

Decision No. 13626

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of .
EAST BAY MUNICIPAL UTILITY DISTRICT

that the Railroad Commission fix and determine the just compensation to be paid for the properties and rights and for the water supply and distribution system of the EAST BAY WATER COMPANY.

ORIGINAL

Application No. 9968.

Edward F. Treadwell and Wm. J. Locke, for Applicant.

McKee, Tasheira & Wahrhaftig, by A.C. Tasheira, for East Bay Water Company, Mercantile Trust Company of California, Union Trust Company and Wells Fargo Bank.

BY THE COMMISSION:

OPINION

On April 1, 1924, the EAST BAY MUNICIPAL UTILITY DISTRICT filed its petition, setting forth its intention to initiate such proceedings as may be required by law to submit to its voters a proposition to acquire under eminent domain proceedings all the lands, properties and rights of every kind and character belonging to the EAST BAY WATER COMPANY, a public utility, with the single exception of that company's water plant at Newark, Alameda County. These several properties are situated in the counties of Contra Costa and Alameda, and together form the water system used by said East Bay Water Company in supplying water to the territory embraced by petitioner, and to certain territory adjacent thereto. In addition to the East Bay

Water Company, the petition names as owners or claimants of these properties the UNION TRUST COMPANY OF SAN FRANCISCO, THE WELLS FARGO BANK AND UNION TRUST COMPANY, THE MERCANTILE TRUST COMPANY OF SAN FRANCISCO and THE MERCANTILE TRUST COMPANY OF CALIFORNIA, and asks this Commission to fix and determine the just compensation to be paid by petitioner for said lands, properties and rights. Detailed statements listing these several properties are contained in exhibits attached to the petition, and in an amendment thereto, which petitioner obtained leave to file.

Upon the filing of said petition, we issued our order to show cause as required by section 47 of the Public Utilities Act, directing the named owners and claimants of these properties to appear and show cause, if any they might have, why we should not proceed to hear said petition and to fix the just compensation to be paid for said lands, properties and rights.

In response to this order, the East Bay Water Company, the Wells Fargo Bank and Union Trust Company and the Mercantile Trust Company of California filed separate returns in substantially identical form, denominated "Special Appearance in Answer to the Order to Show Cause," wherein a number of specific objections to the proceeding are raised. These objections are: (1) That this Commission has no jurisdiction to grant any relief to petitioner, for the reason that Article XII, section 23a of the Constitution of California defines and limits the power of this Commission to fix just compensation upon the request of the State and of certain enumerated political subdivisions thereof, of which, it is declared, petitioner is not one, and that the provisions of section 47 of the Public Utilities Act, in purporting to supplement this

enumeration of political subdivisions and grant power to the Railroad Commission to fix such compensation at the request of a "municipal utility district" is an unconstitutional extension of this grant of power; (2) that petitioner in any event does not possess power to condemn and thereafter acquire and operate those properties because it appears on the face of the petition that some of them are situated without the boundaries of petitioner, and also because these properties comprising the water system of the East Bay Water Company are dedicated to the public use of territory both within and without petitioner's boundaries, and petitioner has no lawful power to supply water to persons without its boundaries; (3) that the proceeding contravenes the provisions of sections 1240 and 1241 of the Code of Civil Procedure; (4) that petitioner is not one of the political subdivisions specifically granted authority by section 1243 of the Code of Civil Procedure to condemn in a single action property located in more than one county, as are the properties here in question; and, (5), that the petition does not show that the use to which these properties are proposed to be put by petitioner is a more necessary public use than that to which they are already appropriated, that the present service of the East Bay Water Company is inadequate, or that the public interest would be subserved by the acquisition of these properties by petitioner. We are asked to vacate and set aside the order to show cause and to dismiss this petition.

The constitutional provisions creating the Railroad Commission and authorizing the Legislature to confer upon it broad powers of control over public utilities did not, in express terms, grant to the Legislature authority to confer upon the Commission the power of fixing just compensation to be paid in cases in which the State or some municipality or other political subdivision should desire to take property of some public utility under eminent domain.

(Art. XII, secs. 22 and 23.) Also, the original Public Utilities Act, passed in 1911 pursuant to these new constitutional provisions, while conferring upon the Railroad Commission general authority to value the property of public utilities (presumably for purposes incidental to regulation, (sec. 47)) did not provide specifically for the fixing of value for condemnation purposes. In 1913, however, the Legislature amended the Public Utilities Act to vest such power in the Commission upon application for a valuation of public utility property by "any county, city and county, incorporated city or town or municipal water district" (Stats. 1913, Chap. 339). This was followed in 1915 by an amendment, adding the words "county water district, irrigation district, public utility district, or any other public corporation" to the list of political subdivisions upon whose request such valuation might be made (Stats. 1915, chap. 91).

In 1914, a new constitutional provision was adopted (sec. 23a, Article XII) specifically authorizing the Legislature to confer powers upon the Railroad Commission "to fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings by the state or any county, city and county, incorporated city or town, or municipal water district." It is to be noted that this constitutional provision includes "the state" and the public bodies mentioned ^{the} in 1913 amendment to section 47, but does not mention the other public bodies which the Legislature added to section 47 by its Act of 1915. The net result, therefore, is that the Railroad Commission is required by the Public Utilities Act to value the properties of public utilities for condemnation purposes upon petition of various public bodies, including municipal utility districts, whereas, the constitutional provision purporting to grant authority to the Legislature to enact such a statutes does not include such a district in its list of public bodies for whom such valuation may be

made. This fact is relied upon by Counsel for the owners and claimants herein as a fatal objection to our jurisdiction over this matter, under the familiar maxim, expressio unius est exclusio alterius.

In the case of Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640 (1913) decided prior to the adoption of section 23a of Article XII, the State Supreme Court discussed the question whether power could constitutionally be vested in the Railroad Commission to assess damages to be paid for the taking of public utility property in eminent domain, in view of the constitutional provision (Art. I, sec. 14), declaring that such compensation shall be assessed by a jury and paid into court, and declared that "the requirement of a jury and of prepayment of damages is not a part of the federal constitution nor of that of many of our states," adding:

"It is certainly true that in the vast modern development of public utilities in their multifarious activities, in their complicated inter-relations, where a taking of property is involved, a great saving of time and a more just award may be expected from a learned, skilled and dispassionate tribunal such as the Railroad Commission than can ever be hoped for from the haphazard verdicts of juries. And very good reasons therefor appear, why, for the benefit of the state as well as for the benefit of the public service companies, awards as to the latter should be made by this body and not by a jury."

In the case of Marin Water & Power Co. v. Railroad Commission, 171 Cal. 706, the court had before it a case in which proceedings before the Commission for a valuation of exactly the type here in question had been begun, and substantially all of the evidence had been taken before the adoption of section 23a. Because of a stipulation on the part of the utility ^{in question} expressly waiving any objection because of the enactment of section 47 before this amendment to the Constitution, the court was not forced to face this problem of the validity of section 47 in the absence of such constitutional authority, and throughout its opinion it refrained from deciding the question, merely mentioning the doubt that had arisen and adding that the constitutional amendment "of course removes all doubt." What the court might have declared had this matter been squarely brought before it was not hinted, although the above-

, mentioned discussion in the Pacific Telephone Company decision lends color to the theory that this power could lawfully have been conferred upon the Railroad Commission under the broad provisions of sections 22 and 23 of Article XII and in the absence of the specific validating provisions of section 23a. If this be true, the problem of construing section 23a need not here be resolved, for full power to include municipal utility districts as proper parties petitioner in such cases would then have rested in the Legislature, and section 47 of the Public Utilities Act is entirely valid.

The answer to this inquiry lies, we believe, in ascertaining whether or not the fixing of value for purposes of condemnation is a matter germane to the regulation and control of public utilities. If it is germane to such regulation it would appear that the doubt which gave rise to the demand for section 23a of the Constitution had small basis in fact, whereas, if it is not germane to such regulation, that amendment was necessary and the enumeration of political subdivisions which it contains may constitute a limitation on the authority of the Legislature to confer such powers on the Commission.

Our attention has been called to other provisions of the Public Utilities Act under which the Commission exercises undoubted regulatory powers over the acquisition and disposal of property dedicated to public use. Under section 51, for example, no public utility may voluntarily sell or otherwise dispose of any of its property used or useful in public service except upon the approval of the Commission. Section 41 authorizes the Commission, under certain conditions, to require the use by one utility of the property belonging to another and to fix the just compensation to be paid for such use. Furthermore, under section 43 the Commission is authorized to fix the just compensation to be paid for property

taken or damaged in connection with grade crossing separation. Such provisions, it is argued, show the intention of the Legislature to provide a complete scheme of regulation and to include therein the power in the regulatory body to fix the just compensation to be paid for public utility property sought to be taken in any condemnation proceeding. But, however persuasive this contention may appear, it must be recognized that in all of the instances above noted wherein the statute authorizes the Commission to supervise the disposal of property or fix just compensation therefor, this authority, in each instance, is incidental to the exercise of some other power clearly regulatory in character. That this is true as to the authority granted by section 47 is not clear. Furthermore, if all the provisions of section 47 are germane and cognate to regulation, and therefore within the scope of powers granted to the Legislature under sections 22 and 23, Article XII, what purpose was served by the adoption of section 23a and what effect can be given to its provisions that was not already completely covered by sections 22 and 23? If, as suggested, section 23a was adopted only out of "abundance of caution", is it not equally true that this same abundance of caution prompted the limited enumeration in that section of the political bodies at whose instance valuations could be made by the Railroad Commission for condemnation purposes? Such doubts as these, we feel, are the strongest objections to our jurisdiction to proceed in this matter, and in the face of such doubts, we think we should not proceed with a long and expensive hearing, investigation and valuation until the Supreme Court has had this matter brought to its attention and has directed us to proceed.

The other objections raised by these owners or claimants do not deal directly with the question whether this municipal utility district is a proper party petitioner before this Commission, but rather with the right of such a district to acquire such prop-

erties by a proceeding in eminent domain subsequent to whatever valuation we might make.

Section 47 of the Public Utilities Act provides that upon the filing of any petition for a valuation of any public utility property for the purposes of condemnation, the Commission shall make and serve upon the named owners or claimants of such property its order to show cause why it should not proceed to hear the petition and to fix the just compensation to be paid for such property. This provision was inserted in this section, in our opinion, for the express purpose of affording opportunity to the owners or claimants of the property in question to appear and raise any objection they might have to further proceedings upon the petition, including objections to the capacity of the petitioner to bring action to condemn the properties or to operate them, if acquired, as well as objections dealing with the technical jurisdiction of this Commission to make the valuation.

The objection has been made that this petitioner has no power to condemn and thereafter to operate these properties because the petition shows upon its face that they are situated partly within and partly without petitioner's boundaries, that they constitute one indivisible water system, and are dedicated to the public use of an extensive territory, part of which is without the boundary of petitioner. It is urged that petitioner has no power to operate a water utility to supply water to such outside territory, and that if it obtained possession of these properties the persons there situated would be deprived of a vested right in these properties without compensation and contrary to law. The further objection that such condemnation of these properties would contravene the provisions of sections 1240 and 1241 of the Code of Civil Procedure, is closely allied to that mentioned above.

To these objections petitioner replies that it seeks only to take these properties subject to whatever obligations of

service to which they may now be dedicated. This fact is relied upon as distinguishing this case from that of Mono Power Co. v. Los Angeles, 284 Fed. 784, in which the City of Los Angeles sought to take property entirely away from territory to whose use it had been devoted. With reference to its power to sell water outside its territory, petitioner declares that it is, in effect, a municipal corporation, and therefore has authority to render such service, under the express provisions of section 19, Article XII of the Constitution. Petitioner urges that the prohibitive clauses of sections 1240 and 1241 of the Code of Civil Procedure do not apply to the present case in which it is alleged that only 7% of the territory to the public use of which these properties are devoted lies outside of petitioner's boundaries. In any event, says petitioner, to hold that the prohibitive clauses of sections 1240 and 1241 apply to halt public corporations from acquiring such properties and not to prevent private corporations from so doing would be discriminatory and unconstitutional.

The next objection to be considered deals with the fact that the properties here sought to be taken are situated within more than one county. Section 1243 of the Code of Civil Procedure provides that when the condemning party is a county, city and county, incorporated city or town, or municipal water district, and the properties which it seeks to take are so situated, it may, at its option, bring the condemnation proceeding in any county in which any of the property sought to be taken is situated, and petitioner contends that because, by section 12, subdivision 6 of the act under which it is organized (Stats. 1921, p. 245), it is given power to act with respect to eminent domain as a municipal corporation, it is one of the public bodies specifically allowed by section 1243 to condemn such properties in a single action. Moreover, says petitioner, these properties are a single unit, and may, therefore, only logically be taken in one action.

The last objection specifically raised by these owners and claimants is that the petition does not show that the use to which petitioner proposes to devote these properties is a more necessary public use than that to which they have already been appropriated, nor that the East Bay Water Company's present service is inadequate, nor that it would be to the public interest for petitioner to acquire and operate these properties. The answer to these objections, says petitioner, is that it is taking these properties for the purpose of continuing their devotion to a public use similar to that to which they are now devoted, and that therefore no proof of more necessary public use need be made. In addition, it is contended that since by statute petitioner is given authority to acquire and operate such properties, it is to be assumed that such acquisition and operation is in the public interest, and no proof need be made that the East Bay Water Company is rendering inadequate service.

As to the last objection, it is our opinion that no valid doubt exists as to petitioner's right to acquire and operate these properties, but the other objections discussed above appear to us to raise important questions in relation to petitioner's authority to proceed with this condemnation. In the ordinary case we would assume that the statutory provisions under which this Commission acts are valid, and that if any one of them is to be declared invalid, this must be done by the Courts, and not by this Commission (In re Marin Municipal Water District, 6 C.R.C. 507, 511). But where, as here, substantial objections as to our jurisdiction have been raised, and extraordinary expense and a great deal of time and effort would be entailed by going ahead under the statute, we are forced to the conclusion that public interest demands that we refuse to act until the matter has been adjudicated and our authority to proceed has been determined by the Supreme Court. This result may be obtained by a dismissal of the present petition, followed by application to the Supreme Court by petitioner, or

O R D E R

Dated at San Francisco, California, this 24th day
of ~~June~~ ^{May}, 1924.

C. S. James

H. T. B. ...

Irving Martin

J. T. Whitney
Commissioners.