STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

April 2, 2003

TO: PARTIES OF RECORD IN CASE 02-05-035

This proceeding was filed on May 9, 2002, and is assigned to Commissioner Susan P. Kennedy and Administrative Law Judge (ALJ) Kathleen Maloney. This is the decision of the Presiding Officer, ALJ Maloney.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:tcg

Attachment

PRESIDING OFFICER'S DECISION (Mailed 4/2/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Breuer, Inc. Complainant, vs. Del Oro Water Company, Inc. Defendant.	Case 02-05-035 (Filed May 9, 2002)

OPINION DENYING COMPLAINT

1. Summary

Complainant Breuer, Inc. (Breuer) alleges that Del Oro Water Company, Inc. (Del Oro) breached two main extension contracts dated January 30, 1991. Breuer asserts two causes of action: the first cause of action alleges that Del Oro breached the contracts by failing to install the facilities described in the contracts; the second cause of action alleges that Del Oro breached the contracts by expending funds collected without having adequate funds to complete the main extension project.

This decision finds that Del Oro has not breached the two main extension contracts with Breuer. The complaint is denied.

2. Underlying Facts

The factual record consists of the record developed in Application (A.) 00-11-053 [1] as well as the record developed in this case. The basic underlying facts are not in dispute.

Del Oro owns and operates a water system in Butte County that serves the Lime Saddle area, including the community of Paradise. The water system was previously operated by the Lime Saddle Community Service District (District), a public entity not subject to the jurisdiction of the Commission. The District's water source was five wells, which proved inadequate to serve existing customers. Therefore, the District entered into an agreement to purchase supplemental water from the Stirling Bluffs Corporation (Stirling Bluffs), a subsidiary of Del Oro. The purchased water was wheeled from Stirling Bluffs through an agreement with the Paradise Irrigation District. Pursuant to these agreements, both Stirling Bluffs and Paradise Irrigation District could refuse to supply water to the District if their own customers required the water. Additionally, the agreement could be terminated on five years' notice.

Del Oro acquired the District's water system in 1990. Included in the transfer to Del Oro was the District's right to an annual allotment of 200 acre-feet of water from Lake Oroville. Lake Oroville water was not, however, available for use because no facilities existed to transport the lake water to the Lime Saddle area. Del Oro also assumed the contracts with Stirling Bluffs and Paradise Irrigation District, enabling it to continue to purchase water, which it has done.

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[1] A.00-11-053, filed by Del Oro, sought a determination by the Commission that certain water main extension contracts between Del Oro and others are valid and comply with the utility's Tariff Rule 15 and/or the Commission's decisions, rules, and regulations.

At the time that Del Oro acquired the water system, the Department of Health Services (DHS) limited the number of Lime Saddle District connections to a maximum of 440 because of the uncertainty of the water supply.[2] DHS encouraged the District to develop means to utilize its Lake Oroville water right.

After Del Oro acquired the water system in 1990, it retained engineers to design a project to interconnect the Lime Saddle system with Lake Oroville. The project would replace the Stirling Bluffs water with Lake Oroville water.[3] At a cost of $2.8 million, the intertie project would permit the system to serve up to 600 new connections and would provide a dependable source of water.

Del Oro decided to finance the intertie project by imposing a $5,000 charge on each new residential connection. The $5,000 charge was determined by dividing the estimated $2.8 million cost by the approximately 600 new connections that could be served with the new source of water. Since January 1, 1991, Del Oro has required a person or entity seeking new water service in its Lime Saddle District area to enter into a water main extension contract with it and pay a non-refundable charge of $5,000 for each new connection. In Decisions (D.) 02-01-014 and D.02-04-064[4] we concluded that the water main extension contract utilized complies with Del Oro's Tariff Rule 15.

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[2] The number of permissible connections to the system is not equivalent to the number of customers. Del Oro's witness Fortino testified that DHS counts residential connections in "residential equivalents." For example a 100 unit mobile home park would count as approximately 33 residential equivalent units.

[3] The project to connect the Lime Saddle system with Lake Oroville in order to access Lake Oroville water is referred to hereinafter as "the intertie project."

[4] Decisions on Del Oro’s Application, A.00-11-053, concerning the validity of Del Oro’s water main extension contracts.

Breuer planned on constructing 100 homes in the Lime Saddle area. On January 30, 1991, it entered into two water main extension contracts with Del Oro. At the time that Breuer entered into the contracts, there were 190 of the 440 connections to the existing system allowed by DHS available. Breuer requested and received 101 of these 190 available connections. Breuer paid $500,000 pursuant to the first contract and requested 100 connections. Breuer paid $5,000 pursuant to the second contract and requested 1 connection. With these connections Breuer had the ability and right to connect to, and obtain water from, the existing system. At such time as the intertie project was completed in the future, the system would deliver Lake Oroville water.

Following acquisition of the 101 connections, Breuer did not connect to the system. Construction of homes on the Breuer property did not occur. Breuer continues to own 101 of the 440 connections to the existing system.

According to the staff audit conducted as part of A.00-11-053, Del Oro collected $865,582 (before taxes, and not including interest) by the end of 1999 from main extension contract contributions. As of that date it paid $268,688 in income taxes on contributions, and $678,412 on projects listed in the main extension contracts. The staff expert in A.00-11-053 determined that the funds collected were properly recorded and reported in the Lime Saddle District's Account 132 (Special Accounts). The Staff expert's examination revealed that the funds were used exclusively for the purposes for which they were collected. The intertie project has not been completed because of lack of funds.

3. Procedural History of Complaint

On September 15, 2000, three Del Oro customers brought suit against Del Oro in Butte County Superior Court concerning water main extension contracts entered into with Del Oro. On November 8, 2000, Breuer filed a complaint

against Del Oro and others in Butte County Superior Court, for declaratory relief and damages related to its two water main extension contracts with Del Oro.

Subsequent to the filing of the complaints in Superior Court, Del Oro filed an application (A.00-11-053) with the Commission seeking a determination that the main extension contract it utilized is in compliance with Del Oro's Tariff Rule 15 and/or relevant Commission decisions, rules and regulations. Breuer and the three other Butte County Superior Court plaintiffs filed protests to Del Oro's application. The Superior Court stayed the civil actions pending the Commission's action in A.00-11-053.

Following hearings and the filing of briefs in A.00-11-053, the Commission issued D.02-01-014 and D.02-04-064 (modifying and denying rehearing of D.02-01-014.) The Commission concluded that the main extension contracts utilized by Del Oro comply with the utility's tariffs and that Del Oro properly accounted for funds collected through these contracts.[5]

Breuer filed this complaint with the Commission alleging breach of contract on May 9, 2002. Del Oro filed a timely answer, denying that it breached the contracts referenced in the complaint, and asserting affirmative defenses.

On September 23, 2002, Del Oro filed three motions: a motion to dismiss the complaint, a motion for summary judgment or summary adjudication, and a motion for judgment on the pleadings. Breuer filed a reply to the motions and Del Oro filed a response to Breuer's reply.

[5] Breuer filed a petition for writ of review of the decisions in A.00-11-053 with the California Supreme Court. The writ was denied on June 12, 2002.

The Commission held a prehearing conference (PHC) on October 4, 2002. At the PHC the presiding administrative law judge (ALJ) denied the three Del Oro motions without prejudice.

On October 16, 2002, Assigned Commissioner Duque issued the Scoping Memo which designated Administrative Law Judge (ALJ) Maloney as the presiding officer. The Scoping Memo identified the issues to be addressed at hearing. The Butte County Superior Court extended the stay of proceedings in the Superior Court complaint cases, pending a decision by the Commission in this case.

The Commission held evidentiary hearings on December 9, 2002. At hearing the presiding officer took official notice of the record in A.00-11-053, in which Del Oro sought a determination regarding the validity of its water main extension contracts. The case was submitted on January 15, 2003 with the filing of reply briefs.

4. Nature of Dispute Between Breuer and Del Oro

The controversy between Breuer and Del Oro centers on the two water main extension contracts. Breuer contends that Del Oro breached its obligations under the contracts.

The complaint asserts two causes of action. The first cause of action alleges that Del Oro breached the contracts by failing to install the distribution plant and facilities described in the contracts. The second cause of action alleges that Del Oro breached the contracts by commencing the intertie project and expending funds collected without having adequate funds to complete the project.

Breuer contends that it is entitled to reparations in the form of a refund of the monies paid to Del Oro under the contracts, plus interest.

5. Discussion

A. First Cause of Action

The first cause of action alleges that Del Oro failed to install the intertie project distribution plant and facilities described in the contracts. Breuer asserts that this failure constitutes a breach of the contracts. A breach of contract occurs where there is a wrongful, either unjustified or unexcused, failure to perform contractual obligations. Breuer, as complainant, has the burden of proving that a breach of contract occurred.

The contracts do not specify a date by which Del Oro is obligated to install the project plant and facilities. Breuer acknowledges this fact in its opening brief, where it states "the contract did not specify any time for Del Oro's performance." It is clear from the circumstances surrounding the contract that there could be no certainty as to when the intertie project would be completed. Attachment B to the contracts shows the intertie project proceeding in two phases, costing approximately $2.8 million.

Del Oro planned to finance the intertie project through main extension contract fees and through the formation of a special assessment district. In order to finance the project through main extension contract fees, contracts for approximately 600 connections had to be executed. There is no evidence that Breuer was at any time informed of a target date by which sufficient funds would be collected from main extension contract fees, nor by which the project would be completed. The uncertainty of financing, and thus of the completion date, is underscored by the contract language stating that Del Oro intends to support the formation of a special assessment district to finance the project.

While the contracts do not specify a project completion date, they do obligate Del Oro to commence and prosecute to completion "with all reasonable diligence" the work of installing the project plant and facilities. A review of Del

Oro's actions since 1991 leads us to conclude that Del Oro has met this contractual obligation. We summarize below the evidence that supports this conclusion.

In 1992 Del Oro commenced negotiations with the developers of a new subdivision called Mountain Oaks. The purpose of the negotiations was to enter into a collaborative effort to construct certain portions of the intertie project that could be jointly used, resulting in cost efficiencies. Del Oro was successful in negotiating an agreement whereby the Mountain Oaks developers oversized their water system improvements to include a new Lake Oroville intake and treatment plant and storage facilities which were part of Del Oro's existing intertie project design. By October, 1994, Del Oro had paid the developer of Mountain Oaks approximately $459,000 of the contributions it had received between 1991 and 1993, which contributions included the $505,000 from Breuer. This money was spent to partially complete the intertie project. We find the commencement of project work at this early date is evidence that Del Oro acted with diligence to move forward with the intertie project.

Following commencement of the intertie project work, collections of contributions from water main extension contracts slowed. In the 1991-1993 period, contributions to the project exceeded $850,000. In contrast, in 1994, Del Oro did not receive any contributions from main extension contracts. As a result, Del Oro did not have sufficient funds to complete the project.

At this point, Del Oro initiated community meetings to propose formation of an assessment district as an alternative means of financing the project. At meetings it was clear that the public did not support formation of an assessment district. Even Complainant Breuer communicated its opposition to the method of financing at a meeting of local residents. Its opposition is also evidenced by a handwritten note from Breuer to another property owner within the Lime Saddle

district. Based upon the overwhelming lack of local public support for the formation of the assessment district, Del Oro abandoned its efforts to form one in 1996. We find the efforts of Del Oro to form an assessment district are consistent with its obligation to act with diligence to bring the project to completion.

We reject Breuer's contention that Del Oro's efforts to form an assessment district constitute a breach of the "implied covenant of good faith and fair dealing." [6] The contracts state that Del Oro intends to pursue establishment of an assessment district. Breuer may have decided that formation of an assessment district was not in its best interests. However, this does not alter the fact that Del Oro, in seeking formation of an assessment district, was acting in accordance with the terms of the contract.

After property owners rejected formation of an assessment district, Del Oro pursued a variety of other means of financing completion of the project. In fact, Del Oro's efforts to arrange financing continue into the present.[7] One step Del Oro took was to cooperate in 1997 with the District in seeking a grant under California Proposition 204. Ultimately the District's request for Proposition 204 funds was denied. Between 1997 and 2000, Del Oro further cooperated with the District in efforts to obtain financing for the intertie project through loans from the Department of Agriculture. In December, 1999, the District's request for

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[6] This allegation is not contained in the complaint. It appears in the testimony of Breuer's witness, Squeri, and in briefs. The argument is not well developed, and contains no citations to legal authority.

[7] Contributions from main extension contracts continued to be collected at an inconsistent pace, until 2001 when the last connection to the current system was allocated. Over time project cost estimates increased and funds from the main extension fees proved insufficient to finance completion of the project.

federal aid was rejected. The District was dissolved in 2000 by Butte County after a public vote.

Another effort Del Oro undertook in 2000 and 2001, was to initiate meetings with the Butte County Water Commission and the Director of Butte County's Department of Water and Resources Conservation to propose a joint venture between Del Oro and Butte County to complete and operate the intertie facilities. The County determined that legal obstacles prevented the joint venture.

Del Oro management is now pursuing a regional solution to water problems in the area surrounding Lime Saddle. This revised project would complete the intertie project, and also connect the Lime Sadde District system to the Paradise Pines District. The estimated budget for this project is $7,500,000. Del Oro sought authority from the Commission in A.02-06-033 to borrow $250,000 to pay the costs of engineers and other consultants to perform a CEQA review of the regional project. Del Oro has meanwhile filed a "pre-application" for a loan under the Safe Drinking Water State Revolving Fund (SRF) program.

Since 1991 Del Oro has acted with reasonable diligence to commence and prosecute to completion the intertie project work. Complainant has failed to prove Del Oro breached its contractual obligations.

We note that though the intertie project has not been completed, it has not been established that Breuer has been harmed. Any conclusions in this regard would be purely speculative. No evidence was introduced regarding the effect on property values, nor of efforts to sell the Breuer property. Breuer remains the owner of 101 connections to the existing water system. All connections to the existing system have been allocated, and there are no new water connections available from Del Oro. Breuer was approached in 2002, with an offer to purchase between seven and ten of its connections, which it declined. It is not

necessary for us to reach a conclusion regarding the impact to Breuer of the incomplete project because no breach of contract has been established.

B. Second Cause of Action

The second cause of action alleges that Del Oro breached the contracts by expending funds collected without having adequate funds to complete the project. The contracts state:

> "Utility agrees that it will, *as soon as adequate funds have been collected*, necessary materials and labor are available…commence and prosecute to completion with all reasonable diligence the work…."(emphasis added)

It is Breuer's contention that Del Oro was contractually obligated to defer commencement of construction until it had collected enough funds to complete the project.[8] Breuer's interpretation is not reasonable in light of the circumstances and subject of the contracts. The contracts specifically show the project divided into two phases. The term "adequate funds" is not defined in the contracts. Given the size of the project, the method of financing, and the amount of money required to complete the project, the most reasonable interpretation of the contract is that project work would commence before all funds were raised. To conclude otherwise would render meaningless Del Oro's obligation to commence work with "reasonable diligence." The requirement that Del Oro begin

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[8] In paragraph 14 of the complaint, Breuer alleges that "Only a portion of the funds collected by Del Oro for the purpose of the project have been expended on the project. The remaining funds have been spent on facilities not specified in the contract or reflect costs incurred in excess of the contract specifications." This issue has already been decided in D.02-04-064, Finding of Fact 33. We concluded that the funds collected by Del Oro were used exclusively for the purposes stated in the contracts. Relitigation of this issue is barred by the doctrine of collateral estoppel.

work as soon as adequate funds were collected served to prevent Del Oro from collecting funds and then simply holding onto them indefinitely.

In fact the funds collected were adequate to engage in a significant amount of work on the project between 1992 and 1994. As discussed above, Del Oro collected sufficient funds to join in the construction of a Lake Oroville intake and treatment plant and storage facility with the Mountain Oaks developers. The money raised by Del Oro at the time of this initial work was enough to pay for its share of costs.

Breuer does not allege that it complained at any time about Del Oro's expenditure of funds until it filed its complaint in November, 2000. Breuer states in its opening brief that "Breuer reasonably waited for Del Oro to commence the Project, as additional connection fees were collected. Once the Project construction commenced, Breuer patiently waited for Del Oro and others to find means to complete the Project." This suggests that Breuer's objection to the commencement of work on the project was developed in hindsight.

Complainant has not met it burden of proving that Del Oro breached the contract in the manner alleged in the second cause of action. Del Oro did not breach the terms of the contract when it commenced work on the project before the entire $2.8 million estimated cost had been collected. Del Oro acted reasonably in commencing the project, and had adequate funds to perform the work commenced. Its conduct was consistent with its obligations under the contracts.

6. Conclusion

Breuer has not met its burden of proving that Del Oro breached the two main extension contracts as alleged in the complaint. The complaint should be denied.

7. Assignment of Proceeding

Susan B. Kennedy is the Assigned Commissioner and Kathleen C. Maloney is the assigned ALJ in this proceeding.

Findings of Fact

1. Del Oro owns and operates a water system in Butte County that serves the Lime Saddle area, including the community of Paradise. Del Oro acquired the system in 1990.

2. When it acquired the water system from the Lime Saddle District, Del Oro acquired a right to an annual allotment of 200 acre-feet of water from Lake Oroville. No facilities existed to transport the water to the Lime Saddle Area.

3. After it acquired the water system, Del Oro retained engineers to design an intertie project to connect the Lime Saddle system with Lake Oroville to access Lake Oroville water. The cost of the project was estimated at $2.8 million.

4. Del Oro planned to finance the intertie project through main extension contract fees and through the formation of a special assessment district.

5. Commencing January 1, 1991, Del Oro required a person or entity seeking a new water service in the Lime Saddle District area to enter into a water main extension contract and pay a non-refundable charge of $5,000 for each new connection. The contract utilized was a standard agreement.

6. The Commission concluded in D.02-01-014 and D.02-04-064 that the main extension contract utilized complies with Rule 15 of Del Oro's filed tariffs for the Lime Saddle District, and with the Commission's rules and regulations.

7. In D.02-01-014 and D.02-04-064 the Commission found that Del Oro had properly accounted for funds collected pursuant to the main extension contracts, and that the funds had been spent exclusively for purposes stated in the main extension contracts.

8. Breuer planned on constructing homes in the Lime Saddle area. On January 30, 1991, Breuer entered into two main extension contracts with Del Oro. Breuer paid $500,000 pursuant to the first contract and acquired 100 connections. Breuer paid $5,000 pursuant to the second contract and acquired 1 connection.

9. At the time that Breuer entered into the two main extension contracts, 190 connections were available. Breuer acquired 101 of the 190 available connections. All connections to the existing system have now been allocated.

10. Breuer has not connected to the system and has not constructed residences on its property. It continues to own 101 connections to the existing system.

11. Del Oro commenced work on the intertie project in 1992 in conjunction with the developers of the Mountain Oaks subdivision. Del Oro paid approximately $459,000 as its share of the costs of construction.

12. In the 1991-1993 time period, Del Oro collected, through main extension agreement contributions, approximately $850,000 for the Lake Oroville intertie project. In 1994, Del Oro did not receive any contributions from main extension contracts. Thereafter, contributions were collected sporadically until 2001 when the last connection to the current system was allocated. The amount of money collected has proved insufficient to complete the intertie project.

13. Consistent with the contract, Del Oro took steps to form an assessment district to finance completion of the project. The effort was abandoned due to lack of public support.

14. The main extension contracts do not state a date by which the Lake Oroville intertie project will be completed. The contracts state that as soon as adequate funds have been collected, Del Oro will commence and prosecute to completion with all reasonable diligence the work of installing the plant and/or facilities.

15. As soon as adequate money had been accumulated, Del Oro commenced work on the intertie project.

16. Del Oro has engaged in a series of efforts to raise funds necessary to complete the intertie project to Lake Oroville. Del Oro has met its obligation under the contracts to act with reasonable diligence to commence and prosecute the project to completion.

17. The Lake Oroville intertie project has not been completed because of lack of funds.

18. In C.02-05-035, Breuer alleges that Del Oro breached the two main extension contracts. Breuer seeks reparations, plus interest.

19. Del Oro denies that it breached the main extension contracts, and asserts affirmative defenses to the complaint.

Conclusions of Law

1. The two main extension agreements between Breuer and Del Oro comply with Del Oro's Tariff Rule 15.

2. Del Oro's failure to complete the installation of distribution plant and facilities described in the main extension contracts does not constitute a breach of the contracts.

3. The commencement of the intertie project and the expenditure of funds by Del Oro, prior to having collected sufficient funds to complete the intertie project, does not constitute a breach of the contracts.

O R D E R

IT IS ORDERED that:

1. The complaint of Breuer, Inc., against Del Oro Water Company, Inc., for breach of two water main extension contracts is denied.
2. Case 02-05-035 is closed.

This order is effective today.

Dated _____, at San Francisco, California.