letter process was inappropriate for resolving the issues raised in the protest and directed Cal Water to file this application, which Cal Water did on November 6, 2008.

On December 11, 2008, the Emmetts protested this application, contending that the relief sought by Cal Water was contrary to prior Commission decisions, contained a material error, and was unjust and unreasonable.

On December 30, 2008, Dwight Nelson sought party status in this proceeding and stated that he was the real party-in-interest in the proceeding.

On March 10, 2009, the assigned Administrative Law Judge (ALJ) convened a prehearing conference, where the parties requested that a mediator be appointed to facilitate an effort to resolve this matter in a mutually agreeable manner. The Chief ALJ appointed another ALJ to serve as the mediator, as provided in the Commission's Alternative Dispute Resolution program.

The mediation was convened on April 23, 2009, with all three parties present. On June 5, 2009, Cal Water and the Emmetts filed their motion for approval of a proposed settlement agreement. Nelson contested the proposed settlement agreement on July 6, 2009, and asked that the Commission reject the settlement and grant the application. The Commission issued D.09-11-008 on

November 24, 2009, which denied the motion to adopt the contested settlement and dismissed the application. That decision found that the moving parties did not make the required showing for proving that the settlement should be adopted by the Commission. Specifically, the settling parties failed to show that the proposed settlement agreement was reasonable in light of the record, consistent with the law, and in the public interest.

Nelson timely filed an application for rehearing. The Commission granted a rehearing to reopen the record on the application in D.11-01-029. That decision reversed and vacated the determination to dismiss the application. On April 25, 2011, Cal Water, Nelson, and the Emmetts (Moving Parties) filed this joint motion for adoption of an all-party settlement.

3. Historical Background – D.85-06-132 and D.93-03-03

In the 1985 decision, the Commission authorized Cal Water to purchase the water system of the Wesmilton Water Company for \$100,000 and to commence providing water service in Wesmilton's former service territory. The Commission noted that Wesmilton's water sources, three wells, were all polluted with dibromochloropane and that Cal Water could provide safe and potable water.

The Commission also noted that in addition to the \$100,000 paid by Cal Water, a real estate developer with property in the Wesmilton service territory, Nelson, had paid \$65,000 to induce the then-owner of the Wesmilton Water Company to sell the water system to Cal Water. The Commission found that Nelson made the payment because he would benefit from the transfer of

Wesmlton to Cal Water by obtaining “water for his impending development more economically if [the transfer] is approved.”³

As set forth in a staff report quoted in the decision, the owner of Trend Homes, another real estate development located in the Wesmlton service territory, had initially agreed to fund \$40,000 of the extra \$65,000 but subsequently decided not to make a contribution, and so Nelson provided the entire \$65,000. Based on an “understanding” with the Commission’s staff, the application for the transfer of Wesmlton also included a request that the Commission require Cal Water both to collect \$40,000 from the developer of the Trend Homes property prior to providing water service to that development and to immediately pass on the payment to Nelson.

In D.85-06-132, the Commission declined to adjudicate the Nelson reimbursement request due to “significant problems,” noting that neither Trend Homes nor John Bonadelle was a party to the proceeding.⁴ Instead, the Commission directed Cal Water to file an Advice Letter with additional information “if and when the developers of the property now owned by Trend Homes apply for water service.”⁵ The Commission further directed that the Advice Letter be reviewed by Commission Staff (at the time, the Evaluation and Compliance Division), which would make “whatever recommendation it deems appropriate for further Commission action on this issue.”⁶

³ See D.85-06-132, *mimeo.* at 8, Finding of Fact 7.

⁴ See D.85-06-132, *mimeo.* at 4.

⁵ *Id.* at 5.

⁶ *Id.*

On August 14, 1992, Nelson petitioned to modify D.85-06-132, to impose a repayment obligation on all customers in the former Wesmilton service territory. The Commission denied the petition for modification in D.93-03-038 and made no changes to the 1985 decision.

4. Description of the Proposed Settlement Agreement

The proposed settlement agreement provides that the Emmetts will pay \$10,000 to Cal Water within 10 days of the effective date of a Commission decision approving the agreement. Upon receipt of the Emmetts' payment, Cal Water will pass that \$10,000 through to Nelson. The settlement also provides for Cal Water to provide water service to the Emmetts or any other owner of the Trend Homes parcel pursuant to the ordinary terms and conditions of Cal Water's tariffs.

Under the terms of the settlement, Cal Water will also "refund the sum of \$20,000 (without interest) to Nelson over a period of 10 years, provided that the Commission approves" treatment of these payments as a "refundable developer's advance."

The Moving Parties intend that this agreement will fully resolve all issues in this proceeding and completely dispose of Nelson's claim. Cal Water also requests approval to include the \$20,000 in its revenue requirement in its next general rate case.

5. Discussion

5.1. Commission's Standard for Reviewing Settlements

Rule 12.1(d) of the Commission's Rules of Practice and Procedure provides:

The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable

in light of the whole record, consistent with law, and in the public interest.

The settling parties have the burden of proving that the settlement should be adopted by the Commission.⁷ The Commission's standard of proof is the preponderance of the evidence.⁸

5.2. Previous Contested Settlement Agreement

In D.09-11-008, the Commission declined to approve a proposed settlement agreement based on a few key findings, namely that (1) Cal Water's ratepayers were not represented during settlement negotiations and ratepayers did not agree to the settlement agreement, and (2) the settlement was contested. The Commission found that Cal Water and the Emmetts, the only settling parties, had not meet their burden of demonstrating by a preponderance of the evidence that the proposed settlement agreement was reasonable in light of the record, consistent with the law, and in the public interest.⁹ The Commission also found that requiring the Emmetts to pay a fee for Nelson's benefit prior to obtaining water service from Cal Water would violate Pub. Util. Code §§ 451, 453, and 532.¹⁰

⁷ Application of Golden State Water Company for Authority to Implement Changes in Ratesetting Mechanisms and Reallocation of Rates for its Region I Service territory, D.09-05-005, *mimeo.* at 6.

⁸ In the Matter of the Application of San Diego Gas & Electric Company (U 902 E) for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project, D.09-07-024, *mimeo.* at 3-4, *citing* California Evidence Code § 115.

⁹ D.09-11-008, Conclusion of Law 1.

¹⁰ *Id.* at Conclusion of Law 3.

5.3. Current Uncontested Settlement Agreement

All parties to this proceeding seek approval of the current uncontested settlement agreement. The parties note two critical differences in the instant proposed settlement agreement and the 2009 settlement agreement. The first is that this is now an all-party settlement – Nelson has approved the settlement agreement and has joined in this motion. The second critical difference is that the parties submitted the proposed settlement to Division of Ratepayer Advocates (DRA) for review and was informed that DRA did not object to the settlement.

We apply Rule 12.1(d) to evaluate the uncontested settlement agreement against the Commission's settlement approval criteria.

5.3.1. Reasonable in Light of the Record as a Whole

In D.09-11-008, the Commission was unable to conclude that the contested settlement agreement was reasonable in light of the record because the ratepayers were not represented in the settlement negotiations. Here, however, the ratepayers have been represented through DRA.¹¹ The parties submitted the instant proposed settlement agreement to DRA, which estimated the approximate effect of the settlement on the ratepayers in Cal Water's Selma District and had no objection to the Commission's approval of the settlement.¹² In addition, it is reasonable to treat \$20,000 of the amount Nelson paid toward the purchase price in a manner similar to a refundable developer's advance. Existing and future development of the parcels, enabled by Nelson's payment,

¹¹ Joint Motion of California Water Service Company, Dwight Nelson, and the Emmetts for Adoption of All-Party Settlement at 3-4.

¹² *Ibid.*

will generate revenue for Cal Water in much the same way as a developer's advance would function.

Therefore, because the parties have cured the lack of ratepayer representation with DRA's review and lack of objection to treating \$20,000 as a refundable developer's advance for ratemaking purposes in Cal Water's Selma District, we conclude that the uncontested settlement agreement is reasonable in light of the record.

5.3.2. Consistent with the Law

In D.09-11-008, the Commission found that Cal Water's proposed collection of \$10,000 from the Emmetts and \$20,000 from its ratepayers for Nelson's benefit in the contested settlement agreement was not consistent with the law. The current uncontested settlement agreement resolves a long-standing and unique legal dispute to the satisfaction of all affected parties. The Commission's approval of this arrangement has no precedential value pursuant to Rule 12.6 of the Commission's Rules of Practice and Procedure. Due to the all-party nature of this agreement and the limited applicability, we find that outcome required by the uncontested settlement is consistent with the law. There is no discrimination against the Emmetts because they have voluntarily agreed to pay the fee.

5.3.3. In the Public Interest

The Moving Parties argue that the settlement agreement is in the public interest because it will allow the Emmetts to immediately proceed with the development or sale of the Trend Homes parcel. Most importantly, and distinct from the 2009 proposed contested settlement agreement, DRA does not object to the treatment of the \$20,000 to Nelson as a refundable developer advance. Numerous Commission decisions endorse settlements and support the public

policy favoring settlement of disputes that are fair and reasonable in light of the whole record.¹³ The Commission's support of this public policy furthers many worthwhile goals, including reducing the expense of litigation, conserving the scarce resources of the Commission, and allowing parties to reduce the risk that litigation will produce unacceptable results.¹⁴ We conclude that the proposed settlement agreement is in the public interest.

In conclusion, we find that the proposed uncontested settlement agreement is reasonable in light of the record, consistent with the law, and in the public interest. Therefore, the proposed uncontested settlement agreement should be approved.

6. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

7. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. All parties agree to the terms of the proposed settlement agreement, so there are assurances in the finality of litigation.

¹³ D.88-12-083 and D.91-05-029.

¹⁴ D.92-12-019.

2. The parties submitted the proposed settlement agreement to DRA for review.
3. The ratepayers' interests were represented by DRA's review of the proposed settlement agreement.
4. DRA does not object to the treatment of \$20,000 to Nelson as a refundable developer advance.
5. Existing and future development of the parcels , enabled by Nelson's payment, will generate revenue for Cal Water.

Conclusions of Law

1. The Moving Parties have met their burden of demonstrating by a preponderance of the evidence that the proposed settlement agreement is reasonable in light of the record, consistent with the law, and in the public interest.
2. The Commission's approval of this settlement agreement will have no precedential value.
3. It is reasonable to treat \$20,000 of the amount Nelson paid towards the purchase price as a refundable developer's advance, because like a refundable developer's advance this payment has resulted in increased revenues for Cal Water.
4. The uncontested all-party settlement agreement should be approved.

O R D E R

Therefore, **IT IS ORDERED** that:

1. The Joint Motion of California Water Service Company, Dwight Nelson, and the Emmetts for Adoption of All-Party Settlement is granted.

2. The uncontested settlement agreement attached hereto as Attachment A is approved and the parties shall comply with the terms of the agreement.

3. Within ten calendar days of the effective date of this Order, John and Lucretia Emmett shall pay \$10,000 to California Water Service Company. California Water Service Company shall promptly pass this payment to Dwight Nelson.

4. California Water Service Company is authorized to treat \$20,000 of Nelson's prior payment as a refundable developer's advance and refund it to Dwight Nelson over 10 years without interest.

5. Application 08-11-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

[Bushey Agenda Dec Revision 1 Attachment A](#)