KC

Decision No. [illegible]

BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA

ORIGINAL

Decision No. 1231

ROY A. PRATT, et al.,

Complainants,

vs.

SPRING VALLEY WATER COMPANY, a corporation,

Defendant.

Case No. 545.

George C. Thrasher for complainant.
McCutchen, Olney and Willard and Warren Olney, Jr. for defendant.
Robert M. Searles, Assistant City Attorney, for City and County of San Francisco.

THELEN, Commissioner.

O P I N I O N

This is a proceeding to compel the Spring Valley Water Company to enlarge its water mains so as to give adequate service to a portion of the City of San Francisco.

The complaint alleges in part that complainants are residents of the westerly portion of the Richmond District in San Francisco; that the sole source of water supply for said section is owned and operated by Spring Valley Water Company; that Spring Valley Water Company has refused to supply complainants with an adequate supply of water; that while the water supply in the homes of all the complainants is distressingly inadequate, some of the complainants have no water at all during certain hours of the day and must store water in tanks each night for use on the succeeding day; that the cause of the inadequacy of the water supply is the insufficient size of the mains and pipes used by Spring Valley Water Company to supply that part of the Richmond District which lies west of 23d Avenue; that while the territory east of

23d Avenue is supplied through a 16-inch main, the section from 23d Avenue west to the ocean beach is served from an 8-inch main laid in Geary Street; and that the Water Company's revenue from this section is estimated at $20,000 annually. The complainants pray that this Commission direct the Water Company to install larger water mains and pipes or take such other measures as will afford relief.

The answer, while not denying the material allegations of the complaint, sets up several reasons why this Commission should not proceed in the premises, including particularly the defense that this Commission is without jurisdiction to entertain this proceeding. The issue of jurisdiction is the material issue which must now be decided.

The hearing in this proceeding was held in San Francisco on May 2, 1914. The City Attorney of San Francisco appeared by Robert M. Searles, Assistant City Attorney, presented a resolution of the Board of Supervisors requesting this Commission to assume jurisdiction, and made an argument in advocacy of this Commission's jurisdiction. The Water Company took the position, in reply, that whatever power there is in any public authority to give the relief requested, vests in the Board of Supervisors of the City and County of San Francisco and not in this Commission.

Before examining the issue of jurisdiction, I desire first to draw attention to the specific relief here requested. This is not a case of compelling a water company to extend its mains. Nor is it a case of compelling such company to install a service connection from an existing main to a new customer whose property abuts on the main. No question of serving new customers is involved in this proceeding. It is simply a question of giving more adequate service to existing customers by increasing the size of existing mains. By bearing this fact clearly in mind, the solution of the problem of jurisdiction becomes less difficult.

The source of this Commission's powers is found principally

in Section 23 of Article XII of the Constitution of California, as amended on October 10, 1911, and in such statutes as the Legislature may, from time to time, enact thereunder. This section, after referring to the corporations, associations and persons which now are, or may hereafter be declared by the Legislature to be public utilities, confers on the Railroad Commission the right to exercise such power and jurisdiction to supervise and regulate public utilities as the Legislature may, from time to time, confer upon the Commission. The section then continues in part as follows:

> "From and after the passage by the legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission."

Then follows this important proviso:

> "Provided, however, that this section shall not affect such powers of control over any public utility vested in any city and county, or incorporated city or town as, at an election to be held pursuant to laws to be passed hereafter by the legislature, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and until such election such powers shall continue unimpaired."

The Public Utilities Act became effective on March 23, 1912. All parties agree that this Commission's jurisdiction in this proceeding depends on whether the power to give the relief requested as against the Spring Valley Water Company was vested in the City and County of San Francisco on March 23, 1912. If it was so vested, this Commission has no jurisdiction; if it was not so vested, this Commission has power to proceed and to give such relief as the evidence, when presented, may warrant.

It accordingly becomes necessary to consider whether power in the premises was vested in the City and County of San Francisco on March 23, 1912. That the Spring Valley Water Company

has operated in San Francisco for many years prior to March 23, 1912, and was so operating on said date is not disputed.

In order to ascertain the powers of the City and County of San Francisco over public utilities on March 23, 1912, we must look to the constitution, the statutes and particularly San Francisco's Freeholders' Charter.

The constitutional provisions delegating to municipalities powers over public utilities are as follows:

(a) Section 11 of Article XI.
(b) Section 19 of Article XI.
(c) Section 1 of Article XIV.

I shall now consider these sections seriatim.

Section 11 of Article XI reads as follows:

> "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

While it has been clear, ever since the decision of the Supreme Court of the United States in the famous case of Munn vs. Illinois, 94 U.S. 113, that the power of the state to regulate and supervise public utilities is based on the state's police power, it seems equally clear, under the authorities, that the grant by the state to a municipality of general power to enact police regulations does not confer power to supervise and regulate the relationship between a utility and its patrons. The exercise by the state of its police power is one thing. The delegation to municipalities of general power to enact "police regulations" is an entirely different thing.

In the absence of delegation of power by the state, a municipality has no power to supervise and regulate the rates, service or other relations between a public utility and its patrons.

Cumberland Telephone and Telegraph Company vs. City of Memphis, 200 Fed. 657, 658.

Minneapolis General Electric Company vs. City of Minneapolis, 194 Fed. 215.

Mills vs. City of Chicago, 127 Fed. 731, 733.

City of Richmond vs. Richmond Natural Gas Company, 168 Ind. 82, 79 N.E. 1031, 1033.

Lewisville Natural Gas Company vs. State ex rel Reynolds, 135 Ind. 49, 34 N.E. 702, 21 L.R.A. 734.

State ex rel Marshall, Attorney for Public Utilities Commission vs. Wyandotte County Gas Company, 88 Kans. 165, 127 Pac. 642.

Helena Light and Railway Company vs. City of Helena, 130 Pac. 446, 448. (Mont).

Ball vs. Texarkana Water Corporation, 127 S.W. 1070, (Texas).

State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861, 863.

City of St. Mary's vs. Hope Natural Gas Company, 76 S.E. 841, 842 (W. Va.).

Proceeding a step further, the decided cases conclusively show that if the state delegates to a municipality the general power to make and enforce police regulations, the municipality is thereby granted no power to supervise or regulate the relation between a public utility and its customers. While the power of a municipality to enact "police regulations," undoubtedly gives to the municipality certain powers over public utilities, these powers are conferred because public utilities, by running cars on the public streets or erecting poles thereon or laying pipes therein, or by some similar act, come into such relationship with the city and its inhabitants as distinguished from the relationship between the utility and its patrons and customers, that the public health, safety, morals or welfare require the exercise by the municipality of the power to make what are ordinarily called police regulations. Thus, a municipality clearly has the right, under the power to enact "police regulations," to act on utilities in such matters as to limit the territory within which a gas plant may be erected,- Dobbins vs. City of Los Angeles, 139 Cal. 179; to enact an ordinance limiting the speed of street railroad cars within the city limits,- Simoneau vs. Pacific Electric Railway Company, 136 Pac. 544; or to direct a water company to cease maintaining an open water ditch in a public street,- City of Santa Ana vs. Santa Ana Valley Irrigation

Company, 163 Cal. 211.

These matters, however, involving the relationship between a utility and a city or the inhabitants thereof as a whole are fundamentally different from the regulation of the relationship between a utility and its patrons or customers. As was said by the Federal Court of Appeals of the Sixth Circuit in Cumberland Telephone and Telegraph Company vs. City of Memphis, 200 Fed. 657, 660:

> "To regulate and control the use of the streets by telephone companies is a natural incident of municipal government (although here expressly granted, see City of Memphis vs. Postal Co., 145 Fed. 602, 76 C.C.A. 292), and this control involves the right to bargain for such use before the right is granted (as it has been here expressly granted); but these things pertain to relations between the city and the company. They do not touch the contract relations between the company and its patrons."

Again, as was said by Judge Grosscup in Mills vs. Chicago, 127 Fed. 731, 734:

> "The mere laying of a gas pipe, and the installation of gas plants, together with their repair, are the subject matter of a power widely separable in circumstance and in substance, from power to deal with the rates at which gas shall be manufactured and sold. The first belongs naturally to the city whose streets are to be occupied, for it is related intimately with the supervision of the streets; the latter, with equal reason, is foreign naturally to the city, for the city is one of the parties in interest, and power to regulate prices ought not, in the usual course of affairs, to go to a party interested."

The courts have accordingly held that the delegation by a state to a municipality of general power to enact police regulations or to enact ordinances for the general welfare or similar powers does not confer the power to regulate rates or service or in any other way to regulate the relationship between a utility and its customers and patrons, as distinguished from the city or the inhabitants in general.

City of St. Louis vs. Bell Tel. Co., 96 Mo. 623, 10 S.W. 197, 199.

In re Pryor, 55 Kans. 724, 41 Pac. 958, 959, 29 L.R.A. 398.

State ex rel Wisconsin Telephone Company vs. City of Sheboygan, 111 Wisc. 39, 86 N.W. 657, 662.

Schroeder vs. Scranton Gas and Water Company, 20 Pa. Super. Ct. 255.

State ex rel. Gardner vs. Missouri and K. Telephone Co., 189 Mo. 83, 88 S.W. 41, 43, 44.

City of Jacksonville vs. Southern Bell Telephone and Telegraph Company, 57 Fla. 374, 49 So. 509, 511.

Bluefield Water Works and Improvement Co. vs. City of Bluefield, 69 W. Va. 1, 70 S.E. 772, 774, 775.

City of St. Mary's vs. Hope Natural Gas Co. 76 S.E. 841, 842 (W. Va.)

Oklahoma Railway Company vs. Powell, 127 Pac. 1080. (Okl.)

The constitution itself contains internal evidence showing that it could not have been intended in Section 11 of Article XI to give to a city any power over the relationship between a public utility and its patrons. I refer to the fact that in subsequent sections of the constitution, particularly in Section 19 of Article XI and in Section 1 of Article XIV the power of establishing rates for certain classes of public utilities was expressly conferred upon municipalities of this state. If the power to regulate the relationship between public utilities and their patrons is conferred by Section 11 of Article XI, it was entirely superfluous again to confer, in subsequent sections, a portion of the powers which had already been delegated to the municipalities. I believe that the courts would be slow to say that the applicable provisions of Section 19 of Article XI and of Section 1 of Article XIV are nothing but surplusage.

I conclude that no power in the premises was conferred upon the City and County of San Francisco by Section 11 of Article XI of the constitution.

The same conclusion follows with reference to Section 19 of Article XI. Spring Valley Water Company accepted the state's offer of a franchise as contained in this section as it stood prior to October 10, 1911, and by such acceptance secured the right to lay its mains and pipes in and along all the public

streets of San Francisco. (Russell vs. Sebastian, U.S. Supreme Court Decisions, April 6, 1914.) The only powers reserved to the City and County of San Francisco under that section were the power to supervise the location of the mains and cognate matters under the direction of the superintendent of streets or other officer in control thereof, to prescribe general regulations for damages and indemnity for damages, and to regulate the charges for water. The City and County of San Francisco was given no power under this section over such matters as adequacy of the service or the making of extensions.

Section 1 of Article XIV has no bearing on this proceeding for the reason that its delegation of power affects simply the establishment of rates or charges for water.

I conclude that no provision of the Constitution conferred upon the City and County of San Francisco any power over the service of a water utility. Likewise there is no general statute conferring such power.

Consequently we are driven to the Freeholders' Charter of San Francisco conferred by the Legislature under the provisions of Section 8 of Article XI of the Constitution. Here, if at all, must San Francisco secure power in the premises.

The applicable provisions of the Charter are Subsections 13 and 14 of Section 1 of Chapter II of Article II. Said Section 1 gives to the Board of Supervisors power, among others:

(7)

"13. Except as otherwise provided in this Charter, to regulate and control the location and quality of all appliances necessary to the furnishing of water, heat, light, power, telephonic and telegraphic service to the City and County, and to acquire, regulate and control any and all appliances for the sprinkling and cleaning of the streets of the City and County, and for flushing the sewers therein."

"14. To fix and determine by ordinance in the month of February of each year, to take effect on the first day of July thereafter, the rates or compensation to be collected by any person, company or corporation in the City and County, for the use of water, heat, light, power or telephonic service, supplied to the City and County, or to the inhabitants thereof, and to prescribe the quality of the service.-

(As amended November 5, 1907; approved by the Legislature November 23, 1907 (Statutes Special Session, 1907, page 55)."

The issue of jurisdiction in this proceeding depends, in the last analysis, upon the proper interpretation of these two subsections. The plaintiff and the City Attorney argue that these subsections confer no power in the premises on the city, while the defendant contends that they cover the present case and clearly give power to the city therein.

It will be noted that the Board of Supervisors is given power under Subsection 13 "to regulate and control the location and quality of all appliances necessary to the furnishing of water" and that under Subsection 14 the Board has power to prescribe the "quality of the service"of water utilities. The City Attorney contends that the Board has not been given power to compel the expenditure of money for capital purposes and that its power over the appliances necessary to the furnishing of water is limited to the quality and material of pipe as distinguished from its size. He also relies on this Commission's decision in Dooley vs. People's Water Company, (Vol. 3, Opinions and Orders of Railroad Commission of California, p. 948).

The City Attorney's argument with reference to the expenditure of moneys for capital account would not seem to be well taken for the reason that expenditures properly chargeable to capital account are frequently necessary to improve "the quality of the service," as to which matter the board is expressly given power. The Dooley case would not seem to be in point. That was a case of extending a water main to serve new customers in Berkeley. The Commission found from an examination of the provisions of the Freeholders' Charter of Berkeley that no power to compel extensions of public utility properties had been conferred on the City of Berkeley and hence concluded that the power is vested in this Commission. The present case is not one of extensions but one of improving the quality of the service by the enlargement of existing mains, and must be decided under the

provisions of the San Francisco Charter.

I have not been able to bring myself to agree with the City Attorney that the power to regulate and control the "quality of the appliances necessary to the furnishing of water" gives the power only to determine the character of the material of water mains and not the size or other characteristics necessary for adequate service. It becomes unnecessary, however, to pass upon this question for the reason that, in my opinion, the power conferred by Subsection 14, "to prescribe the quality of the service" clearly covers the present case. The complainants in this case want better service. That is the sum and substance of their complaint. They ask that the quality of their service be improved by giving them an adequate supply of water and to this end they ask that the size of the existing mains be increased. The matter seems to be one over which the Board of Supervisors alone has jurisdiction. I accordingly suggest to complainants that they present their complaints to the Board of Supervisors, which body alone has jurisdiction in the premises.

It will be understood, of course, that this decision is based on the specific provisions of the Freeholders' Charter of San Francisco and on the specific facts of this case. In other municipalities, this Commission largely has jurisdiction over the "quality of the service" of public utilities and in the City and County of San Francisco itself it is the duty of this Commission to exercise the broad powers conferred upon it by the Constitution and Statutes of this state except only in so far as power over a given public utility was vested in the city on March 23, 1912. As the Commission finds that it has no jurisdiction on the facts of this case, it has no other course open than to dismiss this proceeding.

I submit the following form of order:

O R D E R

A public hearing having been held in the above

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entitled proceeding and the Railroad Commission finding that it has no jurisdiction in the premises,

IT IS HEREBY ORDERED that the above entitled proceeding be and the same is 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 21st day of May, 1914.

Alex Gordon

Max Thelen

Edwin O. Edgerton

Commissioners.