



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

FILED

09/27/22

04:59 PM

C2012017

FCTC Senior, LP,
Complainant,

Case 20-12-017
(Filed December 18, 2020)

vs.

Bakman Water Company (U219W),
Defendant

**RESPONSE OF FCTC SENIOR, LP,
TO THE BAKMAN WATER COMPANY APPEAL**

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September 27, 2022

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Pursuant to Rule 14.4 of the California Public Utilities Commission’s (Commission) Rules of Practice and Procedure, FCTC Senior, LP, (“FCTC Senior”) submits this responsive brief regarding the Appeal of the Presiding Officer’s Decision (“POD” or “Decision”) in the above captioned Complaint against Bakman Water Company (“BWC” or “Bakman”).

I. OVERVIEW

Under Rule 14.4(b), appeals of a Presiding Officers Decision “shall set forth specifically the grounds on which the appellant or requestor believes the presiding officer’s decision to be unlawful or erroneous. Vague assertions as to the record or the law, without citation, may be accorded little weight.” BWC’s appeal may be disregarded as it fails to identify any portion of the POD to be unlawful or erroneous. Rather, it seeks to modify the POD to (1) deny FCTC Senior’s rights to due process in the (hopefully unlikely) event of further disagreement between the parties regarding this matter; (2) permit BWC to unilaterally change the tank size despite the plain language to the contrary in the POD and the record in the proceeding indicating a need for a

600,000 gallon tank; and (3) interject new issues into the proceeding regarding the payment of contributions in aid of construction which were not litigated or briefed by the parties.

II. COMPLAINT SHOULD NOT BE DISMISSED WITH PREJUDICE

BWC requests that the complaint be dismissed with prejudice. Without identifying any factual or legal error in the POD, BWC highlights its perceived victories in the POD and suggests that “FCTC has been attempting to circumvent its obligations for more than a decade....” It suggests all issues have been resolved, BWC won handily, and the Commission should dismiss the complaint with prejudice to avoid future litigation.

A. The Complaint May Have Been Dismissed But the POD Dramatically Improves BWC’s Position

FCTC Senior acknowledges that the POD dismisses its complaint. However, the true winner and loser of this litigation is perhaps better indicated by the difference between BWC’s litigation position and the POD. BWC has argued throughout this proceeding that FCTC Senior was responsible for the entire \$2.289 million cost of the 400,000 gallon water tank and BWC was only responsible for the incremental \$70,000 cost of upsizing the tank to BWC’s requested size of 600,000 gallons. Stated differently, BWC claimed it was responsible for \$70,000 of an estimated \$2.359 million tank. This is approximately 3% of the project cost.

The POD dramatically increases BWC’s share of the project, determining that it should be responsible for forty percent (40%) or \$943,600 of the 600,000 gallon tank. This would reflect the proportional share of the tank beyond what is necessary to provide fire protection to FCTC Senior’s senior housing project. Therefore, the POD increases BWC’s share of the project by \$873,600. On a percentage basis, this is a 1,247% increase in BWC’s contribution.

FCTC Senior did not appeal the POD and is ready to move forward under the POD’s carefully considered analysis and decision. However and as discussed below, BWC already

appears to be considering ways to unilaterally downsize the water tank, presumably in an effort to reduce or eliminate its share. While FCTC Senior is hopeful that litigation and a future dispute can be avoided, it is not guaranteed.

B. D.22-03-015 Is Distinguishable

For this reason, BWC's reliance on D.22-03-015 is misplaced. This decision involved a dispute between a developer and a water company related to an invoice presented to the developer by the water company for work "to provide water and firefighting service to a new housing development."¹ The facts were complicated but, importantly, the work had been finally completed and the only issue before the Commission was responsibility for past actions and a potential credit against the invoice.²

Here, while FCTC is confident that the parties have a path forward based on the POD's allocation of responsibility for the water tank, future disputes are possible (especially given BWC's attempts to modify the POD to allow it to unilaterally dictate a different size of water tank as discussed below). Dismissing the complaint with prejudice would be premature and deprive FCTC's of its due process rights to seek redress if future disputes occur.³ The POD should not be modified as requested by BWC.

III. BWC CANNOT UNILATERALLY MODIFY THE TANK SIZE

BWC requests the POD be modified to clarify that FCTC would be responsible for 75% of a 500,000 gallon water tank and 100% of a 400,000 gallon tank. BWC bases this request on the POD's note that FCTC's and BWC's share of the costs for differently sized water tanks should be based on their proportional responsibility for the tank (i.e., 300,000 gallons for minimum fire

¹ D.22-03-015, p. 2.

² D.22-03-015, pp. 39-40.

³ See generally *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 214.

flows, 200,000 gallons for BWC system needs with the remaining 100,000 sloshing capacity allocated on the same 60/40 basis). This request misstates the POD, ignores the clear record in this proceeding, and appears to be an effort to allow BWC to unilaterally dictate tank size.

Importantly, BWC's request is inconsistent with the text of the POD, as BWC does not fully cite the relevant portions of the POD. The POD does not allow BWC to determine alternative tank sizes. Rather, it notes on page 19, "[t]o the extent that FCTC and Bakman agree to a differently sized storage tank, FCTC shall be responsible for providing as a contribution in aid of construction an amount proportional to the percentage of the tank designed to meet the Development's minimum fire flow requirements, consistent with the calculations in footnote 78 of this Decision." (Emphasis added.) The POD does not grant BWC the ability to unilaterally modify the tank size. Any alternative tank must be agreed to by the parties. In that event, the proportional allocation of responsibility would follow the calculations in footnote 78 of the POD.

In addition to being inconsistent with the POD, any attempt to make this change would be inconsistent with the record in this proceeding. The most recent 2021 Engineering Report commissioned to satisfy Government Code Section 655789.7 states that a 600,000 gallon tank is necessary to provide adequate fire flow to the project, and BWC has consistently provided testimony that a 600,000 gallon tank is in the best interest of the safety of its customers and reliability of its system.⁴ Over the course of the past 13 years, BWC has seen a significant depletion of its available water resources, established through the distinctions between a 2009 Engineering Report based on thirteen available well resources, and the more recent 2021 report based on eight available wells.⁵ The depletion of available well resources has resulted in

⁴ See, e.g., Direct Testimony of R. Shaymus Bakman., 8: 11-12; RT 67: 23-28; 68:1

⁵ RT 61: 6-21, RT 67: 23-28; 68:1

substantially reduced flow and production capability, and explains BWC's plea throughout this litigation to increase the size of the tank from 400,000 to 600,000 gallons.⁶

Because the Commission has determined that BWC must contribute proportionally to the benefits that a 600,000 gallon tank would accrue to its system,⁷ BWC's appeal attempts to reserve the right for it to contradict its own testimony and unilaterally dictate alternative tank sizes that reduce its cost share. This clarification would be inconsistent with the record in this proceeding, which the Commission relies on to dismiss FCTC's complaint.

IV. BWC CANNOT INTERJECT NEW ISSUES IN ITS APPEAL

BWC also requests that the POD be modified⁸ to clarify that FCTC's aid in contribution of construction towards the water tank be paid pursuant to procedures set forth in Section A.6 of BWC Tariff Rule 15. While BWC suggests these changes "would help avoid future confusion and disputes," they cannot be made at this point in the proceeding. They are outside the scope of the proceedings and were not the subject of party briefing.

The scope of the proceeding is set forth below:

1. Pursuant to Public Utilities Code Section 451, and General Order 103-A, did Bakman act reasonably or otherwise violate its tariff when it conditioned the provision of water service for the senior housing development proposed by FCTC on the construction and installation of a water storage tank and booster pumps to meet fire flow requirements, despite the existence of potential alternatives?
2. Did Bakman Water provide a sufficient written engineering analysis and report pursuant to Government Code Section 65589.7(c)(1), finding that the conditions for provision of service are necessary due to insufficient water supply, water shortage emergency, or insufficient water distribution capacity to serve the needs of the

⁶ *Id.*

⁷ Presiding Officers Decision, pp. 18-19, fn. 78.

⁸ BWC similarly requests that the POD be modified to clarify that project costs include the water tank and associated facilities. This wordsmithing does not identify any factual or legal errors and should be disregarded. Moreover, it is unnecessary. The POD already refers to ancillary facilities like booster pumps in multiple locations. (See, e.g., POD, Findings of Fact, No. 1; Conclusions of Law Nos. 7, 8.) BWC attempts to introduce an ambiguity that simply does not exist.

proposed development, and if so, were the report's conclusions reasonable?

3. Pursuant to Government Code Section 65589.7(c)(5), did FCTC fail to agree to reasonable terms and conditions relating to the provision of service generally applicable to development projects seeking service from the public agency or private entity, including, but not limited to, the requirements of local, state, or federal laws and regulation, despite the existence of potential alternatives?

BWC's request to add detailed language regarding the mechanics of how an aid in contribution of construction is paid and processed under Section A.6 of BWC Tariff Rule 15 is not remotely within any of the above questions. Any attempt to expand the scope of the proceeding at this point is improper.⁹

V. CONCLUSION

FCTC Senior, LP, thanks the Commission for its time and effort in reviewing this Response to Bakman Water Company's Appeal and respectfully requests that the Commission not modify the POD as requested by BWC for the reasons discussed above.

Respectfully submitted,

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⁹ See generally *Southern California Edison Company v. Public Utilities Commission* (2006) 140 Cal.App.4th 1085, 1106 [CPUC proceedings are limited to issues outlined in scoping memo].