

Application No. 81.

Application No. 104.

Comrolainant,

YS.

Case No. 268.

Defendants.

Appearances

Everts & Ewing for Tulare County Power Company
Sutherland & Barbour and Frank H. Short for
San Joaquin Light & Power Corporation
Lilienthal, McKinstry & Raymond and E. C. Farnsworth
for Mount Whitney Power & Electric Company

OPINION

Eshleman, Commissioner.

On April 11, 1912, the Mount Whitney Power & Electric Company filed a complaint against the Tulare County Power Company and the San Joaquin Light & Power Corporation, alleging that the Tulare County Power Company was organized on June 10, 1910, and that it had under construction a 1500-horse power steam plant which it was about to operate with a view to serving that portion of Tulare County which is bounded by Tulare, Lindsay and Exeter on the north and Strathmore on the south and that it was threatening to extend its lines to and serve all of the territory being served by the

complainant at the time of filing the complaint; that in addition to its steam plant, the said Tulare County Power Company had in contemplation a water-power plant which, it is alleged in the complaint, could not be a success commercially because of the insufficient water supply and drop and the excessive cost of the same. It is alleged that the defendant San Joaquin Light & Power Corporation has never served any of the territory served by the complainant but has made a contract with the Tulare County Power Company for supply of power to the latter company, under such terms that in practical effect the San Joaquin Light & Power Corporation will serve the consumers of the Tulare County Power Company.

Complainant further alleges that its plant is adequate for the present and future public convenience and necessity of the territory served by it and that the public convenience and necessity do not and will not require any extension of the system of either of the defendants and that the threatened extension of these systems will lead to needless and ruinous competition and inefficient service.

The complainant further alleges that the Tulare County Power Company intends to sell power to its stockholders at cost and urges that this Commission should prevent the Tulare County Power Company from carrying out its proposed plan and should require that it charge no more for electricity to those who are not its stockholders than to those who are and that it should not be permitted to extend its system into the territory served by complainant and, likewise, that the San Joaquin Light & Power Corporation should be prevented from extending its system into the territory served by complainant.

On May 20, 1912, the Tulare County Power Company filed its answer to the complaint of the Mount Whitney Power & Electric Company denying the substantial allegations of the complaint and setting up affirmatively that the territory served by the Mount

Whitney Power & Electric Company is not completely served and that there is ample field for the operation of both the defendant, and the Mount Whitney Power & Electric Company within Tulare County. This defendant urges various delinquencies on the part of the Mount Whitney Power Company and also sets up the fact that for more than a year last past it, the defendant, has been actively at work in developing power within the County of Tulare from a proposed plant on the Tule River and that it has erected a 2,000-horse power auxiliary steam plant in the City of Tulare; that prior to the 23d day of March, 1912, it had secured various franchises in the County of Tulare and municipalities therein and had commenced the actual construction work on its transmission lines along and through the territory proposed to be served by it and was performing such work and constructing its lines in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of its undertaking, and that the public convenience and necessity required that the defendant carry out and complete its plan of development by extending its line in accordance with its theretofore completed plans.

On the same date, defendant San Joaquin Light & Power Corporation answered the complaint of the Mount Whitney Power & Electric Company interposing denials to the material allegations of the complaint and further setting up the fact that it did not contemplate delivering power to consumers within the County of Tulare by means of the new line which it was contemplating from its plant on the Tule River and that during the year 1910 said defendant began the actual construction work of the extension of its transmission lines in the territory involved and ever since has been and now is prosecuting such work in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of its undertaking and that this was being done under franchises acquired prior to the 23d day of March, 1912.

On June 3, 1912, the San Joaquin Light & Power Corporation filed its Application (No. 81) praying for a certificate of public convenience and necessity to carry its 60,000-volt transmission line from its contemplated hydro-electric power house on the Tule River westerly to the intersection of its now existing line at the site of the Tulare County Power Company's substation, thence in a southerly direction to the junction of its already existing line near Famoso, in Kern County, also from a point on its already existing north-and-south line directly west of Lindsay to a point near the Henrietta substation in Kings County. For a more particular description of the proposed extensions reference is hereby made to San Joaquin Light & Power Corporation's Exhibit "G", attached to and made part of its application.

On the 13th day of June, 1912, the Tulare County Power Company filed its application for certificate of public convenience and necessity for the extension of its lines and the exercise by it of franchises in the County of Tulare and the Cities of Tulare, Lindsay and Exeter in said county.

These two applications and Case No. 268 arising out of the Mount Whitney Power & Electric Company's complaint were combined and heard together. At the hearing no protest was presented against the application of the San Joaquin Light & Power Corporation and the only objection raised to the granting of its application was made by the Mount Whitney Power Company and was directed against the contract which was entered into between the San Joaquin Light & Power Corporation and the Tulare County Power Company on the 5th day of March, 1912. The application of the San Joaquin Light & Power Corporation was merely for carrying its transmission lines across Tulare, Kern and Kings Counties, from each of which it has heretofore secured franchises, and no territory is to be served from the proposed lines for which a certificate is desired which is now served by said company, and I find as a

fact that public convenience and necessity require and will require the granting of the application of said company.

While the introduction of evidence in this case consumed five days and many matters which were declared by this Commission to be relevant to an inquiry such as this in its decision in Application No. 35, being application of Great Western Power Company for certificates of public convenience and necessity and authorizations to exercise rights or privileges under franchises, etc., yet it may be that this complaint of the Mount Whitney Power Company and the application of the Tulare County Power Company can be disposed of without determining many of the very interesting and important questions which the evidence presented to the Commission. It is urged on behalf of the applicant the Tulare County Power Company that the Mount Whitney Power Company is not adequately serving its consumers at reasonable rates and that the territory involved in the application is not completely served, while it is urged on behalf of the Mount Whitney Power Company that it is adequately serving the territory at reasonable rates and, further, that the application of the Tulare County Power Company should not be granted by reason of the fact that its scheme is impracticable and it is impossible for it to fulfill the promises which it is making to its consumers. Briefly stated, the scheme of the Tulare County Power Company is to furnish power at cost to certain of its stockholders and as to its other consumers to furnish power for electricity for power and lighting purposes at the prevailing rate heretofore enforced by the Mount Whitney Power Company. It does not appear that the Tulare County Power Company can consistently inveigh against the rates of the Mount Whitney Power Company if it, in fact, expects to accord identically the same rates to its patrons who are not its stockholders and therefore I can dismiss, at the threshold of this inquiry, the complaint of the Tulare County Power Company against the alleged excessive rates of the Mount Whitney Power Company,

its rival in this field. Considerable testimony was introduced affecting the attitude of the Mount Whitney Power Company toward its consumers but I do not find that the complaint of the Tulare County Power Company directed against the service of the Mount Whitney Power Company has been sustained from the evidence. There can be no question that sometimes there are arbitrary acts on the part of corporations that occupy an uncontested field and, likewise, there are always those who are ready to complain against a service however good and, while it appears from the evidence that in some cases there may have been dereliction on the part of the Mount Whitney Power Company, I am of the opinion that as a general attack upon its practices, the evidence does not warrant a finding that such practices are unreasonable.

As I have said, the scheme of the Tulare County Power Company is to furnish energy for light and power purposes to its stockholders at cost and to its other consumers at the rates prevailing in the territory. Much evidence was introduced designed to show the inability of the Tulare County Power Company to furnish its commodity at a cost price of \$36 per horse power to its stockholders but here a mere fog of opinion presents itself to the Commission. Not questioning in any regard the integrity or ability of the experts sworn in this case, yet a lamentable divergence of premises upon which conclusions are based makes their testimony practically valueless. The testimony of the officials of the Mount Whitney Power Company shows that at the present flat rate of \$50 per horse power for power purposes and the lighting and other rates prevailing in the section involved in this controversy that for each horse power connected there is a gross return to the company of approximately \$38.50 and that the total cost, including fixed charges, for delivering this power to the consumer is about \$30, thus giving a net return of practically \$8.50 per horsepower connected at the present rates for pumping, lighting and other purposes that prevail on the system of the Mount Whitney Power Company. The testimony of the experts for this company, however,

shows varying costs and returns which are entirely inconsistent with these figures and such costs and returns are the result of legitimate computation but based on premises that do not exist with reference to the business of the Mount Whitney Power Company. These gentlemen being, as I find myself, necessarily very much in the dark as to what amount of power the Tulare County Power Company will be able to produce and more in the dark as to the amount of power which the same company will be able to sell, necessarily, must merely guess at some of the very material elements which will largely determine the ability of this company to fulfill its promises to its stockholders. I can not, from the evidence, determine this question and if this application were dependent solely upon the determination of this question, I would be compelled to say that the evidence did not satisfy me that the Tulare County Power Company can deliver ^{power} to its present and prospective consumers on conditions any more advantageous to such consumers than those upon which the Mount Whitney Power Company now delivers the same commodity. Therefore, I am constrained to find that not only does the Tulare County Power Company fail in its endeavor to show that the rates accorded by the Mount Whitney Power Company under conditions applicable to it are excessive and its regulations unreasonable but, likewise, it has failed to present the conditions surrounding its enterprise to the Commission in such light as will warrant a finding that it can furnish its commodity at a less rate and under more reasonable restrictions than those accorded by its rival and, were it not for other considerations, I would recommend, under the authority of the decision heretofore rendered in the Application of Great Western Power Company for certificates of public convenience and necessity, -No. 55- that the application be denied.

I find, however, that there are other grounds which move

me to recommend the granting of the application. In the first place, I am convinced, from the testimony, that the territory involved is not nearly completely served. Regardless of this fact, however, if I found from the evidence that the applicant company had not made out its case as to the very substantial matters which we have just discussed and that the Mount Whitney Power Company had apparent ability to develop power and extend its system so as to meet the requirements of the territory as they arise and afford its patrons efficient service at reasonable rates, I should be disposed still to deny the application and permit the Mount Whitney Power Company to extend its lines and enlarge its service so as to satisfy the larger market for electricity, rather than to permit a new company to come in whose promise to better conditions had not been shown to be substantial and whose attack upon the rates and service of the existing company had not been shown to be well founded. I find, however, that an entirely different aspect is put upon this case by reason of the conditions which I find to have existed at the time the Public Utilities Act became effective. Section 50-b of the Public Utilities Act reads, in part, as follows:

"No public utility of a class specified in subsection (a) hereof shall henceforth exercise any right or privilege under any franchise or permit hereafter granted, or under any franchise or permit heretofore granted but not heretofore actually exercised, or the exercise of which has been suspended for more than one year, without first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege; provided, that when the commission shall find, after hearing, that a public utility has heretofore begun actual construction work and is prosecuting such work, in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking, under any franchise or permit heretofore granted but not heretofore actually exercised, such public utility may proceed, under such rules and regulations as the commission may prescribe, to the completion of such work, and may, after such completion exercise such right or privilege;"...

The evidence is undisputed that this corporation was organized and its plan partially laid out long before the Public

Utilities Act took effect and, further, that on the 7th day of November, 1911, it was granted a franchise to prosecute its business within the County of Tulare; on the 5th day of March, 1912, it was granted a franchise to conduct its business within the corporate limits of the City of Lindsay; on the 7th day of March, 1912, it was granted a franchise to transact its business in the City of Tulare and on the 22d day of March, 1912, it was granted a franchise to conduct its business within the City of Exeter. It furthermore appears, from undisputed evidence, that on June 10, 1910, that the Tulare County Power Company began work on its Tule River project by making surveys and that it has prosecuted that work ever since and that its dam and headgate were completed on the 24th day of December, 1910; that in August 1911 the plans for the steam plant in Tulare were prepared and that on October 10th of the same year the contract for the plant was let and that the work on said steam plant has been prosecuted continuously and in good faith up to its completion, which was brought about soon after the Public Utilities Act went into effect; that on December 15, 1911, contracts were made for the construction of distributing pole lines and that the distribution of poles began on the 26th day of December, 1911; and that the work of constructing the distribution system has been prosecuted continuously since; that on March 10, 1912, the erection of a pole line in the City of Lindsay began, which was three days after the granting of a franchise in that city; that on the 17th day of March, 1912, the erection of its distribution system in the City of Exeter was commenced, which apparently was five days before the granting of the franchise therein; that on March 20, 1912, - three days before the effective date of the Public Utilities Act - the erection of distribution lines in the City of Tulare was begun, which was two days before the granting of the franchise in said City. So long, however, as the city authorities permitted such action and the franchise actually was granted and became effective before the effective date of the Public Utilities Act and con-

struction thereunder was actually being carried on, in good faith, uninterruptedly and in proportion to the magnitude of the undertaking before said date, I am of the opinion that it would be an abuse of discretion on the part of this Commission to interfere with the future activities under said franchises. Therefore, as to the County of Tulare and the City of Lindsay, there is no question in my mind, from the evidence adduced in this case, that before the effective date of the Public Utilities Act that this company actually possessed franchises and was carrying on its work thereunder in good faith. As to the other two cities, the question is much closer, but, from all the circumstances in the case, I am of the opinion that it is not the province of this Commission at this time to interfere with the further activity of this company.

I therefore find as a fact that prior to the 23d day of March, 1912, the Tulare County Power Company had secured a franchise within the County of Tulare, within the cities of Lindsay, Exeter and Tulare in said county, and had actually begun construction work under such franchises and was prosecuting such work in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking and that, by reason of such fact, it has been lawful since said date and is now lawful for said public utility, the Tulare County Power Company, to proceed with its said construction within the said County of Tulare and within the said cities, under whatever rules and regulations this Commission may prescribe and that a certificate of public convenience and necessity has not been and is not now necessary to the further construction of its plant by said Tulare County Power Company within said county and within said cities, and the exercise of its said franchises. I do not mean to hold that where a utility was on March 23, 1912, actually engaged in construction in a county under a franchise theretofore granted that it thereby became entitled to extend into competitive territory

within said county, within which it was not on said date constructing. In this case the construction was actually going on in the competitive field thus rendering unnecessary the decision on this point, and it will be left open until its presentation requires us to pass upon it.

Feeling, however, that the intent of the law is that this company should proceed in the county and the cities hereinbefore mentioned and that the intent of the law being such, there should be no obstacles placed in its way, in order to remove any question that may be raised in the future and taking into consideration all the facts and circumstances surrounding this case, including the actual beginning of construction and the expenditure of money before the Public Utilities Act was even introduced into the Legislature, all of which acts were performed and expenditure of money made by said public utility on the faith that it would be allowed to proceed within the territory involved, I find further that the public convenience and necessity, under such circumstances, will be subserved by the granting of the application in so far as the authority of this Commission may exist so to do.

Again, in this connection, I desire to call attention to the fact, as was done by this Commission in Application 35, being application of Great Western Power Company for certificate of public convenience and necessity- that the granting of applications as to public utilities that were actually in being and whose projects were mapped out before those responsible for such public utilities could know that the operation of such utility might be restricted by the Public Utilities Act which is now in effect is not to be taken as an indication of the attitude which will be assumed by this Commission concerning new utilities that shall hereafter come into existence and apply to this Commission for leave to enter competitive territory.

Much has been said concerning the contract which the Tulare County Power Company has entered into with the San Joaquin Light & Power Corporation, whereby it agrees to take a minimum of

1000 horse power continuously throughout the year at \$40 per horse power. It is urged on the part of the Mount Whitney Power Company

that this is an unconscionable contract, while the Tulare County Power Company and the San Joaquin Light & Power Corporation, with equal earnestness, urge that it is a contract fair in all respects. While I do not agree that contracts between public utilities which may in any wise affect the rates to be charged by any of the public utilities involved in such contracts, which were entered into before the Public Utilities Act became effective, are beyond the jurisdiction of this Commission, yet I believe that as to all such contracts the evidence should be very clear that such contracts are likely to work to the detriment of the rate-bearing public before this Commission shall assume to interfere with them. In other words, as to contracts that have heretofore been entered into under the appearance of good faith, I believe the burden should be upon the person challenging them to show their inequity and, though the evidence is conflicting, I do not believe the Mount Whitney Power Company has sustained its burden in this regard and the contract will not be disturbed.

+ I do not believe it is necessary at this time, holding the view that I do concerning the legal status of the Tulare County Power Company, to determine the legality of its proposed arrangement whereby it accords one rate to its stockholders and another to other consumers. There can be no question that by indirection it could bring about the same results. It may have preferred and common stock and on the preferred stock it may guarantee a certain earning, as it has here done, and to the common stock it may apportion all other earnings that remain after the interest on the preferred stock has been paid. This would, in effect, be and is the furnishing of its commodity to its stockholders at cost because it makes little difference whether the profit be rebated to them in commodity or paid to them in equivalent cash in the form of dividends. As I have said, I do not deem it necessary to determine the legality of the scheme of this company at the present time. It was

intimated by the Supreme Court in the case of Hildreth vs. Montecito Creek Water Co., 139 Cal 22, that a purely mutual water company might as to its surplus water be a public utility and there have been other cases which tend to the same conclusion. I see no reason why the same rules of law which apply to a mutual water company or a private appropriator of water should not be applicable to one who generates power for his own use or to an association of power users who combine for the purpose of constructing joint generating works, but I do not decide this question specifically, leaving it for future determination when the rates of the Tulare County Power Company are finally passed upon by this Commission. Except, in so far as the right of a rival company to enter territory already served is dependent upon its ability and willingness to furnish the commodity at a less rate than the utility already occupying the field, in application for ^{certificates of} public convenience and necessity it is not necessary for us to pass upon the reasonableness of rates, and in such cases we only pass upon the comparative reasonableness and determine, first, the question as to whether or not the utility which desires to compete is offering rates which are less than those of its rival already in the field and, second, whether or not the rates offered by the applicant utility are at least high enough to be reasonable. In other words, we do not determine finally the question of reasonableness of rates per se in an application for a certificate of public convenience and necessity. In this case, by reason of the view that I have taken of the law involved, we do not even pass upon the relative reasonableness of the rates of the two utilities involved. Under my view of the case, the Tulare County Power Company would be in the same position legally to complain against the extension of the Mount Whitney Company's lines as is the Mount Whitney Company to complain against the extension of the Tulare County Power Company's lines within the County of Tulare and the three cities involved. I find that the Tulare County Power Company occupies the legal status of an existent,

active public utility in this territory under franchises actually secured before the passage of the Public Utilities Act by reason of it having begun actual construction work and prosecuted the same in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of its undertaking prior to March 23, 1912, and, such being the case, apply entirely different rules for the disposition of this controversy than would be applied if it were a public utility desiring to exercise franchises under which no such construction work had been commenced prior to said date.

The length of time required in the hearing of this case and the conflicting testimony lead me to make an observation which I think is at this juncture pertinent. Public Utilities of this state know entirely too little about their own affairs. This, I believe, most of them admit. It is necessary for the public authorities whose duty it is to regulate the affairs of these utilities and whose desire it is to regulate them justly to have a complete disclosure of all the affairs of such utilities and it is, likewise, advisable, from the standpoint of the utility compelled to be regulated and desirous of being regulated justly, to have such information at hand concerning its own business as will be designed to aid public authorities in according fair treatment to the public utility and equally fair treatment to its patrons. I can not too strongly urge that the utilities of this state immediately take steps to secure the fullest information concerning their property, their operating expenses and their income. I do not mean by this to invite a preparation of information by utilities which will present the affairs of these utilities to the Commission in a too favorable light from the utility standpoint. The Commission's engineers and experts will always check such information and if it develops that it is prepared in any way other than in accordance with the facts, the Commission, of course, will always look askance upon such information and any information that may thereafter be submitted to it by said utility. But if the utilities will be convinced that the public authorities only

desire to know the facts and will co-operate in presenting clearly the facts to this Commission, then regulation will be less irksome and certainly none the less just to the utilities involved.

I herewith present the following order:

ORDER

The Mount Whitney Power Company having heretofore filed with this Commission its complaint against the San

Joaquin Light & Power Corporation in Case No. 268, complaining against said San Joaquin Light & Power Corporation in extending its lines in Tulare, Kings and Kern Counties and, likewise, complaining against the Tulare County Power Company in extending its lines in the County of Tulare and in the cities of Lindsay, Tulare and Exeter, in said County, and the San Joaquin Light & Power Corporation having thereafter filed with this Commission its application - No. 81- asking for certificate of public convenience and necessity to construct certain lines in said counties of Tulare, Kern and Kings, said lines to be used merely for transmission and not for distribution of power, and the said Tulare County Power Company having filed its application No. 104- for permission to extend its lines throughout the County of Tulare and the cities of Lindsay, Tulare and Exeter, and said complaint and said applications having been combined for hearing and notice of said hearing having been published by direction of this Commission, and public hearings having been held in the City of Porterville, in said County of Tulare, and at the office of the Commission in San Francisco, and being fully informed in the premises,

I HEREBY FIND AS A FACT that the present and future public convenience and necessity require and will require:

(a) The granting of the application of the San Joaquin Light & Power Corporation to extend its lines throughout the

Counties of Tulare, Kern and Kings, as set out in its application, and to exercise franchises heretofore secured in said counties as far as such exercise is involved in its application, the lines upon which such extensions are to be made to be substantially in accordance with the map filed with said application No. 81 and marked Exhibit "G", to which reference is hereby made for further particulars. Deviations from the route outlined in said Exhibit "G" may be made, however, so long as such deviations do not cause such lines to interfere with the line or plant of any other public utility. Because this company does not desire to distribute power within the territory traversed by these lines, it is of very little concern to the public or to other utilities, what route is followed.

(b) I further find as a fact that the Tulare County Power Company has heretofore begun actual construction work before the 23d day of March, 1912, and was prosecuting such work in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking under franchises granted by the County of Tulare and the cities of Lindsay, Exeter and Tulare within said county of Tulare, respectively, which were granted but not actually exercised before the 23d day of March, 1912, and I find that the public convenience and necessity require and will require the exercise hereafter of the said franchises by the said Tulare County Power Company, and basing the conclusion upon the foregoing findings of fact and the further findings and statements specified in the opinion which precedes this order,

IT IS HEREBY ORDERED:

(1) The application of the San Joaquin Light & Power Corporation, under the provisions of Section 50-a of the Public Utilities Act, that the present or future public convenience and necessity require or will require the construction specified in its petition in Application No. 81 is hereby granted as applied for.

(2) The application of the San Joaquin Light & Power Corporation, under the provisions of Section 50-b of the Public Utilities Act, for a certificate that public convenience and necessity require or will require the exercise of rights or privileges under franchises or permits granted prior to the 23d day of March, 1912, under which actual construction work had been begun and was being prosecuted in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking, prior to said date, is hereby granted as to the Counties of Tulare, Kings and Kern, for the purpose solely and alone of conducting high tension wires across said counties and this permission does not add to the rights and privileges which said San Joaquin Light & Power Corporation enjoyed on the 23d day of March, 1912, to distribute power within said counties or any part thereof, or within any city within any of said counties.

(3) The application of the Tulare County Power Company, under the provisions of Section 50-b of the Public Utilities Act, for a certificate that public convenience and necessity require the exercise of rights or privileges under franchises or permits granted prior to March 23, 1912, under which actual construction work had been begun and was being prosecuted in good faith, uninterruptedly, and with reasonable diligence in proportion to the magnitude of the undertaking, but which otherwise had not been actually exercised, is hereby granted as to all the County of Tulare and the Cities of Lindsay, Tulare and Exeter in said County of Tulare.

The foregoing opinion and order are hereby
approved and ordered filed as the opinion and order of
the Railroad Commission.

Dated at San Francisco, California, this 11th
day of July, 1912.

John M. Eschbacher
H. B. Garland
Alfred Gordon

Commissioners.