

Decision 23-02-031 February 23, 2023

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FCTC Senior, LP

Complainant,

vs.

Case 20-12-017

Bakman Water Company, (U219W),

Defendant.

FCTC Senior, LP, Complainant
Bakman Water Company (U219W-), Defendant.

DECISION DENYING COMPLAINT

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DECISION DENYING COMPLAINT

Summary

This decision dismisses the complaint of FCTC Senior, LP, Complainant, against Defendant, Bakman Water Company. We find that Complainant has not shown that Bakman Water Company acted unreasonably or violated any applicable statutes, tariffs, or rules in conditioning service to the development on the construction of a water storage tank. This decision also clarifies Bakman Water Company's Tariff Rule 15(D)(3), and orders Bakman Water Company to condition its service consistent with the terms of its Tariff.

This proceeding is closed.

1. Procedural and Factual Background

On December 18, 2020, Complainant FCTC Senior, LP, (FCTC or Complainant) filed a formal complaint (Complaint) with the Commission. FCTC is a developer, with plans to build a 180-unit affordable senior rental housing project (Development) in Fresno, CA, as part of a larger plan known as the Fancher Creek Town Center.¹ FCTC alleges that Bakman Water Company (Bakman or Defendant) is imposing unreasonable and unlawful requirements as a condition of service to the Development. Bakman's service territory includes the Development's location.² The Fresno Fire Department determined that the current infrastructure at the location does not meet minimum water flow requirements during fire events (fire flows) of 2,500 gallons per minute.³ In 2009,

¹ Complaint at 2.

² Bakman Answer, Attachment F (noting expansion of Bakman service territory to cover the Development).

³ Complaint at 2.

Bakman received a Yamabe & Horn Inc. (Yamabe & Horn) engineering report⁴ stating that the installation of a 400,000 gallon water storage tank was needed to meet minimum fire flows. A more recent Yamabe & Horn report in 2021 again concluded that a water storage tank was necessary (but now proposes a 600,000 gallon tank).⁵ Pursuant to these reports, Bakman has since 2009 required as a condition of service the installation of a water tank in Will-Serve letters for the Development.⁶

FCTC alleges in the instant Complaint that Bakman is unreasonably requiring the installation of a water storage tank and other structures, and that other more economical alternatives exist and must be considered.⁷ FCTC alleges that the Development is an affordable housing development under Government Code Section 65589.7(c), and per that statute Bakman is not allowed to condition or deny approval of services unless specific requirements have been met, such as presentation of a report finding insufficient water supply. FCTC alleges that such conditions have not been met.

In its Answer to the Complaint, filed February 19, 2021, Bakman argues that it has followed all applicable tariffs and rules in requiring the construction of the water storage tank, and that the tank is necessary to provide domestic water and fire flow service to the development.⁸ Bakman's Answer also asserts that it has sufficiently complied with Government Code Section 65589.7, by providing a

⁴ Exhibit BWC-02B, Attachment 2.

⁵ Exhibit BWC-02B, Attachment 4.

⁶ Bakman Answer at 3-4, Attachment D, Attachment E; BWC-01 Attachment 3, 4.

⁷ Complaint at 2.

⁸ Answer at 2-4.

written engineering analysis report detailing the insufficient water supply issue,⁹ and has engaged in good faith negotiations and provided reasonable terms to FCTC.¹⁰ Bakman notes that in 2020 it offered to split the costs of the storage tank, so that FCTC would only pay \$1.1 million of the construction costs¹¹ (now estimated to be \$2,289,000¹²). This offer was revoked by Bakman, and it now states that FCTC must provide the full \$2,289,000 as a deposit for the storage tank before it will approve service.¹³

A Prehearing Conference (PHC) was held on March 11, 2021, to address the issues of law and fact, determine the need for hearing, and set the schedule for resolving the matter. Both parties attended via Webex. At the PHC, parties discussed the proposed scope. The Assigned Commissioner's Scoping Memo Ruling was issued on May 5, 2021, laying out the issues and schedule of the proceeding. On June 24, 2021, evidentiary hearing was held in the proceeding. On July 16, 2021, Bakman testimony was admitted into the record after corrections were noted during the evidentiary hearing. Opening briefs were filed on August 6, 2021, and reply briefs were filed on August 20, 2021.

On August 6, 2021, FCTC filed a Request for Official Notice (Request) of three documents that FCTC alleges show inaccuracies in the testimony of Bakman witness Horn.¹⁴ Portions of FCTC's Opening and Reply briefs cite to the

⁹ Answer at 7-8.

¹⁰ Answer at 6.

¹¹ BWC-01, Attachment 9.

¹² Bakman Answer, Attachment C; BWC-01, Attachment 11.

¹³ Bakman Answer, Attachment H (Nov. 2, 2020 letter).

¹⁴ Request for Official Notice at 1-2.

documents in the Request.¹⁵ Bakman filed a response to the Request on August 23, 2021, stating that the Request was untimely and that the items for which FCTC requested official notice are inappropriate for official notice. After receiving approval from the assigned Administrative Law Judge on August 24, 2021, FCTC filed a reply to the response on September 2, 2021.

On November 9, 2021, a settlement conference was held. Parties filed for Commission-led Alternative Dispute Resolution on November 16, 2021,¹⁶ and on April 6, 2022 informed the assigned ALJ that mediation discussions had failed to produce a settlement. The statutory deadline for resolution of the instant proceeding was extended to April 16, 2023 by Commission Decision.¹⁷ A Presiding Officer's Decision (POD) was mailed on August 12, 2022. An appeal to the POD was filed on September 12, 2022 by Bakman.

2. Review and Denial of the Request for Official Notice

FCTC's Request for Official Notice asks that we take into official notice three documents:

- Exhibit 1, a City of Clovis Urban Water Management Plan 2020 Update Draft;
- Exhibit 2, a City of Fresno Urban Water Management Plan 2020 Update Draft; and
- Exhibit 3, a State Water Resources Control Board – Division of Drinking Water Emergency Response Plan Guidance for Public Drinking Water Systems Serving a Population of 3,300 or More.¹⁸

¹⁵ FCTC Opening Brief at 11-12; FCTC Reply Brief at 6.

¹⁶ See Joint Settlement Status Statement, November 18, 2020.

¹⁷ D.22-10-008.

¹⁸ Request at 1-2; excerpts found in Exhibits 1, 2, and 3 of FCTC Request for Official Notice.

Commission Rule of Practice and Procedure 13.1 allows the Commission to take official notice “of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450.”¹⁹ California Evidence Code Section 452(g) allows courts to take judicial notice of “Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.”²⁰

FCTC claims the documents address the accuracy of the testimony of Bakman witness Horn, who at evidentiary hearing stated that he would not recommend an emergency intertie with a neighboring water agency, and that he was unaware of any interties between the City of Fresno and the City of Clovis.²¹ Exhibits 1 and 2, which are relevant excerpts of City of Fresno and City of Clovis urban water management plans, note that interties have either been constructed or plan to be constructed between the Clovis and Fresno water systems, for treatment of surface water supplies as well as for emergency backups. Exhibit 3 is an excerpt of a State Water Resources Control Board document instructing water systems on how to plan and prepare for emergency situations. It includes a recommendation that water systems develop alternative water sources, such as interties with other systems, in case of emergencies.

Bakman’s Reply states that the Request is an inappropriate attempt to introduce new evidence. Bakman states that FCTC should have introduced these documents before or during evidentiary hearings, and by waiting until the filing of opening briefs to file this Request, has deprived Bakman of the ability to

¹⁹ Commission Rule of Practice and Procedure 13.1.

²⁰ California Evidence Code Section 452(g).

²¹ FCTC Reply to Bakman Response to FCTC Request for Official Notice at 3; Evidentiary Hearing Transcript at 32:7-13.

address the information in these excerpts. Bakman also states that Exhibits 1 and 2 are draft documents yet to be adopted or approved by the relevant authorities and are therefore inappropriate for official notice. Accordingly, Bakman requests that the portions of FCTC's opening and reply briefs that rely on and cite to these documents should be stricken from the record.

2.1. Analysis

Commission Rule of Practice and Procedure 13.1 allows the Commission to take official notice "of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450".²² As cited to by FCTC,²³ California Evidence Code Section 452(h) allows courts to take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."²⁴

After review of the documents in question, as well as the filings by the parties, the Request is denied. The materials cited to are not of a nature that they could be described as facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Exhibits 1 and 2 are draft documents that state an intertie exists or will exist between the City of Clovis and City of Fresno's water systems. Such a fact is not readily apparent without resort to additional research. Exhibit 3 presents a policy of the State Water Resources Control Board. A policy statement is not a fact or proposition, nor is it capable of accurate determination by resort to sources of indisputable accuracy. The

²² Commission Rule of Practice and Procedure 13.1.

²³ Request for Official Notice at 3.

²⁴ California Evidence Code Section 452(h).

Request is also deficient because it attempts to establish facts to prove the truth of the matter asserted, and not simply the existence of such documents. Matters officially noticed cannot be relied upon to prove the truth of the matter.²⁵ Here, FCTC would like the Commission to take official notice of the existence of the interties and the State Water Resources Control Board policy for the truths of the matter asserted – that the interties exist, and that the policy exists. Where the opposing party has not had the opportunity to conduct cross-examination on the documents in question, the Commission has declined to accept them for the truth of the matter asserted.²⁶

Additionally, the Request is procedurally deficient. California Evidence Code Section 453(a) states that the party filing a Motion for Official Notice must give “each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request.” FCTC argues that the Request is in response to testimony at evidentiary hearings by Bakman witness Mr. Horn, who stated that he was unaware of the existence of any interties.²⁷ As noted in Bakman’s Response to the Request for Official Notice,²⁸ the appropriate time to have challenged Mr. Horn’s assertion would have been at evidentiary hearings, through the presentation of Exhibits 1 and 2. Similarly, Exhibit 3 could have been presented at any time before evidentiary hearings.

²⁵ Gilman v. Dalby, 61 Cal. App. 5th 923, 930 (March 12, 2021).

²⁶ D.11-03-048 at 17, footnote 43; ²⁶ 2016 Cal. PUC Lexis 22 at 23, D.16-01.014.

²⁷ FCTC Reply To Response of Bakman Water Company Concerning the Request for Official Notice at 2; Evidentiary Hearing Transcript, at 32:7-13.

²⁸ Bakman Response to the Request for Official Notice at 2.

For the above reasons, the Request for Official Notice is denied.

References to Exhibits 1, 2, and 3 are to be given no weight in the record.²⁹

3. Issues for Review

A “[c]omplaint may be made ... by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility ... in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.”³⁰ Pursuant to the standards set forth in Public Utilities Code Section § 1702, a competent complaint must allege that a public utility has either engaged in an act or has failed to engage in an act in violation of a law or a Commission order or rule.³¹

After review of the issues laid out in the Scoping Memo³² and the filings by the parties, the issues in this proceeding can be presented in the following manner:

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

²⁹ FCTC Opening Brief at 11-12; FCTC Reply Brief at 6.

³⁰ California Public Utilities Code § 1702.

³¹ D.14-03-032.

³² Scoping Memo at 3.

distribution capacity to serve the needs of the 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?

FCTC alleges that Bakman has violated or is otherwise out of compliance with the above-mentioned authorities, and asks that the Commission order Bakman to revise its condition of storage tank construction to a less expensive alternative.³³

4. Did Bakman Act Unreasonably or Violate its Tariff in Conditioning Service on the Installation of a Water Tank

FCTC alleges that Bakman has violated Code Section 451, General Order (GO) 103-A, and Bakman's Tariff Rule 15 by acting unreasonably in conditioning water service on the installation of a storage tank to meet minimum fire flows. Public Utilities Code Section 451 requires that "[a]ll charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable."³⁴ GO 103-A requires that "each utility shall operate its system so as to deliver reliable, high quality service to its customers at reasonable cost," subject to the Commission's oversight.³⁵

³³ Complaint at 3.

³⁴ Code Section 451.

³⁵ GO 103-A at 9.

Bakman's Tariff Rule 15 (Rule 15) covers main extension agreements. Rule 15(A)(8) states that "In case of disagreement or dispute regarding the application of any provision of this rule, or in circumstances where the application or this rule appears unreasonable to either party, the utility, applicant, or applicants may refer the matter to the Commission for determination."³⁶ "The Commission's standard for reasonableness is the preponderance standard."³⁷ The party with the burden of proof must show "such evidence as, when weighed with that opposed to it, has more convincing force and the greater possibility of truth."³⁸

4.1. Parties' Positions

FCTC alleges that Bakman failed to sufficiently investigate alternatives to the water storage tank, and in failing to do so acted unreasonably.³⁹ FCTC alleges that Bakman should have conducted additional analysis to search for viable wells, and that the Yamabe & Horn reports did not appropriately consider potentially sufficient fire flow rates if a second well was found to serve the Development.⁴⁰ FCTC argues that Bakman did not adequately consider the possibility of new well resources or the impact of well rehabilitation to provide supply to the Development. FCTC also states that Bakman was unreasonable in not conducting a thorough analysis of the possibility of an intertie solution with the City of Fresno's water system.⁴¹ FCTC argues that any arguments so far

³⁶ Bakman Tariff Rule 15(A)(8).

³⁷ D.14-06-007 at 13.

³⁸ *Id.*, quoting D.08-12-058.

³⁹ FCTC Opening Brief at 7.

⁴⁰ FCTC Opening Brief at 7-9.

⁴¹ FCTC Opening Brief at 10-13.

presented by Bakman to discuss the infeasibility of an intertie are based on insufficient analysis.⁴² Bakman did not consider FCTC's offer to pay for an intertie with the necessary redundancies and a dedicated power source,⁴³ nor did they conduct any serious investigation into the financial or operational concerns presented by an intertie. FCTC says that evidence Bakman has presented concerning discussions with the City of Fresno about the possibility of system interties shows that Bakman has not seriously pursued the issue in the past, and recent attempts are attempts by Bakman to cover its tracks.⁴⁴

FCTC also states that Bakman has conditioned service on the construction of a storage tank, due to operational difficulties in the Bakman system unrelated to the Development that could be remedied by the tank.⁴⁵ FCTC presented analysis suggesting the Bakman system faces supply and water quality issues due to a loss in production.⁴⁶ FCTC states improvements to the system are needed, regardless of the potential improvements needed to resolve fire flow issues to the Development. For example, FCTC notes that Bakman is separately considering wellhead treatments to resolve water quality concerns.⁴⁷ FCTC notes that the oversized tank proposed by Bakman will allow for contamination removal.⁴⁸ FCTC states that by requiring the installation of the proposed water tank, Bakman is attempting to offload some of the cost of these necessary

⁴² FCTC Reply Brief at 6-7.

⁴³ FCTC Opening Brief at 12-13.

⁴⁴ FCTC Opening Brief at 13-14.

⁴⁵ FCTC Opening Brief at 9; FCTC Reply Brief at 11-12

⁴⁶ FCTC Reply Brief at 11-12; FCTC-03 2:9-4:14.

⁴⁷ FCTC Reply Brief at 12.

⁴⁸ FCTC Opening Brief at 9-10.

improvements onto the Development and FCTC.⁴⁹ The tank proposed for the Development would therefore help Bakman defray rehabilitation costs, whereas the construction of new wells would not.

With regards to finding a new well, FCTC alleges that Bakman did not attempt to meaningfully engage the City of Fresno in finding a suitable alternative well location for the Development⁵⁰, and did so purposefully, in order to focus on its preferred option of a water tank and booster pump. Bakman did not propose to the City of Fresno any alternative well locations to potentially meet the Development's fire flow requirements, nor did it ask the City to reconsider the Conditional Use Permit's mitigation measure of constructing a water tank.⁵¹ FCTC also states that Bakman should have more seriously considered a lake option.⁵² In summation, FCTC states that Bakman has not adequately considered any alternatives to its preferred option of a water tank and booster pump, for a variety of reasons, and the requirement that FCTC construct a water tank and pump is therefore an unreasonable condition of service.

Bakman states that it acted reasonably in conditioning service on the installation of a new water storage tank and booster pumps, and that FCTC has not shown by a preponderance of the evidence that it acted unreasonably. Bakman asserts that FCTC has not shown any alternatives to the water storage tank option to be feasible.⁵³ This includes the intertie between the City of Fresno

⁴⁹ *Id.*

⁵⁰ FCTC Opening Brief at 8-9.

⁵¹ *Id.*

⁵² FCTC Reply Brief at 9-10.

⁵³ Bakman Opening Brief at 8.

and usage of a pressure valve, the digging of a second well, and the use of a man-made lake for fire suppression. Bakman's expert testimony by Mr. Horn stated that an intertie with pressure valve would be unreliable for use in emergency purposes,⁵⁴ as relying on a valve not in regular use would be unsafe.⁵⁵ Mr. Bakman's testimony stated that Bakman Water would need to simulate emergencies to confirm the operational reliability of the pressure relief valve.⁵⁶ Bakman also states that the drilling of an additional well would be "very, very difficult"⁵⁷ and go against the terms of an agreement with the City of Fresno which precluded the digging of a second well and required the construction of a storage tank to meet the needs of the Development.⁵⁸ Regarding the lake, Bakman noted that the Fresno Fire Department had a number of questions regarding the viability of a lake for fire flow purposes and as such removed that option from consideration.⁵⁹

4.2. Analysis

Code Section 451 states that "[a]ll charges demanded or received by any public utility. . . shall be just and reasonable," and "every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful."⁶⁰ General Order 103-A states that "Subject to the Commission's oversight, each utility shall operate its system so as to deliver reliable, high

⁵⁴ Evidentiary Hearing (EH) Transcript (June 24, 2021, 30:23-31:2.

⁵⁵ EH Transcript, 38:20-39:10

⁵⁶ Bakman Opening Brief at 12.

⁵⁷ EH Transcript, 29:7-13.

⁵⁸ 49 BWC-01, Bakman Direct at 4; BWC-03, Bakman Reply at. 3. 50 BWC-01, Bakman Direct, Attachment 1, Operational Statement at 4.

⁵⁹ Bakman Opening Brief at 4.

⁶⁰ Code Section 451.

quality service to its customers at reasonable cost.”⁶¹ FCTC has the burden of showing by a preponderance of the evidence that Bakman is acting unreasonably in requiring the construction of the water tank as a condition of service. In considering whether Bakman acted unreasonably, it is instructive to consider whether Bakman has violated its tariff in requiring the construction of a storage tank as opposed to considering other options.

FCTC claims that Bakman has acted unreasonably in requiring construction of the tank because it has not adequately considered alternatives such as the digging of an additional well or an intertie with the City of Fresno. However, FCTC has not specified a specific violation of Bakman’s Tariff Rule 15 (Rule 15), beyond a general claim of unreasonableness.⁶² Bakman notes that Rule 15(D)(3) states that “The cost of facilities other than hydrants and distribution mains required to provide supply, pressure, or storage for fire protection purposes, or portions of such facilities allocated in proportion to the capacity designed for fire protection purposes, shall be paid to the utility as a contribution in aid of construction.”⁶³ FCTC has not disputed that the storage tank is being required in response to Fresno Fire Department fire flow requirements.⁶⁴ Bakman’s current proposal is for FCTC to pay as contribution in aid of construction the costs of a 400,000 gallon water storage tank. FCTC’s complaint is as to the method which has been prescribed to remedy the fire flow issue, the storage tank. However, Rule 15(D)(3) does not require that Bakman consider all alternatives. “The fact that a utility will not make an exception to its tariff to suit

⁶¹ General Order 103-A, Section II(1)(A) at 9.

⁶² Bakman Tariff Rule 15, Attachment G to Bakman Answer.

⁶³ Bakman Rule 15 at 13.

⁶⁴ See Complaint at 2.

a single customer's convenience is not grounds for us to find the utility in breach of its duties under GO 103-A or section 451.”⁶⁵ FCTC has not shown that Bakman is in violation of Rule 15(D)(3), by not considering alternatives.

Nor has FCTC shown by a preponderance of the evidence that Bakman has acted unreasonably, per Rule 15 (A)(8), Code Section 451, or General Order 103-A. Bakman has presented evidence that it has considered and discussed the intertie and well options and determined them to be unworkable or disfavored.⁶⁶ Bakman discussed options with FCTC's predecessor⁶⁷ as well as with the City of Fresno.⁶⁸ FCTC disputes the thoroughness of the alternatives analysis conducted by Bakman. Although FCTC's expert Mr. Jolly states that there is nothing preventing the investigation of an intertie or second well solution, FCTC does not present any analysis of the benefits or deficiencies of those courses of action, nor does it discuss with any specificity the potential cost savings.⁶⁹ In order to show Bakman acted unreasonably in not further considering alternatives, it would be helpful to determine the disparity in cost. Based on the facts of this case, additional evidence that would have been favorable to FCTC could have been discussions with the local governments, fire agencies, and water companies whose approval would have been needed to implement the potential

⁶⁵ D.22-03-015 at 26.

⁶⁶ EH Transcript at 42:14-20.

⁶⁷ BWC-01, Attachment 5 (Letter to Fancher Creek Properties summarizing discussions).

⁶⁸ FCTC-04 at 30 (2013 e-mails discussing lake fire suppression option), BWC-01 Attachment 6 (showing discussion with City of Fresno Water), Attachment 7 (discussion with City of Fresno City Manager regarding intertie); EH Transcript at 56:15-25, 58:14-21, 90:28-28-91:1-14.

⁶⁹ FCTC 01, 3:18-22, 4:1-22, 5:1-4; FCTC-03 at 4:2-14.

alternatives.⁷⁰ FCTC also seeks to ignore Bakman's initial offer⁷¹ to pay for all but \$1.1 million of the cost of the tank. That proposal, wherein Bakman would have covered approximately half of the estimated \$2.289 million cost⁷² was a reasonable attempt to negotiate. FCTC (and its predecessors) have had knowledge of need for the proposed storage tank since the April 22, 2009 Will-Serve Letter for the Development.⁷³ FCTC therefore cannot claim it lacked time to consider the situation and the implications of the offer made. FCTC had a reasonable offer available and chose not to accept it. Bakman did not act unreasonably in its actions regarding the construction of the water tank.

4.3. Does the Proposed Cost Allocation for the Storage Tank Satisfy Tariff Rule 15(D)(3)?

Although FCTC has not shown Bakman was unreasonable in requiring the construction of a water storage tank, there is a separate issue with Bakman's interpretation of Tariff Rule 15(D)(3). Rule 15(D)(3) states that "The cost of facilities other than hydrants and distribution mains required to provide supply, pressure, or storage for fire protection purposes, or portions of such facilities allocated in proportion to the capacity designed for fire protection purposes, shall be paid to the utility as a contribution in aid of construction." According to the 2021 Report, the storage tank is only needed to meet the Development's minimum fire flow requirements, and not to provide additional supply to the

⁷⁰ See *Humber vs. North Gualala Water Company*, D.93-09-007, 1993 Cal. PUC LEXIS 600 at 13-14 (discussing additional evidence needed to support a deviation from G.O. 103 fire flow requirements).

⁷¹ See Bakman Direct, Attachment 9

⁷² See Bakman Direct, Attachment 9, Bakman Answer at 7.

⁷³ Bakman Answer, Attachment D.

Development or Bakman's system.⁷⁴ It therefore is only needed for fire protection purposes and Rule 15(D)(3) applies. Bakman's current offer⁷⁵ is for FCTC to pay the full cost of the 400,000 gallon tank (\$2.289 million), while it covers any incremental cost to upsize the tank to 600,000 gallons (approximately \$70,000).

By the terms of Tariff 15(D)(3), FCTC should cover the cost of the tank and associated fire facilities in proportion to the amount of its capacity it is responsible for. To the extent that Bakman decides to utilize the storage tank for other purposes, such as removal of contaminants,⁷⁶ and requires additional tank capacity for such purposes, Bakman shall share in the cost of the tank at a proportion equal to the amount of total tank volume needed for such purposes. Bakman did note that the recommended size of the tank had changed in the 2021 Report.⁷⁷ Based on the calculations and system specifications presented in the 2021 Report, FCTC should be responsible for providing 60%⁷⁸ of the cost of the

⁷⁴ 2021 Report at 7.

⁷⁵ See EH Transcript, at 78 17:22 (noting incremental \$70,000 cost to upsize tank to 600,000 gallons) and Bakman Direct Attachment 9 (noting (\$2.289 million estimated cost of 400,000 gallon tank).

⁷⁶ Bakman Opening Brief at 20.

⁷⁷ Bakman Opening Brief at 23.

⁷⁸ Attachment B to Bakman's Answer, the 2021 Report, at page 12 discusses the required specifications for the storage tank. It notes that a tank of 500,000 gallons is needed to meet minimum fire flow, with 200,000 gallons of that being reserved for operation of the water system (presumably for backwashing wellhead treatment (EH Transcript at 79:6-28)). It then recommends another 100,000 gallons for sloshing height for a total of 600,000 gallons. This would mean 300,000 gallons is dedicated to meeting minimum fire flow for the development (consistent with a calculation of a 120-minute fire flow event at a rate of 2500 gallons per minute $120 \times 2500 = 300,000$). These amounts are consistent with what is described in the 2009 Report and Mr. Bakman's testimony (EH Transcript at 79:6-28). It is also consistent with other descriptions in the 2021 Report which state that the current Bakman system can already meet Maximum Day Demand in 10 years (2021 Report at 7), which suggests that the additional 200,000 gallons are not needed to otherwise serve the Development. Therefore, to the extent that a 600,000 gallon tank is used, 300,000 gallons (for minimum fire flows) could be charged to the development,

Footnote continued on next page.

600,000 gallon storage tank and any associated fire facilities, as a contribution in aid of construction, while the remaining cost is paid by Bakman, which Bakman could seek cost recovery for at a later time. To 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, plus any associated fire facilities costs in the same proportion, designed to meet the Development's minimum fire flow requirements, consistent with the calculations in footnote 78. Bakman is not required to agree to the construction of a tank beyond the size required to meet the Development's minimum fire flows. These payments shall be made consistent with Bakman's Tariff Rule 15(A)(6).

4.4. Conclusion

Bakman did not act unreasonably, nor did it violate its tariff in requiring the construction of a water storage tank to meet minimum fire flow requirements at the Development. However, to the extent that Bakman would upsize the tank to provide additional benefits to Bakman and its customers, or would like to use the tank to provide other benefits to its system, then Bakman shall share in the cost of the construction at a proportion equal to the additional capacity being added for non-minimum fire flow purposes.

and 200,000 gallons (for other system needs) could be changed to Bakman, which is a 60/40 proportion. The sloshing capacity, which provides benefits to both, could be charged to both at the same proportion. If the tank costs an estimated \$2.359 million, then FCTC would be responsible for 60%, and providing a \$1.415 million as contribution in aid of construction. If the tank was constructed merely to serve the Development's fire purposes, then FCTC would be responsible for the full cost of the tank and associated facilities.

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

California Government Code Section 65589.7(c) states "A public agency or private entity that provides water or sewer services shall not deny or condition the approval of an application for services to, or reduce the amount of services applied for by, a proposed development that includes housing units affordable to lower income households unless the public agency or private entity makes specific written findings that the denial, condition, or reduction is necessary due to the existence of one or more of the following..." This section is followed by Section 65589.7(c)(1), which provides that the public agency or private entity providing water service to the affordable housing development must find that the development "does not have sufficient water supply," as defined in paragraph (2) of subdivision (a) of Section 66473.7, or is operating under a water shortage emergency as defined in Section 350 of the Water Code, or does not have sufficient water treatment or distribution capacity, to serve the needs of the proposed development, as demonstrated by a written engineering analysis and report." Neither party has disputed the applicability of Section 65589.7(c) to Bakman as a private entity providing water service or to the Development as an affordable housing development. For our purposes, the parties agree that the point of contention is whether a sufficient written engineering analysis and report was prepared showing that the Development does not have sufficient water treatment or distribution capacity.

Bakman, in support of its contention that it has satisfied Section 65589.7, has presented a 2009 Bakman Water Company Water System Analysis Report (2009 Report) as well as a 2021 Bakman Water Company Water System Analysis Report (2021 Report), both prepared for Bakman by Yamabe and Horn Engineering Incorporated (Yamabe). The reports “evaluate the ability of Bakman Water Company to supply water to the proposed Fancher Creek Town Center, and to determine what improvements, if any, are needed to the Bakman Water Company system.”⁷⁹ The reports state that in determining whether the system can support the Development as is, they consider whether the system can 1) meet Maximum Day Demand for water production, 2) deliver the required fire flow on the Maximum Day with a residual system pressure of 20 psi, and 3) meet Maximum Day Demand with the highest producing well not in service, assuming a 10-year build-out period and water supply period. The reports consider the existing system pumping capacity, production, consumption, and growth estimates. The reports then consider potential system improvements that would be needed to meet Maximum Day Demand and fire flow requirements, in particular with regards to the Development.⁸⁰ Both the 2009 Report and the 2021 Report conclude that the Bakman system has adequate supply to meet future Maximum Day Demand without the Development’s fire flow requirements⁸¹, and that there are no logical main extensions that could be installed to deliver additional water to the site.⁸² Therefore, the reports conclude that a storage tank

⁷⁹ BWC-02 Horn Testimony, Attachment 2 at 1; Attachment 4 at 1.

⁸⁰ BWC Horn-02, Attachment 2 at 8; Attachment 4 at 9.

⁸¹ The 2009 Report used a 20 year development baseline, whereas the 2021 Report used a 10 year development baseline.

⁸² BWC Horn-02, Attachment 2 at 8; Attachment 4 at 9.

and booster pumps are reasonable solutions to meet the Development's fire flow requirements.⁸³

5.1. Party Arguments

FCTC states that the 2009 Report and 2021 Report fail to meet the requirements of Section 65589.7(c) because the 2009 Report inaccurately represented the state of the Bakman system, the 2021 Report was prepared after the Complaint was filed, both reports do not consider alternatives to the water storage tank, and the 2021 Report failed to accurately consider changed conditions in the Bakman system.⁸⁴

FCTC states that the 2009 Report could not be used to justify conditions in 2020 when FCTC filed its complaint. By the time of the Complaint, various well resources had become unavailable to Bakman, as shown by the 2021 Report.⁸⁵ These wells had become unavailable due to water quality concerns. FCTC therefore claims that the 2009 Report is outdated and could not have been used in 2020 to justify the conditions placed on the Development. Similarly, FCTC argues that the 2021 Report cannot be used to retroactively justify the conditions placed in 2020 on the Development, as it was only prepared due to the instant Complaint.⁸⁶

FCTC also states that the reports should be found deficient as they do not consider alternatives to the storage tank, nor future water resource availability.⁸⁷ FCTC notes that Mr. Horn, Bakman's witness and a writer of the 2009 Report and

⁸³ *Id.*

⁸⁴ FCTC Opening Brief at 2-3.

⁸⁵ *Id.* at 3; *see* BWC-02B, Attachment 2, Attachment 4.

⁸⁶ FCTC Opening Brief at 4.

⁸⁷ *Id.* at 5-7.

2021 Reports, did not examine or consider any other options for meeting the Development's minimum fire flows other than the water storage project.⁸⁸ FCTC's witness Mr. Jolly stated that given reduced resources and the potential for future well failures, the Bakman system would likely need upgrades in the future regardless of the Development's requirements.⁸⁹ According to FCTC, the 2009 Report and 2021 Report do not provide sufficient information regarding Bakman's plans for future resource development, should additional well failures occur.⁹⁰ Given the lack of information on that, FCTC argues that the reports cannot reasonably argue that the Bakman system does not need either the storage tank or additional wells to meet future demand, and that Bakman is simply trying to offload Bakman's expected costs onto the Development.⁹¹

Bakman states in response to FCTC's arguments regarding the timing of the 2009 Report and the 2021 Report, that Bakman had prepared the 2009 Report when making its initial determinations and recommendations regarding the project, and because the conclusion that Bakman's system was unable to meet the Development's fire flow requirements had not changed (as reflected in the 2021 Report) no such updated version was needed.⁹² Since the 2021 Report also supports Bakman's imposed conditions on the Development, the 2009 Report had at all times been valid as well, meaning there was no violation of Section 65589.7. Bakman also argues that the 2021 Report is valid regardless of when it

⁸⁸ FCTC Opening Brief at 5; EH Transcript 21:11-17.

⁸⁹ FCTC Opening Brief at 6; FCTC-03, at 3:1-5.

⁹⁰ FCTC Opening Brief at 6.

⁹¹ *Id.*

⁹² Bakman Reply Brief at 7.

was produced, as the report supports the current conditions for service in compliance with Section 65589.7.⁹³

Regarding the findings of the reports, Bakman states that FCTC's critiques are unfounded and not based on any technical analysis. Mr. Jolly's testimony regarding Bakman's supply or future need for improvements was not based on calculations other than a superficial review of the supply margins of the system and the status of Well 15A.⁹⁴ Bakman also states that Section 65589.7(c)(1) does not require an alternatives analysis in its report – merely a finding that the water provider is unable to serve the needs of the proposed affordable housing development due to insufficient water supply, treatment, or distribution capacity (or a finding that a shortage emergency exists).⁹⁵ Regarding the reports' lack of consideration of potential future well failures, Bakman states that such an analysis not required by Section 65589.7, nor has FCTC provided evidence to suggest any well failures are likely to occur.⁹⁶

5.2. Analysis

Much of our analysis on these issues go to the question of what substantive discussions must be contained within the 655789.7(C)(1) written engineering analysis and report. We must therefore conduct statutory interpretation in order to determine the legislature's intent in order to effectuate the statute's purpose.⁹⁷ Where the language is clear and unambiguous, there is

⁹³ Bakman Reply Brief at 8-9.

⁹⁴ FCTC Opening Brief at 18.

⁹⁵ Bakman Reply at 10.

⁹⁶ *Id.* at 11-12.

⁹⁷ D.04-01-012 at 9.

no need for statutory construction.⁹⁸ The statute itself does not discuss what is required to be in the report, beyond an “engineering analysis.” “Where ambiguity, doubt or uncertainty exists, statutory interpretation principles instruct that the next step is to look to the legislative history.”⁹⁹ At the outset, we note that Government Code Section 65589.7 was designed to encourage and prioritize hookups and connections for proposed affordable housing developments.¹⁰⁰ SB 1087 (2005), which enacted Section 65589.7, was designed to remedy situations where “affordable housing projects have been ... denied water or sewer hookups because of limited availability, even though hookups have been provided to market rate housing.” “In a few cases, the (water) districts have explicitly refused to serve affordable housing. This bill enhances the priority by requiring providers to reserve capacity for affordable housing and facilitates enforcement by prohibiting providers from allocating hookups to other developments.”¹⁰¹

It can be interpreted from these discussions that the goal of SB 1087 (and Section 65589.7) was to ensure that water suppliers were not discriminating against affordable housing developments in deciding who to provide service to. Further, the requirements of Section 65589.7(c) can then also be interpreted as seeking to ensure that water suppliers are only denying or conditioning service for specified reasons, including those laid out in subdivision (1) (which require a written engineering analysis and report). As such, the main purpose for the Section 655789.7(C)(1) written engineering analysis and report are to sufficiently

⁹⁸ *Id.*

⁹⁹ D.11-05-047 at 25.

¹⁰⁰ SB 1087 (2005) Senate Floor Analysis, available at [SB 1087 Senate Bill - Bill Analysis \(ca.gov\)](#).

¹⁰¹ *Id.*

show that the water supplier lacks sufficient water supply, is operating under a water shortage emergency, or does not have sufficient water treatment or distribution capacity to serve the needs of the proposed development.

As discussed above, FCTC's main arguments address the 2009 Report's and 2021 Report's lack of discussion of alternatives and Bakman's future plans to address potential resource availability and supply issues. However, based on the above analysis, such considerations are not needed to satisfy the requirements of Government Code Section 655789.7(c)(1). Bakman's reports must simply show that the water system currently lacks sufficient water supply or does not have sufficient water treatment or distribution capacity to serve the needs of the Development. The 2021 Report made findings that the Maximum Day Demand after ten years of development would be within system capacity should Bakman's highest producing well go down.¹⁰² The 2021 Report then went on to find that although Bakman's system could meet system demand, the system could not adequately meet the pumping demands imposed by the fire suppression flow requirements of the Development.¹⁰³ Due to this insufficient distribution capacity, Bakman imposed conditions on the Development's water service, in the form of a storage tank. FCTC's arguments did not dispute any insufficiency in delivering fire flows to the Development in Bakman's system – and instead stated that Bakman's system was inadequate,¹⁰⁴ which would instead bolster Bakman's argument with regards to finding a Section 655789.7(c)(1) insufficiency.

¹⁰² BWC-04, Attachment 4 at 7.

¹⁰³ *Id.* at 9.

¹⁰⁴ FCTC Opening Brief at 6, FCTC-03 2:6-21, 3:1-5.

Government Code Section 655789.7(c)(1) does not require that the written engineering analysis and report discuss all alternatives, or even any alternatives, nor does it require that Bakman consider potential future problems that may need to be addressed in the future. It merely requires that Bakman produce a report finding that it lacks sufficient supply or infrastructure to serve the needs of the Development. Nor does Section 65589.7(c)(1) state that it requires a constantly updated engineering report, although we will note that Bakman did produce an initial report in 2009 and Bakman should not be required to produce a new report any time its system conditions have changed. Bakman's 2009 Report and 2021 Report satisfied the requirements of Government Code Section 65589.7.

5.3. Conclusion

FCTC's arguments that the 2009 Report and 2021 Report do not satisfy Government Code Section 65589.7 are unpersuasive, as nothing in the statute suggests an alternatives analysis or consideration of future water resource availability are necessary. FCTC's argument regarding the timing of the reports is also unpersuasive.

6. 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?

Government Code Section 65589.7(c)(5) states that private entities may also deny or, reduce, or condition water service to affordable housing developments with a finding that the applicant (in this case, FCTC) "has failed 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 regulations or payment of a fee or charge imposed pursuant to Section 66013.”¹⁰⁵ In the instant Complaint, Bakman has not yet denied or proposed to reduce FCTC’s water allocation, instead conditioning it upon the installation of a water storage tank.

6.1. Analysis

As discussed *supra*, Bakman has been following the procedures laid out in its tariff. The Fresno Fire Department determined that fire flows to the Development were insufficient.¹⁰⁶ Per General Order 103-A, Bakman’s analysis and system conditions dictated that a water storage tank and booster pump were reasonable options for remedying this issue. Pursuant to Tariff Rule 15, Bakman would be within its rights to generally seek a contribution in aid of construction of FCTC in an amount totaling the full estimated cost of the storage tank, subject to any adjustments for additional capacity imposed or requested by Bakman for its own purposes. Thus, Bakman has satisfied the requirements of Section 65589.7(c)(5), given that its current offer is conditional due to “requirements of local or state law.” However, Bakman also previously made an offer to share in the cost with FCTC at a roughly 50% split. Such an offer was undoubtedly reasonable, given the terms of the tariff, which would lay the whole cost with FCTC. Bakman has thus clearly satisfied the requirements of Section 65589.7(c)(5) and is justified in conditioning service for the Development.

¹⁰⁵ California Government Code Section 65589.7(c)(5)

¹⁰⁶ Complaint at 2.

7. Bakman Appeal of Presiding Officer's Decision

On August 12, 2022, a Presiding Officer's Decision was mailed in this proceeding. On September 12, 2022 Bakman filed an appeal, asking that the Commission dismiss FCTC's complaint with prejudice, and clarify payment mechanics and cost responsibilities. FCTC filed a Response on September 27, 2022, opposing these changes. Changes to the Decision have been made clarifying the application of contribution in aid of construction payment rules, as well as clarifying responsibility for other associated fire facilities. Additional changes have been made clarifying cost responsibility. However, this Decision does not adopt Bakman's request to dismiss the complaint with prejudice, given the potential for future disagreements over implementation. However, any future complaints by FCTC should allege facts other than those presented in this proceeding.

8. Conclusion

FCTC's arguments do not hold weight. FCTC has not shown by a preponderance of the evidence that Bakman has violated any tariffs or has acted unreasonably in conditioning service to the Development on the installation of a water storage tank and booster pump. Bakman has also presented a sufficient written engineering analysis report compliant with Government Code Section 65589.7 and has shown that it has made reasonable offers to FCTC. However, Bakman should be responsible for the costs not attributable to FCTC and should Bakman seek to upsize the proposed water storage tank, it should share in the cost of the tank for any additional capacity added for its own purposes consistent with the cost allocation methodology described above. The Complaint is dismissed.

9. Categorization and Need for Hearings

The categorization of this proceeding is adjudicatory. Evidentiary hearings were held.

10. Assignment of Proceeding

Commissioner Darcie Houck is the assigned Commissioner, and Garrett Toy is the assigned Administrative Law Judge and Presiding Officer in this proceeding.

Findings of Fact

1. FCTC Senior, LP (FCTC) is a developer with plans to construct an affordable senior rental housing project (Development) in Fresno, CA as part of a larger plan known as the Fancher Creek Town Center.
2. The Development falls within Bakman Water Company's (Bakman) service territory.
3. The Fresno Fire Department determined that Bakman's infrastructure could not during a fire event meet the required 2,500 gallons per minute minimum water flows to the Development.
4. In 2009, Bakman obtained an engineering report from Yamabe & Horn Inc. (2009 Report).
5. In 2021, Bakman obtained an additional engineering report from Yamabe & Horn Inc. (2021 Report).
6. Bakman has since 2009 required as a condition of service to the Development the construction of a water storage tank in Will-Serve letters for the Development.
7. Bakman has sufficient water supply to meet projected future demand, including supply needs for the Development.

8. The construction of the water storage tank is needed only due to insufficient fire suppression water flows at the Development, and no other Bakman system needs.

9. Bakman offered to FCTC to cover all costs for the storage tank beyond a \$1.1 million contribution in aid of construction to be provided by FCTC.

10. Bakman discussed the possibility of alternatives to the water storage tank including interties, man-made lakes, and additional wells with FCTC's predecessor, the City of Fresno, and the Fresno Fire Department.

11. Bakman investigated alternatives to a water storage tank and booster pump to meet the Development's minimum fire flows.

12. Bakman offered that FCTC pay \$1.1 million as contribution in aid of construction for the water storage tank, with the remainder paid for by Bakman.

13. Only 60% of the 600,000 gallon tank proposed in the 2021 Report is dedicated to minimum fire flows.

14. The documents submitted for official notice were filed by FCTC to rebut the testimony of a Bakman witness.

15. The documents filed for official notice were provided to show the existence of interties in nearby water systems, as well as to show the existence of a State Water Resources Control Board policy.

Conclusions of Law

1. A utility tariff filed with the Commission carries the force and effectiveness of a statute.

2. The Commission standard for reasonableness is the preponderance of the evidence standard.

3. Bakman was not required to conduct an alternatives analysis.

4. Tariff Rule 15(D)(3) does not require Bakman to consider alternatives to meet minimum fire flow demands when it conditions service.

5. There is insufficient evidence on the record to conclude that alternatives to the water storage tank would be significantly cheaper.

6. Bakman provided a sufficient written engineering analysis, as required by Government Code Section 65589.7(c)(1).

7. Bakman did not violate its tariff in conditioning service to the Development on the construction of a water storage tank and booster pump.

8. Bakman did not act unreasonably pursuant to Public Utilities Code Section 451, General Order 103-A, or Bakman's Tariff Rule 15 in conditioning service to the Development on the construction of a water storage tank and booster pump.

9. Pursuant to Bakman's Tariff Rule 15(D)(3), FCTC shall only be responsible for providing as a contribution in aid of construction a percentage of the cost of the water storage tank and associated fire facilities equal to the percentage of the tank dedicated specifically to meeting minimum fire flow requirements.

10. Bakman should be responsible for the costs of the water storage tank not attributable to FCTC and should Bakman seek to upsize the proposed water storage tank, it should share in a proportional cost of the tank for any additional capacity added for its own purposes.

11. Bakman met the requirements of Government Code Section 65589.7(c)(1) when it conditioned service on the construction of a water storage tank.

12. Bakman met the requirements of Government Code Section 65589.7(c)(5) when it conditioned service on the construction of a water storage tank.

13. FCTC's request for official notice improperly seeks to use documents for the truth of the matter asserted, and for purposes of establishing facts that could be disputed.

14. FCTC's request for official notice of documents for the purpose of rebutting the testimony of a witness, which was filed after the conclusion of evidentiary hearings, was procedurally deficient and should be denied.

O R D E R

IT IS ORDERED that:

1. FCTC Senior, LP's Complaint is dismissed.
2. FCTC Senior, LP's Motion for Official Notice is denied.
3. Bakman Water Company shall be responsible for the costs of the water storage tank determined to be required for FCTC Senior, LP's proposed affordable senior rental housing development in Fresno, California that are not attributable to FCTC Senior, LP's fire suppression needs. Should Bakman Water Company seek to upsize the proposed water storage tank, it shall share in the cost of the tank for any additional capacity added for its own purposes, pursuant to Bakman Water Company's Tariff Rule 15 or an arrangement agreed upon by the parties.
4. Case 20-12-017 is closed.

This order is effective today.

Dated February 23, 2023, at San Francisco, California.

ALICE REYNOLDS
President
GENEVIEVE SHIROMA
DARCIE L. HOUCK
JOHN REYNOLDS
KAREN DOUGLAS
Commissioners