

Decision No. 11368.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

JOHN E. SEXTON,

Complainant,

-vs-

WESTERN STATES GAS AND ELECTRIC  
COMPANY, a corporation, and  
EL DORADO WATER COMPANY, a cor-  
poration,

Defendants.

Case No. 1550.

BY THE COMMISSION:

OPINION AND ORDER DENYING REHEARING

An application for rehearing was filed herein November 26, 1921, by the Western States Gas and Electric Company, seeking the revocation of the order contained in our Decision No. 9698 rendered November 4, 1921. This order directed the El Dorado Water Company to permit the delivery, and the defendant, Western States Gas and Electric Company, to deliver to complainant for mining uses, water in the amount of 40 miner's inches per day of 24 hours every third day, or its equivalent of 40 miner's inches for 8 hours each day. By the terms of the order, this water is to be taken "from the present supply of 1800 miner's inches available for public use through the ditch of the defendant, Western States Gas and Electric Company, known as the El Dorado ditch, referred to and described in the contract executed by

defendants and approved by this Commission in its Decision No. 6436."

The principal points urged in the application for rehearing are that the requirement for the delivery of water to complainant for mining uses interferes with the terms of the contract above referred to, and also, that it necessitates the diversion of this amount of water from its present public utility use for hydro-electric purposes. Both of these things, it was contended, would be inconsistent with the company's legal obligations. A careful review of the terms of the contract and proceedings relative thereto, leads to the belief that the terms of our decision and order herein, as to which rehearing is sought, have been misunderstood in so far as they relate to the provisions of this contract. A brief explanation should clarify any possible ambiguity in the language of the order.

As above shown, this order directed that the water to be delivered to complainant be taken "from the present supply of 1800 miner's inches available for public use" through the El Dorado ditch. This 1800 miner's inches is the total amount which the defendant, Electric Company, by the terms of the contract in question, agreed to furnish to the defendant, Water Company, for distribution to the public. This transaction is more fully described in the opinion preceding the order. It is therein set forth that, under the contract, the defendant, Electric Company, agreed to deliver to the Water Company "40 second feet or 1600 miner's inches for irrigation use, and 5 second feet, or 200 miner's inches for mining use." It also appears from the contract that 1600 miner's inches

was the maximum delivery for irrigation and domestic uses, subject to certain limitations and conditions relative to the available supply from certain natural and artificial sources. During certain months of the year, the amount of water to be delivered is much less than 1600 miner's inches for irrigation or domestic uses. Delivery of water for mining use is covered by a separate and distinct paragraph of the contract, as follows:

"With reference to water for mining use, hereinbefore many times referred to, IT IS AGREED that the Consumer shall take over and assume the obligations of the Company as a water utility in connection with the service of water for mining use; provided, that the Consumer expressly agrees not to permit the increase of mining use or to take on any consumers for mining use in excess of those supplied with water therefor by the Company during the year 1918, unless compelled to do so by the final order of judgment of the Railroad Commission of the State of California or any court of competent jurisdiction. If demand shall be made on the Consumer for water for mining use, the Consumer agrees to resist such demand, to notify the Company thereof, and to permit the Company to act with it in resisting such demand and to be represented as a party in any litigation, whether before the Courts or the Railroad Commission of the State of California, in resisting the same; and the consumer further agrees to reduce and eliminate all mining use so far as may be in its power. Subject to these limitations, the Company agrees to deliver to the Consumer, under rates, method of measurements and terms of payment stated herein, for mining use, such water as may be required for said purposes, plus thirty-three and one-third ( $33\frac{1}{3}$ ) per cent thereof, said thirty-three and one-third ( $33\frac{1}{3}$ ) per cent being fixed and determined by the parties for the purpose of determining the amount of water to be delivered to the Consumer, for said purposes, as the loss in transmission from said measuring weir to the point of measuring the delivery for such mining use. It is, however, expressly agreed between the parties that the water to be delivered to Consumer at said measuring weir for resale for mining use shall not, under any circumstances, exceed the maximum of five (5) cubic feet per second."

The foregoing shows a definite intention on the part of the defendant, Electric Company, to reserve 200 miner's inches for the purpose of meeting its obligations as a public utility in the distribution of water for mining uses.

Any subsequent use of its entire available supply of water for hydro-electric purposes is, of necessity, subject to this reservation. This utility having neither sought nor obtained formal authorization of the Commission to withdraw from public service in the sale and distribution of water for mining uses, it cannot be concluded that the use, subsequent to the contract, of all surplus water for hydro-electric purposes, during a time when the company has not been called upon to deliver, for mining uses, the amount reserved under the terms of the contract, has, in effect, terminated the company's obligations as a public utility in this regard. Also, the requirement that the two defendants herein deliver to the complainant, as one of the general public entitled to the service of water for mining uses, an amount of water not in excess of the quantity reserved under the terms of the contract for mining uses, is not inconsistent with the provisions of the contract. These defendants were both parties to the contract. They have agreed, in substance, that the Water Company shall take over and assume the obligations of the Electric Company as a water utility in connection with the service of water for mining use, and that for this purpose the Electric Company will provide and deliver an agreed amount of water to the Water Company.

It is immaterial that the point of service to complainant is above the 14-Mile House, below which the distributing system was transferred to the Water Company by the Electric Company. As pointed out in our prior decision, we do not believe that it is proper to construe this contract as having effectually cut off the supply of water for mining uses from the complainant or other members of the public generally entitled to participate in this use, above the 14-Mile House, in favor of the possible future requirements of other members of the public below the 14-Mile House.

On the other hand, all members of the public entitled to service of water for mining uses can participate in this service only to the extent of the available supply. This supply, we understand to be 200 miner's inches as fixed and limited by the provisions of the contract and the subsequent use by the defendant, Electric Company, of all surplus water for hydro-electric purposes. Our prior order, therefore, in directing that the supply delivered to the complainant shall be taken from the amount of 1800 miner's inches available for public use, must be deemed to mean that this water is taken out of the reserved 200 miner's inches, or 5 cubic feet per second for mining uses which is included in the total of 1800 miner's inches indicated in the order.

In view of the considerations above set forth, we conclude that the application for rehearing should be denied.

#### O R D E R

An application for rehearing having been filed herein on November 26, 1921 by the defendant, Western States Gas and Electric Company, and oral arguments having been heard thereon, February 9, 1922, the matter submitted, and the Commission after a full consideration of the points presented being of the opinion that the grounds set forth in support of the application are insufficient to justify a rehearing;

IT IS HEREBY ORDERED that said application of the Western States Gas and Electric Company filed herein November

26, 1921, be and the same is hereby denied.

Dated at San Francisco, this 16<sup>th</sup> day of  
December, 1922.

L. B. Burdick  
James Martin  
Chas. Howell

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Commissioners.