Decision No. 22613

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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TOWN OF FAIRFIELD (a municipal corporation), Complainant vs. GREAT WESTERN POWER COMPANY OF CALIFORNIA (a public utility corporation), Defendant.	Case No. 2678
CITY OF MOUNTAIN VIEW (a municipal corporation), Complainant, vs. PACIFIC GAS & ELECTRIC COMPANY (a public utility corporation), Defendant.	Case No. 2692
CITY OF STOCKTON (a municipal corporation), Complainant, vs. PACIFIC GAS & ELECTRIC COMPANY (a public utility corporation), Defendant.	Case No. 2698

Louis Bartlett, for Complainants
J. Leroy Johnson, City Attorney, and C. A. Grant, Assistant City Attorney, of Stockton;
Norman E. Malcolm, City Attorney of Palo Alto, and Mountain View;
W. B. Matthews, Attorney for the Bureau of Light and Power of Los Angeles;
C. W. White, City Attorney of Hayward;
Walter E. Bruns, City Attorney of Reedley;
F. B. Andrews, City Attorney of Chula Vista;
Albert Launer, City Attorney of Fullerton;
Walter J. Hartzell, City Attorney of Redlands;
R. A. Rapsey, City Attorney of San Bruno;
Chester L. Coffin, City Attorney of Santa Monica;
John F. Davis, City Attorney of Burlingame;
P. N. McCloskey, City Attorney of Colton,
Russell Scott, City Attorney of Salinas, and
Gardiner Johnson, of Counsel for Complainants.

J. J. Deuel and L. S. Wing, for California Farm Bureau Federation.

Brobeck, Phleger & Harrison, by Herman Phleger and James S. Moore, Jr., for Pacific Gas and Electric Company.

Chaffee Hall, for Great Western Power Company of California.

LOUTTIT, Commissioner:

O P I N I O N

Case 2678 is a complaint by the Town of Fairfield against the Great Western Power Company of California reciting that the Board of Trustees of Fairfield has adopted resolutions (a) proposing the construction by the town of an electrical distribution system; (b) ordering construction of the first unit thereof, and directing the advertising for bids, and (c) directing the filing of an application before this Commission. Complainant asks that

an order be made directing defendant (hereafter referred to as Great Western Company) to supply electricity to the town for municipal use, and for purposes of resale to inhabitants over a municipally owned distributing system in competition with Great Western Company, and also that the Commission fix rates to be paid by the town for such energy. Great Western Company denies that its system has been dedicated to the delivery of energy to municipalities for resale, or any purposes other than for municipal purposes.

Case 2692 is a complaint by the City of Mountain View against Pacific Gas and Electric Company (hereafter referred to as Pacific Company). It recites that the City Council of complainant city has passed resolutions (a) proposing the construction of an electrical distributing system within the city, and (b) directing the filing of this proceeding before the Commission; alleges that Pacific Company has dedicated its properties for the sale of energy to competitors; asks that Pacific Company be directed to supply energy to the city on request for resale over a municipally owned distributing system in competition with Pacific Company, and requests the Commission to fix rates to be paid by the city for such energy. Pacific Company denies that it has dedicated any of its properties for the distribution or resale of energy over distributing systems of competitors.

Case 2698 is a complaint by the City of Stockton against Pacific Company, and contains substantially the same allegations as set forth in Case 2692, and similar denials by Pacific Company.

Associated with counsel for complainants are the city attorneys of some twelve municipalities. Hearings were held on June 26 and 27, September 27, November 15 and November 20, 1929, oral argument had on December 4, 1929, and the matter submitted on briefs.

Complainants have proceeded upon the theory that defendant utilities have dedicated all of their generating and transmission facilities to a competitive use, and are under the duty of furnishing electrical energy to competing systems for resale when and as requested.

For the purpose of showing such dedication complainants have directed attention to several transactions between Pacific Company and Great Western Company, whereby the latter sold certain energy to Pacific Company between 1908 and 1925. Various contracts between these parties were introduced in evidence (Exhibits No. 11, 12, 13, 14, 15, 16, 17, and 34). Generally, these agreements specified maximum and minimum quantities of energy to be delivered thereunder for a specified period, the deliveries being at comparatively high voltage, a part being delivered at Pacific Company substations, and part at an intersection of the transmission

lines of the respective companies at a point east of Oakland. The charges specified were comparatively low and in later contracts were increased without application by the Great Western Company for authority to increase its rates. The contracts in effect from 1908 to 1918 provided a daily minimum charge, instead of monthly or yearly, as is the case in contracts with ordinary consumers of an electric utility. The agreement of December 2, 1913, (Exhibit No. 16) expiring January 15, 1915, was extended until terminated on six month's written notice. Subsequently such service was terminated by Great Western Company, and after negotiations a new contract was entered into.

In October 1908, the date of the first contract, Great Western Company, then in the development stage, was delivering no current and serving no consumers. In later years Great Western Company extended its lines into the territory of Pacific Company and into unoccupied territory for the service of retail consumers. For a long period the rates of the two utilities have been identical, and "competition" between them has been in an effort to secure new consumers not served by either. It is true that the companies are both rendering service largely in the same area, and also that certain consumers have from time to time transferred from one to the other.

Careful consideration of the contracts, the history and development of the two companies as shown by the

record, together with the circumstances and conditions surrounding the sale of power by Great Western Company to Pacific Company, discloses that the service to the latter was rendered not as a "matter of right", but as an accommodation to the purchaser, and the disposal of excess or surplus energy by the seller. It cannot be found that these transactions constitute a dedication by Great Western Company of its facilities for the use of competing distribution systems.

During the water shortage of 1924-1925 power was developed at a plant belonging to the City of Alameda and supplied into the system of Great Western Company. An equivalent amount of power, less line losses, was delivered by Great Western Company to Pacific Company. In 1924 deliveries were made at Oakland, and in 1925 at the Pacific Company's North Beach steam plant in San Francisco. An amount equivalent to that received by it, less losses in transmission, was in turn furnished by Pacific Company to San Joaquin Light and Power Corporation at or near Newman, California. In 1924 San Joaquin Light and Power Corporation in turn furnished certain energy to Southern California Edison Company.

Exhibit 1 is a contract between the City of Alameda and Great Western Company, dated August 9, 1924. It recites the existence of a shortage of electric power in

Southern California. Under its terms the City of Alameda agreed to place its generating plant in operation and to generate and deliver energy as required, to the full capacity of the plant, to Great Western Company. The latter agreed to pay the city $65 per day for each day during which any energy was delivered, also to reimburse the city for all operating costs, costs of placing the plant in operation, and costs necessary for laying up the plant at the termination of service. The term of the contract was to February 1, 1925, Great Western Company having the option, however, of terminating the contract on five days' notice.

Exhibit 14 is a letter from Pacific Company to Great Western Company, dated May 23, 1925, proposing a temporary exchange of energy, which was accepted by the latter company. It provided that the Pacific Company would make delivery at Newman, and Great Western Company in exchange was to deliver an equivalent amount of energy in San Francisco, subject to certain conditions, the agreement to terminate upon 24-hours' notice by either party. Power was exchanged until October 31, 1925, and the agreement was terminated. 1924-1925 were years of power shortage necessitating the appointment of a power supervisor (24 C.R.C. 104).

Exhibit 32 is a contract, dated July 23, 1913, under which Pacific Company agreed to deliver to Great Western Company energy not exceeding 350 kilowatts required by the latter for supplying the demands of the Yukon Gold

Company for the operation of a gold dredge, etc., on the American River. This was in territory then unoccupied by either utility, and the contract required that Pacific Company construct a line thereto. Service was actually rendered by the latter company, although the consumer was billed by Great Western Company. While the contract was for a period of two years, with an option to extend, it was cancelled in July 1914, and Great Western Company assigned its contract with the Yukon Gold Company to Pacific Company. The latter continued service some six or eight months until the dredge ceased operations.

Some eight instances of emergency sales of power by Pacific Company to Great Western Power Company between 1917 and 1925 are listed in Exhibit 37. It appears that these sales were the result of emergency requests under terms agreed upon at the time, and not under any rate schedule of Pacific Company.

Since 1922 Pacific Company has been supplying energy to the municipal system of Palo Alto under its Schedule P-6. The city began distribution of power some 28 or 30 years ago, and since purchasing power from the Pacific Company there has been no competition, the utility turning consumers over to the city as soon as the latter was in a position to take them. Pacific Company now has 17 consumers in Palo Alto who are receiving three phase service for power purposes, and the city is not in a physical position to serve these consumers.

The City of Lodi acquired a distribution system in 1910 and first purchased power from American River Electric Company. In 1912 it contracted to purchase power from Western States Gas and Electric Company, renewing its contracts with the latter from time to time. Neither of the above companies were operating in competition with the municipal system. In June 1922, the city annexed certain territory which then contained some fifteen consumers of Western States Company. Following this annexation the municipal system was serving approximately two thousand consumers. Negotiations for purchase of the lines of the utility failed because of disagreement as to the sale price. In December 1922, another annexation brought within the city an area in which Western States Company was serving a few consumers. The city proceeded to extend its distribution facilities and in the territory last mentioned the city now has 170 services and Pacific Company 9. Pacific Company acquired the Western States System in 1928. At the present time Pacific Company has 13 consumers within the city, all located within the annexed areas, 11 having three phase power installations, the city not having such lines near their premises, and 2 being lighting consumers. Additional business has not been solicited by Pacific Company, and neither it nor its predecessors has taken on any additional consumers since 1922.

A careful review of all the facts and circumstances of the above instances of power sales cited by complainants fails to establish the claim that either of the defendant utilities has dedicated its facilities to the use of systems operating in competition with it.

Complainants lay much stress on Schedule P-6 of Pacific Company as being in itself a dedication to competitors. That schedule (Exhibit 4) filed in compliance with Decision 13316 (24 C.R.C. 638), and made effective April 15, 1924, reads in part as follows:

"Resale Power Service:

Applicable to electric service to other electric utilities and to municipalities for distribution and resale. Service to be supplied at standard voltages of 2200 volts or over.

Territory:

Entire territory served."

I do not believe that the mere filing of this schedule, pursuant to the above decision, particularly when coupled with the refusal of defendant utilities to serve competitors thereunder, as shown by the evidence, constitutes such a dedication as complainants here urge.

None of the complainant cities are now prepared to receive power for resale purposes, nor have they any existing facilities for the distribution of energy. Great Western Company is now serving Fairfield, while Stockton and Mountain View are being served by Pacific Company. Complainants are thus not in a position to receive service even

if it be determined that the utilities are under obliga- to serve them. However, because of the importance to the municipalities of the issues presented, the evidence which is claimed to show an unequivocal intention to dedicate facilities for the use of competing systems, has been here analysed. I am of the opinion that none of complainants have sustained their claim to the service of energy for the purpose of resale in competition with the respective defendants.

While the evidence offered in support of each complaint is substantially the same, there is one respect in which the complaint of the City of Stockton, Case 2698, differs from the others. This city has expressed the desire that its purchases of electricity for pumping, lighting of streets and public buildings, and other purposes be combined at one point of service and under one bill. χ To effect such an arrangement, electric lines would have to be built connecting the various points of use, and it was from these lines that it was proposed to sell electricity to the inhabitants of the city, apparently more or less incidentally in the beginning. Both complainants and defendants have devoted their cases almost exclusively to the question of service to competitors and there is not sufficient evidence in the record to permit of a decision on any other point. This portion of the complaint in Case 2698 must, therefore, be dismissed for lack of evidence,

such dismissal being without prejudice.

O R D E R

Hearings having been held and the above-entitled complaints now being under submission,

IT IS HEREBY ORDERED that said complaints be and they are hereby dismissed.

The foregoing Opinion and Order are hereby approved and ordered filed as the Opinion and Order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 30th day of June, 1930.

Commissioners

I cannot concur in the majority order. The cases here under consideration are not only unusual but of considerable importance because they involve:

First, the right of the City, as a competitor, to purchase under a properly filed schedule of rates applicable, without limitation, generally to all other electric utilities and municipalities purchasing for resale, and

Second, the right of the City, as a competitor, to demand service at a rate to be fixed by this Commission under a franchise agreement to serve.

While this statement of questions involved is somewhat broader than the positions taken by the parties at interest, yet the record in the case amply covers the larger issue.

It is my opinion that the special contracts for and the actual sale and exchange of power between the large utilities under such contracts, as disclosed by this record, do not constitute a dedication of the facilities of any one utility to the service of another. The utmost they could be held to show would be a dedication of surplus power.

The utilities, however, went much further in the matter of dedication when they filed schedules for resale power service. The present Schedule P-6, in addition to the actual rates and other matters, provides as follows:

"Resale Power Service:

Applicable to electric service to other electric utilities and to municipalities for distribution and resale. Service to be supplied at standard voltages of 2200 volts or over.

Territory:

Entire territory served."

This commitment is complete. It is a declaration of dedication of service to all electric utilities and to municipal-

ities that distribute any where in the territory of the offering Company. This would seem to be inclusive of competitors. The Companies contend it was not so intended. Their avowed purposes for incorporation, their complete act of filing rates and the practices of at least one company, the Pacific Company, as disclosed in this record, however, show clearly a dedication for the purpose of the complaints.

The City of Palo Alto for many years maintained a generating plant and sold in vigorous competition with the utility. The utility lost much of its business. It came to a point where the Company retains certain service which it can give to better advantage than the City and the City retains the service which it can give to better advantage than the utility. They are each holding certain service against the other. They are still competitors in fact, though they are not so actively competitive as they once were. The City found it convenient and profitable to buy service from the utility and the utility found it convenient and profitable to sell to the City and for several years, without protest, the sale and purchase between these competitors has been going on under Schedule P-6.

The City of Lodi in 1910 acquired the distributing system and purchased power under contract first from the American River Electric Company for two years, and then from the Western States Gas and Electric Company until that Company was purchased by the Pacific Gas and Electric Company in 1928. In 1922 the City annexed new territory in which the Western States Company was serving. Failing to agree on a purchase price for the distributing system of the utility the City built its own system and proceeded to serve in competition with the utility and resold energy purchased from the competing utility. The

utility did not refuse to sell because the City competed. The condition in the annexed territory of Lodi as to competition, service, purchase and sale of energy is at the present time quite similar to that in Palo Alto.

The record also discloses a state of competition between the cities and utilities in the matter of street lighting. This was specifically referred to in the cities of Stockton, Berkeley, Oakland and Emeryville, and the Company witness testified it happened generally over the system of the Pacific Company, that the City would substitute its own lighting system for that of the Company, causing the abandonment of all or part of the Company's system, the loss being sustained by the Company. In those instances, however, there was no evidence of refusal on the part of the utility to sell power to the City under regularly filed schedules, and in fact such sale was made and is being made at the present time.

It would seem that the interpretation which has and should be placed upon the filing of Schedule P-6 is that it offers service to a competitor, and if the utilities before us find such a dedication improvident or a burden upon other service their legal recourse is not a refusal of service but an application to abandon.

In addition to the first proposition above discussed is the second question as to the right of the City to demand service under the dedication to the City through franchises granted to the utility, irrespective of whether or not general schedules have been filed.

The municipality has the legal right, whether or not it has granted franchises to private utilities, to supply its municipal needs and also to supply and sell to its inhabitants light, heat and power.

The utility is organized primarily for the purpose, among others, of selling light, heat and power to municipalities. When it procures a franchise from a city and thereby dedicates its property to serve, it does so with the full knowledge that the city has the power and the right to condemn or to build a parallel system and compete. The procuring of a franchise in a city, without reservation, appears to be a clear dedication of service to the city as a competitor. The city may or may not elect to compete, but that is the chance which the utility takes. It is one of the hazards of the business. In the cases before us the utilities have so dedicated.

In the cases cited by defendent companies, where courts have held a non-dedication to competitive service, there appears no direct and conclusive evidence of dedications such as obtain in the matters before us.

It therefore appears that the Companies should be directed to serve complainants.

C L Seavey
Commissioner.

I dissent.

It is not claimed nor held that any particular part of the utilities' property has not been dedicated to the public service but rather that as to all of the property there exists a qualification or exception to the offer to serve. The carving out of such an exception or qualification destroys the universality of the dedication. This claimed qualification is not expressed in Articles of Incorporation(1), franchises(2), certificates of public convenience and necessity (3), or published rate schedules(4), although if there were such a qualification one would think it would find lodgment in one or all of these.

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(1) Articles of Incorporation of Pacific Gas and Electric Company on file with this Commission, although frequently amended, consistently carry among the declared purposes of the corporation:

> "*****to****conduct the business of *****selling**** and otherwise disposing of electricity to be used for light, heat, power and all lawful purposes, and in particular *****for supplying counties, cities, cities and counties, villages, towns and other localities and places in the State of California, and the inhabitants thereof, with electric light, heat and power."

The same is true of the Articles of Great Western Power Company, among the declared purposes contained therein being

> "to supply electricity to light or heat incorporated cities, counties, villages or towns; ****to furnish and supply electricity and electric current****to**** individuals, firms, corporations and incorporated cities, towns, villages and counties******."

(2) Each, it would appear from the record and from annual reports on file with the Commission, operates, to some extent at least, under the constitutional franchise granted by Sec. 19 of Art. XI of the Constitution, which before its amendment on October 10, 1911, read as follows:

> "Sec. 19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public

It is sought to limit the apparent comprehensiveness of these by the claimed practice of the utilities not to sell electricity to a "competitor." Assuming the existence of the practice, I cannot bring myself to think that a qualification to such unequivocal offer as is found, in particular, in the rate schedule may be thus effected. If it can be so accomplished, other reservations and exceptions, not now known, are likely to develop and these two utilities, the first step in the merger and consolidation of which has already been sanctioned, will be enjoying a monopoly in a large section of the State, with their obligation to sell uncertain and not commensurate with the franchises and special privileges extended them by the State.

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(2) Cont'd:

> streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

This grant was made in 1879 and continued until the time of the 1911 amendment of this Section.

(3) An examination of certificates of public convenience and necessity granted to these utilities by the Commission do not suggest the existence of any such reservation or qualification to the extent of dedication as here claimed.

(4) Schedule P-6, identical for each utility, is referred to in the majority opinion. The language of the schedule is applicable to the service here requested and involved. In connection with this it is interesting to note the "preliminary statement" contained on "Revised Sheet C.R.C. No. 421-E" of the Pacific Gas and Electric Company, preceding the various schedules and rules and regulations of the Company. This runs as follows:

> "1. - Territory Served by the Company:
> The Pacific Gas and Electric Company supplies electric service in all or portions of the following thirty-four counties in the northern and central part of the State of California, the locality in which each schedule is applicable being more specifically described on the schedules." (Here follows a list of 34 counties of the State).

As to one of the utilities, the claim as to their practice is not supported by the evidence. In two places at least power was sold to municipalities which were competitors of the vendor. While the competition may not have been extensive or bitter, both the utility and the cities were serving identical territory.

I am unable to accede to the view that to require the service here sought involves a taking of the property of the utilities, justifiable only as an exercise of the right of eminent domain. These utilities are engaged in selling a commodity, the price of which is subject to regulation and control of public authority. No physical occupation of their property is involved, as was the case in Evansville and H Traction Co. v. Henderson Bridge Co., 134 Fed. 973, and in the various adjudications involving physical connections between telephone and telegraph companies. Rather, the price, terms and conditions of sale are matters of regulation falling within the powers of this Commission, in the proper exercise of which powers abuses, if they arise, may be considered and appropriate orders and determinations made (see Sec. 35 of the Public Utilities Act.)

What conditions would justify the Commission's approving a rule, regulation or practice denying service to a "competitor," it is unnecessary here to decide. It is enough to say that where a municipal corporation, exercising a right consistently extended to it for many years by constitution and statute desires service from a utility occupying its streets under the franchise formerly extended by Sec. 19 of Art. XI of the Constitution or by local franchise of similar import, and the utility has a

general schedule such as the P-6 Schedule here, there is no ground for such a course.

W. H. Cam
Commissioner.