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Decision No. 24226.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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ORIGINAL

In the Matter of the COUSINS LAUNCH & LIGHTER COMPANY to sell and the COGGESHALL LAUNCH COMPANY (a corporation) to buy or purchase three certain vessels now used for the transportation of persons and property for compensation between points on the inland waters of Humboldt Bay, State of California.	Application No. 17599.
In the Matter of the Application of the COGGESHALL LAUNCH COMPANY for certificate of public convenience and necessity to operate all vessels owned by itself; for the transportation of "LONGSHOREMEN" for compensation between points upon the inland waters of the State of California.	Application No. 17600.

W. Coggeshall for Coggeshall Launch Company.

BY THE COMMISSION:

O P I N I O N

By Application No. 17599 the Commission is requested to authorize the Cousins Launch and Lighter Company (hereinafter referred to as the Cousins Company) to sell and transfer for the sum of five thousand three hundred ($5,300.00) dollars, to the Coggeshall Launch Company, three vessels, to-wit: the Willard C, Nellie C and Sallie C, now operated in the transportation of persons and property between points on Humboldt Bay. By Application No. 17600 we are requested to grant to Coggeshall Launch Company a certificate of public convenience and necessity to operate vessels for the transportation of

longshoremen for compensation between points upon the inland waters of Humboldt Bay.

A public hearing was held before Examiner Kennedy at San Francisco October 26, 1931, and the applications having been duly heard and submitted are now ready for an opinion and order. The proceedings were heard upon a common record and will be disposed of in one decision.

By Decision No. 20873 of March 18, 1929, the Cousins Company was authorized to file tariffs providing for "the transportation of persons and property between all points on Humboldt Bay except that between Eureka, California and Rolph (Fairhaven), California, service shall be rendered only for the transportation of stevedores for the purpose of loading and unloading vessels, ship's crews, ship's officers, U. S. Custom officers and persons directly connected with the ship and for the transportation of lumber, shakes, shingles or wood."

The Cousins Company owns and operates five vessels in this service, the Willard C, Nellie C, Sallie C, Henry C and Tryphena. Three of these vessels, the Willard C, Nellie C and Sallie C, are in such condition that repairs to them must be made immediately, but this the Cousins Company is financially unable to do. Therefore, applicant proposes to relinquish a portion of its business to the Coggeshall Launch Company but to retain its operating right between the points heretofore authorized to be served and to confine such service to the operation of the two vessels remaining in its possession. The balance of the service will be rendered by the Coggeshall Launch Company if the necessary certificate of public convenience and necessity is granted by the Commission.

The Coggeshall Launch Company and its predecessor, the Coggeshall Launch and Towboat Company, have been transporting passengers and freight between points on Humboldt Bay under tariffs on file with this Commission since 1918. Its present operating rights, however, do not include the transportation of longshoremen between Eureka and ships docked at Samoa, Fairhaven (also known as Rolph), Arcata Wharves, Fields Landing, South Jetty Landing or lying at anchor off Samoa, in Arcata Channel, in South Bay or off Fairhaven. It is for operation between these points that applicant seeks a certificate of public convenience and necessity and for authority to purchase the three vessels from the Cousins Company to be used in this service and the service now being rendered by it.

By letter dated August 29, 1931, Mr. W. W. Cousins, Manager of the Cousins Company, informed the Commission that that company had no objection to the carrying of stevedores by the Coggeshall Launch Company. There were no appearances in opposition to the granting of the applications.

Upon consideration of all the facts of record we are of the opinion that both these applications should be granted. An order will be entered accordingly.

O R D E R

These proceedings having been duly heard and submitted, full investigation of the matters and things involved having been had, and basing this order on the findings of fact and the conclusions contained in the preceding opinion,

IT IS HEREBY ORDERED that in Application No. 17599 the

Cousins Launch and Lighter Company be and it is hereby authorized to sell, and the Coggeshall Launch Company to buy, the vessels Willard C, Nellie C and Sallie C, subject to the following condition:

> The rights and privileges herein authorized may not be sold, leased, transferred or assigned, nor service thereunder discontinued unless the written consent of the Railroad Commission to the sale, lease, transfer or discontinuance has first been secured.

IT IS HEREBY FURTHER ORDERED that a certificate of public convenience and necessity be and it is hereby granted to Coggeshall Launch Company for the transportation of longshoremen for compensation between Eureka and ships docked at Samoa, Fairhaven (also known as Rolph), Arcata Wharves, Field's Landing, South Jetty Landing, or lying at anchor off Samoa, in Arcata Channel, in South Bay or off Fairhaven, subject to the following conditions:

1. Applicant Coggeshall Launch Company shall immediately supplement or reissue its tariff on file so as to provide in addition to the fares and rules now contained therein fares and rules of the volume and effect of those contained in Exhibit B attached to Application No. 17600.

2. Applicant Coggeshall Launch Company shall file its written acceptance of the certificate herein granted within a period of not to exceed ten (10) days from the date hereof.

3. The rights and privileges herein authorized may not be sold, leased, transferred or assigned, nor service thereunder discontinued unless the written consent of the Railroad Commission to such sale, lease, transfer, assignment or discontinuance has first been secured.

IT IS HEREBY FURTHER ORDERED that the effective date of this order shall be ten (10) days from the date hereof.

Dated at San Francisco, California, this 14th day of November, 1931.

O. C. Leaver
Leon O. Whitsell
M. B. Harris
Fred G. Stevenot
Commissioners.

Louis Bartlett and L. J. Maddux for Modesto Irrigation District.
Norman E. Malcolm and Louis Bartlett, for the City of Palo Alto.
Louis Bartlett, for the Town of Fairfield.
Frank F. Atkinson, for Carmichael Irrigation District.
Hankins & Hankins, by Homer J. Hankins, for Glenn-Colusa Irrigation District.
J. L. Johnson, for the City of Stockton.
John J. O'Toole and Dion R. Holm, for the City and County of San Francisco.
Preston Higgins and W. W. Cooper for the City of Oakland
J. J. Deuel and L. S. Wing for the California Farm Federation Bureau.
L. B. Hayhurst, for Fresno Irrigation District.
Chaffee E. Hall for Great Western Power Company of California and San Joaquin Light & Power Corporation.
C. P. Cuttem, for the Sierra & San Francisco Power Company, Pacific Gas & Electric Company, Lessee, and Pacific Gas and Electric Company.
Louis Bartlett, for City of Orland, Jacinto Irrigation District.
Raymond A. Leonard and Louis Bartlett, for the City of Oroville.
Richard Callaham and Louis Bartlett, for the City of Livermore.
Alexander Murdock and Louis Bartlett, for East Contra Costa Irrigation District.
A. B. Tinning and Louis Bartlett, for City of Antioch.
N. E. Wietman and Louis Bartlett, for City of Sunnyvale.
George Hench and Louis Bartlett, for the City of Tracy.
J. W. Colbert and Louis Bartlett, for City of South San Francisco.
Frank F. Atkinson and Louis Bartlett for Carmichael Irrigation District.
Louis Bartlett, for the City of Merced.
L. L. Dennett, for Byron-Bethany Irrigation District.
A. L. Cowell and Louis Bartlett, for Dos Palos Drainage District.

CARR, Commissioner:

O P I N I O N

The above entitled cases, all arising out of the bitter competitive struggle between the publicly owned electric plant of Modesto Irrigation District and the privately owned plant operated in the Modesto territory by Pacific Gas and Electric Company, as lessee, were by stipulation consolidated and heard together, although the remedies sought were varied and the

positions assumed by the same and by different complainants were not always entirely consistent.(1) The hearings were concluded months ago, but attorneys for the parties have proceeded in a leisurely fashion to file their briefs, the last arriving on August 12th.

The facts essential to a decision may be stated briefly:

The Pacific Gas and Electric Company, by its lessor and predecessors, has been operating for many years in the Modesto District. These operations have been and are under local franchises and under the provisions of Section 19 Article XI of the California Constitution as it existed prior to the amendment of 1911. They commenced prior to the enactment of the Public Utilities Act and hence, under the terms of Sec. 50(a) thereof, a certificate of public convenience was not required. Some years ago Modesto Irrigation District established an electric system, since which time competition between the two plants has been severe and has been the source of many charges and accusations of unfair methods.

Until recently the struggle was carried on with the rates of the District ranging from 10 to 20% below those of the utility. Because of that and other reasons the business of the

(1) The relief most insisted upon by the Modesto District is an order requiring the Pacific Gas and Electric Company to withdraw from the Modesto territory (Case 2954). Such an order, the argument in its brief runs, would not be a taking of property without compensation since "every year that the company continues to operate it will make a loss" in the Modesto section, and "instead of taking away the property of the defendant, an order to cease and desist will put money in its pocket". On the other hand the City of Oakland and the other complainants urge that the company's Modesto rates, which are the same as those of the District, but lower than its rates elsewhere, should be taken as reasonable rates for them and their rates be lowered to the Modesto level. The Modesto district (Case 2953) also asks this relief if the withdrawal relief sought is not granted.

District grew and that of the utility decreased. In the rural districts lines of the utility in some instances became denuded of consumers and certain of them were taken out. On January 15, 1930, the Commission ordered general reductions in the system rates of the company, (Oakland v. Pacific Gas & Electric Co., 34 C.R.C. 212) which had the effect of narrowing the then existing differential between the district and company rates in the Modesto territory. The Modesto District thereupon further reduced its rates so as to maintain the differential theretofore existing.

At about this time Pacific Fruit Express, a large power user on the lines of the utility, showed a disposition to go over to the District with its lower rates. The Company then entered into a contract to supply it with power at the identical rates the district was charging. This contract the Commission refused to approve and the Company thereafter filed its schedule P-21 embracing the Modesto territory and containing power rates identical with the reduced power rates of the Irrigation District.(2) By this means the Company was enabled to hold the Pacific Fruit Express business. Thereafter it filed its schedules L-21, C-22, D-21 and L-22, meeting the District's rates in competitive territory.

How much of its existing business the Company was enabled to hold by these means is not clear. Its business has continued to decline, but the Company stoutly maintained (and

(2) It seems the company in billing the Express Company treated this schedule as retro-active to the date of the contract. Technically it could not lawfully do this and it should collect the amount by which this Company was undercharged.

adduced considerable evidence in support of its position) that it was still operating in the Modesto section at a slight profit. The record does not justify the conclusion that the operation is at an out of pocket loss. So hard pressed, however, is the Company in holding on as against the District that the situation provoked counsel for complainants in their brief to the facetious remark, addressed to the withdrawal relief sought, that the Irrigation District "is merely inviting the Commission to deliver the funeral oration over the corpse." Certainly, by no stretch of the imagination may it be deduced from the record that the utility was crushing its publicly owned competitor or that it was attempting anything more than to hold as much as possible of its gradually declining business by meeting the rates of its competitor.

Both forms of relief here sought must be denied.

I.

Neither in reason nor on authority may it be concluded that the Company by merely meeting the rates of its competitor in order to attempt to hold its business created an unjust or unlawful discrimination. While the prevention of locality discrimination long has been the object of prohibitory statutes, federal and state, and of orders of administrative bodies such as the Interstate Commerce Commission and the various state railroad and utility commissions, the existence of competition at one point and not at another has, in itself, generally been deemed to destroy that similarity of circumstances and conditions without which such discrimination would not exist.

Sometimes the statute itself specifically permits the meeting of a competitive rate; and irrespective of statutory authorization, the books are replete with decisions approving the propriety and lawfulness of meeting a competitive condition.

Thus, Section 2 of the Clayton Act forbids price discrimination, but specifically provides that this should not prevent "discrimination in price in the same or different communities made in good faith to meet competition." California, in 1913, placed on its statute books a law against locality discrimination for the purpose of destroying a competitor, but it was specifically provided that the act "was not intended to prohibit the meeting in good faith of a competitive rate." (Stats. 1913, p. 508)(3).

As to carriers, the United States Supreme Court in interpreting, and the Interstate Commerce Commission in administering, the Interstate Commerce Act have repeatedly recognized the existence of competition as justifying rates which differ as between localities, variations forced by competition not being considered to work an unlawful discrimination.(4)

(3) Other states have similar statutes, among them being Iowa, Code of Iowa 1927, Ch. 432, Sec. 9885; Minnesota, Mason's Minnesota Statutes 1927, Sec. 10464 (Stats. 1921, Ch. 431, Sec. 1); Montana, Revised Code of Montana 1921, Sec. 10904, as amended Laws 1925, Ch. 131, Sec. 1.

(4) Thus in East Tennessee V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 19, it was held that "* * * competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place", and that the right to thus recognize competitive conditions "is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it." To the same effect are Texas & Pacific R.R. v. Interstate Commerce Commission, 162 U. S. 192; Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144; Interstate Commission v. Louisville & N. R. Co., 190 U. S. 273; Chamber of Commerce of New York v. N. Y. C. & H. R. R. Co., 24 I.C.C. 55, 75; Cado Central Oil & Refining Corporation v. K. C. S. Ry. Co., 98 I.C.C. 39.

Similarly in California this Commission has uniformly recognized the existence of competition as warranting railroad companies in publishing a lower rate at a competitive point than at a corresponding one where competition does not exist,[5] and constantly such companies are being permitted to publish reduced rates on less than statutory notice to meet competition.[6]

The meeting of a competitive rate by utilities has found general recognition and approval by the commissions of other states.[7]

(5) In Sperry Flour Company v. Island Transportation Co., 30 C.R.C. 561, 565, it was said: "Carrier competition has long been recognized as a controlling factor in creating different circumstances and conditions, warranting a lower level of rates between points where the competition exists than between points not so situated. The mere showing that rates from one point in a territory are higher than rates from other points in that territory whether maintained by the same carrier or different carriers, does not establish the fact of undue prejudice or preference. (Texas and Pacific R.R. v. Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144; Louisville and N. R. Co. v. Behlmer, 175 U. S. 648; East Tennessee V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1; Interstate Commerce Commission v. Louisville & N. R. Co., 190 U. S. 273)." The same rule was again expressed in Continental Can Company v. Southern Pacific, 35 C.R.C. 531.

(6) During the week cases 2953 and 2954 were filed twelve authorizations were granted carriers to publish, on less than statutory notice, reduced rates to meet competition; and during the week in which the final brief was filed herein, seventeen such authorizations were granted. These are typical of what has been done for many years, except that as competition has grown the number of authorizations has been increasing.

(7) In Re Mass. N. E. St. Ry. Co. P.U.R. 1917A, 331, 349, the Massachusetts Commission approved the charging by an interurban electric company of a lower rate on a portion of its system where competition existed, it being said "It is well established that a company may, to meet competition, charge relatively lower rates upon certain lines, provided no higher rates are charged upon other parts of its system than would otherwise be permissible". In the same book at page 923 is reported a decision by the West Virginia Commission in which a natural gas company was permitted to meet the rate of a competitor in a portion of its territory. To the same effect is the decision of the Tennessee Commission in Re Flat Creek Telephone Co., P.U.R. 1916B, 80.

And finally it may be pointed out that this Commission has uniformly permitted and sanctioned the meeting by gas and electric utilities of competitive rates.(8) The leading decision is Re Southern Calif. Edison Co., 16 C.R.C. 454. There the company had been authorized to surcharge its rates but applied for permission to waive the surcharge in the competitive territory served by the City of Pasadena. In granting the request the Commission said:

> "The imposition of the surcharge upon the rates theretofore in effect on the service rendered by the company would at once put the company at the disadvantage of charging more than its competitor.
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> "We have, after very careful consideration, determined that the company's request must be granted. To hold otherwise would mean that the commission would deny the right of a utility company to maintain its existence by meeting the rates of its competitor."

That the question of possible locality discrimination was before the Commission appears from the following excerpt from the opinion, where there was laid down a formula or requirement to guard against consumers in noncompetitive territory being burdened by the meeting of a competitive rate:

(8) In Re Southern California Edison Co., 4 C.R.C. 159, the Commission allowed a rate in territory surrounding Pasadena the same as the Pasadena rate, Pasadena being competitive territory. The Commission it was said was not in a position to hold "that a just and reasonable rate over the entire territory served by applicant is a rate as low as that now being charged in Pasadena." In Re Pacific Gas & Electric Co., 11 C.R.C. 795, the Company's rates in the Chico district were at its request fixed the same as those of its competitor. In Re City of Los Angeles v. Southern Calif. Gas Co., 13 C.R.C. 742, 744, it was recognized that the Company's rates must be the same as those of its competitor and they were so established. In Re Citrus Belt Gas Co., 15 C.R.C. 614, gas rates in San Bernardino were fixed to meet the competitive rates there of Southern California Gas Company. Identical rates in territory competitive as between Southern Sierras Power Company and Southern California Edison Company were approved in Re Southern Sierras Power Co., 18 C.R.C. 818, 856, it being pointed out that it was "practically necessary that the two schedules of rates be the same."

"The commission would not ordinarily acquiesce in a company's desire to give lower rates to a portion of its consumers as compared with the rest even though the company were willing to absorb a resulting loss, because this would be discrimination not justifiable upon the sole ground that the company wished out of its own earnings to favor certain consumers. But this is a different situation. The company faces a municipal competitor which is charging low rates and it must either meet these rates or retire from the field. Retiring from the field would mean a loss of a very considerable part of the investment and a giving up of a market for power. Merely for the purpose of maintaining all consumers on an exact parity we should not compel a company to charge rates which will annihilate its service in competitive territory.

"Of course it is true that if we permit municipal competition to be met in a given community it should at all times be made definite and certain that consumers in noncompetitive territory be not burdened with the slightest additional cost or charge for service because of the comparatively lower rates in the competitive territory. If this condition be met we are convinced that no undue discrimination results where the rates in noncompetitive territory are fixed on a basis of reasonableness and are as low as they can be made considering the usual factors of operating expense, depreciation and reasonable return on investment.

"The company itself must absorb the lessened return or loss occasioned by the low competitive rates." (9)

Thus, to hold here under this record that there is an unlawful discrimination would involve not only a serious but unjustifiable departure from the long and unbroken trend of statutory, judicial and commission precedent, both in this state and elsewhere, which overwhelmingly sustains the right of a utility to meet in good faith a competitive rate without rendering itself subject to a charge of unlawful locality discrimination.

II.

As to the withdrawal relief sought it is enough to call attention to Los Angeles v. Los Angeles Gas & Electric Co., 251 U. S. 32, which is decisive against its granting. The complaint

(9) Losses in revenue thus sustained were actually deducted from the company's surplus (Re So. Calif. Edison Co., 18 C.R.C. 67, 73)

and prayer for relief in this regard runs completely counter to principles there laid down.(10) There, as here, it was urged that the police power was sufficiently elastic to justify a public command to a private utility lawfully operating under a subsisting franchise to make way for a publicly owned system. This, it was held, could not be done without rendering compensation, it being said:

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(10) In Case 2954 Modesto Irrigation District alleges: "That within the incorporate limits of the City of Modesto which is a part of the Modesto Irrigation District, the Pacific Gas and Electric Company has been supplying electric energy to less than (10%) ten percent of the total electric consumers within the incorporate limits of the City of Modesto, and that, for some years past the gross revenue for sale of electric energy within the above named area has not been sufficient to make the proper return on the investment involved, and that the electric energy users on the Pacific Gas and Electric System outside of the above named area have been making up the deficit and that the Modesto Irrigation District is now and has for some time past been furnishing sufficient and proper service to all consumers desiring electric energy within the above named area, and that the Modesto Irrigation District is supplying electric energy to the consumers within the Modesto Irrigation District under and by virtue of the laws of the State of California, and that the electric energy so supplied is generated, transmitted, distributed and owned by the tax payers of the Modesto Irrigation District."

On the strength of this allegation, the prayer for relief is as follows:

"WHEREFORE, Complainant protests and objects to the Railroad Commission of the State of California in permitting the Pacific Gas and Electric Company to continue the operation of its electric system within the Modesto Irrigation District and petitions the Railroad Commission of the State of California to compel the Pacific Gas and Electric Company in a formal hearing to show cause why the aforesaid company should be further permitted to continue in the electric business within the Modesto Irrigation District, and further petitions the Railroad Commission of the State of California to cancel the Pacific Gas and Electric Company's certificate of necessity and public convenience for the operation of an electric business within the Modesto Irrigation District."

"It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the 14th amendment forbids. What the grant was at its inception it remained, and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated."

I recommend the following form of Order:

O R D E R

The various cases referred to in the title having been consolidated for hearing and public hearing thereon having been held and the cases having been submitted for decision,

IT IS HEREBY ORDERED, that the said cases be and the same hereby are 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 9th day of November, 1931.

C. E. Jenney
Leon O. Whitsell
M. J. Carr
M. B. Harris
Fred G. Woodward.
Commissioners