

Decision 09-11-008 November 20, 2009

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of CALIFORNIA WATER SERVICE COMPANY (Applicant) (U-60-W), 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 DENYING MOTION TO ADOPT CONTESTED SETTLEMENT AND DISMISSING APPLICATION**

**1. Summary**

This decision finds that the settling parties have not demonstrated by a preponderance of the evidence that the proposed settlement agreement is reasonable in light of the record, consistent with the law, or in the public interest. The motion to approve the proposed settlement agreement is, therefore, denied.

The application is dismissed.

**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 property<sup>1</sup> in Cal Water's Selma District to pay a \$40,000 fee prior to receiving water service from Cal Water, and (2) for 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.

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<sup>1</sup> 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.

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, which is the subject of today's decision. These two parties contend that the proposed settlement agreement is reasonable in light of the record, consistent with the law, and in the public interest, as required by Commission Rule of Practice and Procedure 12.1(d).

Nelson contested the proposed settlement on July 6, 2009. He argued that the Commission views contested settlements as merely joint positions of the participating parties, and that this proposed settlement fails to meet the standards for approving settlements. Nelson asked instead that the settlement be rejected and the application granted.

## **2. Historical Background – D.85-06-132 and D.93-03-038**

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.”<sup>2</sup>

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 reneged, 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.<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup>

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<sup>2</sup> See D.85-06-132, *mimeo.* at p. 8, Finding of Fact 7.

<sup>3</sup> See D.85-06-132, *mimeo.* at p. 4.

<sup>4</sup> *Id.* at p. 5.

<sup>5</sup> *Id.*

On August 14, 1992, Nelson petitioned to modify D.85-06-132, to extend the repayment obligation to 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.

### **3. Description of the Proposed Settlement Agreement**

The proposed settlement agreement provides that the Emmetts will pay \$10,000 to Nelson within 10 days of the effective date of a Commission decision approving the agreement.

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.” Although not explicitly stated by Cal Water, the settling parties appear to intend that the payments to Nelson be included in Cal Water’s revenue requirement and collected from Selma district ratepayers.

These two parties intend that this agreement will fully resolve all issues in this proceeding and completely dispose of Nelson’s claim.

Nelson opposes the settlement agreement as being insufficient, given the amount of time he has waited for reimbursement. No representative of ratepayers, who will be funding Cal Water’s payments, took part in the negotiations or joined in the settlement.

### **5. Opposition to the Settlement Agreement; Replies to Opposition**

Nelson opposed the settlement and contended that receiving \$10,000 and \$2,000 a year for 10 years was not a reasonable outcome where he had advanced \$40,000 24 years ago.

In reply, Cal Water argued that Nelson had failed to discount his claim due to litigation exposure and the substantial expense of pursuing the matter through hearings and beyond.

The Emmetts separately replied and explained that the Commission decisions did not determine that Nelson was entitled to the \$40,000, only that Cal Water could apply for such a payment when water service was requested. As such, the proposed payment of \$30,000 is a windfall to Nelson, rather than an unreasonably small sum.

## **6. 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."

As the settling parties, Cal Water and the Emmetts have the burden of proving that the settlement should be adopted by the Commission.<sup>6</sup> The Commission's standard of proof is the preponderance of the evidence.<sup>7</sup> As set forth below, we find that the moving parties have not made the required showing, and therefore, we decline to approve the proposed settlement agreement.

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<sup>6</sup> 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 p. 6.

<sup>7</sup> 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 pp. 3-4, *citing* California Evidence Code § 115.

**6.1. The Settling Parties Have Not Shown that the Proposed Settlement Agreement is Reasonable in Light of the Record**

The proposed settlement agreement would require, in part, that Cal Water's Selma district rates be changed to reflect \$20,000 for the benefit of Nelson. No representative of ratepayers, however, is a party to this proceeding, and Cal Water has not demonstrated that ratepayers will accrue any benefits from these payments to Nelson. As discussed further below, we are unable to find that the proposed ratemaking treatment of the payments to Nelson is reasonable in light of the record.

The record shows that Cal Water was authorized to acquire the water system of the Wesmilton Water Company for \$100,000 and to carry forward the plant and accumulated depreciation as reflected in Wesmilton's books. Cal Water now proposes to include in its revenue requirement \$2,000 a year for 10 years of payments to Nelson. Cal Water describes these payments as "refunds" but Cal Water did not receive the initial payment from Nelson and thus is not making a refund of any kind. (Nelson's \$65,000 payment was to the former owners of the Wesmilton system.) Cal Water's proposed ratemaking treatment of the payments as an "expense," as correctly observed by Nelson,<sup>8</sup> makes ratepayers responsible this amount.

Cal Water contends that the new customers in the former Trend Homes property will generate revenue from which to fund the payments.<sup>9</sup> Cal Water's Selma district rates are limited to the just and reasonable costs of providing

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<sup>8</sup> See Opposition of Nelson to Motion to Adopt Settlement Agreement at p. 4.

<sup>9</sup> Joint Motion of California Water Service Company and John and Lucretia Emmett for Approval of Settlement at p. 7.

water service. It is not clear how Cal Water could justify payments to Nelson as a component of revenue requirement, and the record in this proceeding contains no such showing. Moreover, Cal Water's reasoning is circular: If customer rates are based on a revenue requirement that includes the payments to Nelson, then, of course, there will be funds from ratepayers to make the payments.

Assessing Cal Water's Selma district ratepayers with the obligation to fund payments to Nelson is not reasonable because (1) these ratepayers have received no benefit from Nelson, and (2) ratepayers were not represented at all in the settlement negotiations. For both these reasons, we conclude that the proposed settlement agreement is not reasonable in light of the record.

## **6.2 The Settling Parties Have Not Shown that the Proposed Settlement Agreement is Consistent with the Law**

To approve a proposed settlement agreement, the Commission must conclude that the provisions of the agreement do not violate applicable law. We are unable to make that finding here because the proposed settlement agreement requires Cal Water to collect (1) \$10,000 from a prospective customer (the Emmetts) as a prerequisite to receiving public utility water service and (2) \$20,000 from ratepayers, and to remit the \$30,000 total to a third party. This collection mechanism violates the Public Utilities Code in several ways, as specified below.

Nelson claims the Commission determined that he was entitled to receive \$40,000 from any future Cal Water customers on the Trend Homes property. This claimed entitlement forms the legal basis for the \$10,000 payment by the Emmetts in the proposed settlement agreement. Absent such an

entitlement, this payment appears to unlawfully discriminate in violation of the Public Utilities Code.<sup>10</sup>

Nelson argues that the Commission's 1985 decision authorized the contribution by the owners of the Trend Homes development, and that the purpose of the Advice Letter filing was simply to determine whether the allocation amount "made sense" in light of the relative sizes of the two parcels and benefits from Wesmilton transfer.<sup>11</sup> This interpretation, however, is not supported by the plain words of D.85-06-132.

In the 1985 decision, the Commission noted at the start of its discussion of the Nelson reimbursement request that requiring the Trend Homes developer to share in the \$65,000 payment "raises significant problems." The Commission's first listed "problem" is that neither the Trend Homes nor its representative was a party to the proceeding, and neither had indicated a willingness to share in the \$65,000 developer contribution by joining with Nelson in signing the Wesmilton sale agreement.<sup>12</sup>

The Commission concluded that: "Clearly the request cannot be adjudicated in this proceeding."<sup>13</sup> Consistent with this determination, the Commission made no findings of fact, conclusions of law, or ordering paragraph granting Nelson a right to reimbursement. The Commission's only directive regarding Nelson's request for a reimbursement order was for Cal Water to file

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<sup>10</sup> See, e.g., Pub. Utils. Code § 453, "No public utility shall, as to rates, charges, service, facilities, ... subject any person or corporation to any prejudice or disadvantage."

<sup>11</sup> Nelson Opposition to Motion for Approval of Settlement Agreement at p. 6.

<sup>12</sup> D.85-06-0132, *mimeo.* at p. 4.

<sup>13</sup> *Id.*

an Advice Letter for review by the Commission's staff "if and when" the developers seek water service, and for staff to "make whatever recommendations it deems appropriate for further Commission action on this issue." By expressly declining to adjudicate the reimbursement issue, the Commission at most reserved the issue for later determination. No fair reading of the 1985 decision would suggest that the Commission both adjudicated the issue and resolved it in Nelson's favor. The Commission, however, did clearly find that Nelson benefited from Cal Water's acquisition of the Wesmilton service territory, which provided Nelson with lower cost water service.

Moreover, a Commission order binding one who was not a party to the prior proceeding, as well as its successors in interest, to pay a fee to a third-party in excess of the utility's properly tariffed charges as a precondition to receiving public utility water service, would be extraordinary.<sup>14</sup> Nothing in the record of these proceedings would enable us to make the procedural and substantive findings, conclusions, and order that would be necessary to support such a fee.<sup>15</sup>

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<sup>14</sup> The closest analogy to such an arrangement is Cal Water's Main Extension Rule, which requires subsequent developers to reimburse a share of the cost of previously built facilities. That rule, however, has been approved by the Commission and is published as Cal Water's Tariff Rule 15. The rule ensures that later developers pay their share of facilities financed by the initial developer. The rule does not apply to this situation where Nelson's payments are to a third party, not to Cal Water.

<sup>15</sup> Nelson appears to believe that the 1993 decision denying his petition for modification also had substantive implications and he recorded it in the Trend Homes chain of title as an "ORDER OF DECISION Affecting Real Property." Prepared Testimony of Dwight Nelson at Tab B. The sole substantive effect of that decision was to deny the petition for modification; the 1985 decision was not changed in any way by the subsequent decision.

Absent special authorization to collect this fee for the benefit of Nelson, we turn to the provisions of the Public Utilities Code that guide our ratemaking authority. Cal Water is prohibited by Public Utilities Code § 453 from discriminating among its customers: “No public utility shall, as to rates, charges, service, facilities, ... subject any person or corporation to any prejudice or disadvantage.” The proposed settlement agreement would have Cal Water collect \$10,000 from the owners of the former Trend Homes property and remit it to Nelson, even though the Commission has not determined that the owners of that property owe anything to Nelson. This fee is a “prejudice or disadvantage” imposed only on these property owners without justification and therefore would violate § 453. Accordingly, this component of the proposed settlement agreement is not consistent with the law.

The proposed settlement agreement also conflicts with the Pub. Util. Code in another fundamental respect. In Ordering Paragraph 2 of D.85-06-132, the Commission ordered Cal Water to “reflect the acquisition of Wesmilton on its books using the plant and accumulated depreciation figures carried forward from the Westmilton books.” Cal Water’s plant account books, and the amounts reflected there, have been relied upon by this Commission in setting rates for the Selma district for 24 years. The proposed settlement agreement would alter this ratemaking treatment by, in effect, increasing Cal Water’s cost of acquiring the Wesmilton system by \$20,000.

Cal Water may only impose charges determined by the Commission to be just and reasonable as required by Pub. Util. Code § 451. The Commission has not determined that rates collecting funds for the benefit of Nelson are just and reasonable or that the recorded plant accounts of the Wesmilton acquisition

should be revisited. Accordingly, the proposed \$20,000 payment from ratepayers for the benefit of Nelson is not consistent with Pub. Util. Code § 451.

Finally, pursuant to Pub. Util. Code § 532, Cal Water must charge for water service in accord with its filed tariffs. No filed tariff requires a payment from the Emmetts for the benefit of Nelson as a condition of service. There can be no such tariff because Cal Water may only impose charges determined by the Commission to be just and reasonable, as required by Pub. Util. Code § 451, and the Commission has not determined that a fee for payment for the benefit of Nelson is just and reasonable for service in any portion of Cal Water's Selma district.

To summarize, the proposed settlement agreement requires payments from the Emmetts and Cal Water's ratepayers that are in conflict with statute and Commission order. Accordingly, Cal Water's proposed collection of \$10,000 from the Emmetts and \$20,000 from its ratepayers for the benefit of Nelson is not consistent with law.

**6.3. The Settling Parties Have Not Shown  
that the Proposed Settlement Agreement  
is in the Public Interest**

The settling parties state that the proposed settlement is in the public interest because Nelson will immediately receive \$10,000, the Emmetts will receive water service to their parcel, and Cal Water's ratepayers will pay their allocation over 10 years, which will "moderate" the impact. They argue that the Commission will also conserve its resources by closing this docket without further expenditure of public resources.<sup>16</sup>

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<sup>16</sup> Joint Motion at p. 7.

As discussed above, elements of the proposed settlement agreement are not reasonable in light of the record and are inconsistent with applicable law. Additionally, the settling parties have presented no evidence of a compelling public interest that would be furthered by this proposed settlement agreement.

In summary, the proposed settlement agreement is not reasonable in light of the record because ratepayers, who are proposed to pay \$20,000 out of the total \$30,000, were not represented during the negotiations. The proposed settlement agreement requires payments from the Emmetts and ratepayers for the benefit of Nelson that are not consistent with the Public Utilities Code and thus, are contrary to law. Finally, we find no compelling public interest to be furthered by the proposed settlement agreement. We conclude that the settling parties have not met their burden to support the proposed settlement agreement. We, therefore, deny the settling parties' motion for approval of the proposed settlement agreement.

## **7. Disposition of Cal Water's Application**

The findings and conclusions in today's decision dispose of the substantive issues to be addressed in Cal Water's application. The Commission did not adjudicate, much less grant, Nelson a right to reimbursement, enforced by access to water service from Cal Water, from any developer of the Trend Homes property. The Commission did determine the appropriate ratemaking treatment for Cal Water's acquisition of the Wesmilton system, and no justification has been presented to revise that treatment to support a payment from ratepayers for the benefit of Nelson.

Because ratepayers generally and the Emmetts specifically cannot be compelled to fund a payment for the benefit of Nelson, we must dismiss the application. No party has identified a disputed issue of material fact so no

evidentiary hearings are necessary. Thus, we conclude that the record can be closed and the matter determined at this time.

Nelson argues that his payment assisted the Commission in replacing a system with contaminated wells with a reliable provider of potable water, which is uncontroverted. A laudable outcome, however, does not justify requiring non-parties to contribute to the acquisition premium paid to the former owner of the Wesmilton System. Moreover, Nelson offers no jurisdictional analysis that supports use of this Commission's ratemaking authority to create and collect an alleged third-party debt, a use that our research suggests is unprecedented.

The Emmetts have requested public utility water service from Cal Water. Cal Water's application should be dismissed and Cal Water should provide public utility water service to the Emmetts consistent with its tariffs.

This proceeding should be closed.

## **8. Comments on Proposed Decision**

The proposed decision of Administrative Law Judge (ALJ) Maribeth A. Bushey 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. Nelson filed comments on October 19, 2009, reiterating previous arguments which are addressed in today's decision. Nelson also contends that assessing a \$40,000 fee against to Emmetts would not violate § 453 because the fee would not constitute unreasonable discrimination. Nelson asked that the application be granted.

On November 9, 2009, the Emmetts filed reply comments supporting the proposed decision.

No substantive changes have been made to the proposed decision.

## **9. Assignment of Proceeding**

John A. Bohn is the assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. The terms of the proposed settlement agreement require ratepayers, as a consequence of increased revenue requirement in Cal Water's Selma district, to fund \$20,000 of the payments included in the proposed settlement agreement.

2. Ratepayers were not represented in the negotiations leading up to the proposed settlement agreement, and ratepayers have not agreed to the proposed settlement agreement.

3. Nelson opposes the proposed settlement agreement.

4. The Commission did not adjudicate or grant Nelson's request for reimbursement in D.85-06-132 or D.93-03-038.

5. The requirement that Cal Water file an advice letter prior to providing service to the Trend Homes property did not guarantee or authorize any payment to Nelson. The Commission merely directed staff to make "whatever recommendations [staff] deems appropriate for further Commission action on this issue."

6. The Commission authorized Cal Water to acquire the water system of Wesmilton Water Company in D.85-06-132 and determined the acquisition costs that would be properly included in revenue requirement and assessed to ratepayers; such costs did not include any reimbursement of Nelson's payment to the former owners.

7. Trend Homes did not agree to pay Nelson \$40,000, nor did the Commission order Trend Homes to make such a payment.

8. Cal Water has no authorized tariff on file that requires a payment for the benefit of Nelson as a prerequisite to receiving water service.

9. Cal Water has provided no ratemaking justification for assessing the Emmetts or Selma district ratepayers any amounts for the benefit of Nelson.

### **Conclusions of Law**

1. Cal Water and the Emmetts have not 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. Requiring the Emmetts to pay a fee for the benefit of Nelson prior to obtaining water service from Cal Water would violate Pub. Util. Code §§ 532, 451, and 453.

3. The Commission determined the ratemaking treatment for the costs of acquiring the Wesmilton system in D.85-06-132, and Cal Water has presented no justification for altering this determination.

4. Cal Water's application does not support its requested relief and should be dismissed.

5. No hearings are necessary.

6. Today's decision should be made effective immediately.

### **ORDER**

Therefore, **IT IS ORDERED** that:

1. The Joint Motion of California Water Service Company and John and Lucretia Emmett for Adoption of Settlement Agreement is denied.

2. This application of California Water Service Company is dismissed.

3. Application 08-11-009 is closed.

This order is effective today.

Dated November 20, 2009, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners

