

ORIGINAL

Decision No. 21099

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

BAY POINT LIGHT & POWER COMPANY,
a corporation,

Complainant,

vs.

GREAT WESTERN POWER COMPANY OF
CALIFORNIA, a corporation,

Defendant.

Case No. 2650.

Sanborn & Roehl & De Lancy C. Smith, by
E. H. Sanborn, for the complainant,

Chaffee E. Hall, for the defendant.

BY THE COMMISSION:

O P I N I O N

Complainant asks the Commission to make its order requiring defendant to cease and desist from the construction of an electrical line to the plant of the Coos Bay Lumber Company near Bay Point, and to prescribe the respective area in which each utility may serve consumers with electricity. Public hearings in this matter were held in San Francisco before Examiner Rowell on February 26, and March 2, 1929.

The C. A. Smith Lumber Company, the predecessor of the Coos Bay Lumber Company, in the year 1907 purchased what was known as the Cunningham Ranch in Contra Costa County, built a lumber plant on the bay shore, laid out the townsite of Bay Point imme-

diately south therefrom and supplied the residents within the town with both water and electricity. In March, 1911, it organized a subsidiary corporation called Bay Point Light and Water Company for the purpose of conducting the utility functions which it had undertaken. In March, 1917, the stock of this utility corporation was purchased by W. S. Van Winkle, who then caused the name of the corporation to be changed to Bay Point Light and Power Company, the complainant herein.

Although the record is not entirely clear, it appears that the electricity generated by the C. A. Smith Lumber Company in its steam plant was utilized for its own needs and for supplying the subsidiary utility for distribution in the Town of Bay Point. In the latter part of 1912 it entered into a contract for the purchase of power from defendant, and thereafter, under a series of contracts, continued to receive service from defendant until the year 1916, when the lumber company by letter requested defendant to render bills to the subsidiary utility corporation. Apparently defendant complied to such request, and has since supplied energy directly to the local utility. It appears, therefore, that the plant of the Lumber Company was served by defendant from about December, 1912, to September, 1916, and subsequently has been served by the complainant. Again in January, 1929, the Lumber Company entered into a contract with defendant for power service, giving rise to the present complaint.

The construction of defendant's transmission lines in this general portion of Contra Costa County was begun in the year 1910. By September of that year it had completed a line from Avon to Peyton, a point approximately five miles west of Bay Point, and by November of the same year it had completed a line from Bay Point to Nichols, a point about two miles east of Bay Point.

Immediately after the completion of these lines it began service to the plant of the General Chemical Company at Peyton, and another plant of the same company at Nichols. It appears also that defendant commenced service to the Pacific Electric Metals Company in December, 1917, and to Pacific Coast Ship Building Company in 1918, the plant of both companies being on the bay shore, adjacent to that of Coos Bay Lumber Company.

Defendant does not possess a certificate from the Commission to serve the territory in dispute. It claims the right to serve without a certificate by virtue of a franchise granted by the County of Contra Costa, in 1907 (known as the Downer Franchise) under which it constructed its electrical facilities in the territory and rendered service therein prior to March 23, 1912, the effective date of the Public Utilities Act. The contention of complainant is that such franchise had, prior to that date, become forfeited, and that defendant has since served in this territory without legal right.

It is claimed that defendant's franchise was forfeited because of violation of the condition therein that the construction of all facilities contemplated under the franchise should be completed within a period of three years. There is no evidence that the construction work in the territory we are here considering was not undertaken by defendant in good faith under authority of the franchise, nor any evidence that the franchise has ever been declared forfeited by the County. This Commission has no authority to make such declaration. It, obviously, is for the courts alone to say whether a provision in a franchise providing for a forfeiture because of a condition subsequent is self-executing, or may be waived, or in what manner the foreclosure may be declared. (Application of Southern Sierras Power Company, Decision

No. 582, 2 C.R.C. 647). We must assume, therefore, that to the extent its electrical system was completed on March 23, 1912, under color of legal right, and to the extent it was actually serving the territory in question, there is secured to defendant the right to continue such service without procuring a certificate from this Commission.

After carefully considering the evidence submitted in this proceeding, we have arrived at the conclusion that the defendant, at the time the Public Utilities Act became effective, was actually serving the territory near Bay Point in which the plant of the Coos Bay Lumber Company is located. As stated above, the defendant was then serving industrial plants along the bay shore a few miles to the east and to the west of Bay Point. Considering these two services, the natural conditions of the territory, its state of development and the facilities which defendant had constructed along such bay shore industrial area, we cannot hold that defendant was not then serving the area contiguous to Bay Point. At Bay Point the only existing industry was the C. A. Smith Lumber Company, which itself became a consumer a few months after the Act became effective, and subsequently as new development took place defendant acquired other consumers, its right to do so having never before been questioned by complainant or its predecessor. Defendant has never held itself out to render service within the town itself, which at all times has been served exclusively by the complainant. But complainant cannot claim an exclusive right to occupy the territory along the bay shore contiguous to Bay Point, except upon the theory that defendant has forfeited all right to operate therein, a theory which, as we have said, we cannot accept.

Complainant asks that the Commission make its order

prescribing the respective areas in which complainant and defendant may serve consumers with electricity. We find, however, that another public utility, Pacific Gas and Electric Company, is also operating in the general vicinity of Bay Point. We do not believe, therefore, that we should, with the limited evidence before us, attempt to determine the respective service area of each. We find merely that the defendant is entitled to serve the plant of the Coos Bay Lumber Company near Bay Point. Accordingly, the restraining order must be denied.

O R D E R

Complaint as above entitled having been filed, public hearings thereon having been held, the matter duly submitted, and now being ready for decision, and basing its order on the conclusions and findings in the Opinion above,

IT IS HEREBY ORDERED by the Railroad Commission of the State of California that the complaint herein be and the same is hereby dismissed.

The effective date of this order shall be twenty (20) days from and after the date hereof.

Dated at San Francisco, California, this 15th day of May, 1929.

Thomas D. Lattin

Edmund

Frederick

Leon Whittell

W. H. H. H.

Commissioners.