BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

ORIGINAL

Decision No. 2816

TOWN OF SAUSALITO, a municipal corporation,
Complainant,

vs.

MARIN WATER AND POWER COMPANY, a corporation,
Defendant.

Case No. 731.

Thomas, Beedy & Lanagan, by James Lanagan, for complainant.
Lilienthal, McKinstry & Raymond, by Joseph Haber, Jr., for defendant.

THELEN, Commissioner.

O P I N I O N.

In this proceeding, the Town of Sausalito asks the Railroad Commission to establish a just and reasonable rate to be paid by the Town for water sold to it by Marin Water and Power Company, hereinafter referred to as the Water Company. The water thus bought is resold by Town of Sausalito through a municipally owned and operated distributing system to the inhabitants of the Town.

The complaint alleges, in effect, that complainant is a municipal corporation of the sixth class; that defendant is a California corporation authorized to supply water to the incorporated towns of Marin County and to the inhabitants thereof for domestic, irrigation and other purposes, and generally to carry on a water business; and that on March 8, 1909, the Town of Sausalito and the Water Company entered into a certain contract which is set out in full in the complaint, and to which more extended reference will hereinafter be made. The complaint contains allegations with reference to the circumstances surrounding the execution of said contract, alleges that the rates therein specified are unjust and unreasonable, and asks this Commission to

establish a reasonable rate to be paid by the Town of Sausalito to the Water Company.

The contract dated March 8, 1909, hereinbefore referred to, provides in part as follows:

(1) The Water Company agrees to proceed diligently to construct and lay pipes and conduits from its water mains at Corte Madera to the Town of Sausalito.

(2) The Water Company waives any rights which it might have to sell water to any firm, person or corporation within the limits of the Town of Sausalito, except to Northwestern Pacific Railroad Company and its successors.

(3) The Town of Sausalito agrees to pay to the Water Company the maximum rate of 30 cents per 1000 gallons when the total amount of water furnished to the Town shall not exceed an average during the year of 200,000 gallons per day, with proportionally lesser amounts if the average daily consumption exceeds 200,000 gallons.

(4) The Town agrees that during the first year of the contract it will pay for not less than 150,000 gallons of water per day, and after the first year for not less than 200,000 gallons per day for every year during the life of the agreement.

(5) Provision is made for payment by the Town for water delivered to it.

(6) The Town agrees that it will not, during the term of the agreement, grant a franchise to any other person or corporation to occupy the streets of Sausalito for the distribution of water. The Water Company is granted the right to occupy the streets of Sausalito for the purpose of supplying water to points outside of or beyond the Town limits.

(7) The term of the agreement is ten years from August 1, 1909, with an option to the Town of renewing the agreement for an additional ten years after the expiration of the first term.

The agreement contains other provisions to which it is not necessary here to refer.

The Water Company filed its written objections to the consideration of the complaint by this Commission and moved to dismiss the complaint on the ground that this Commission does not have jurisdiction to entertain the same.

A public hearing was held in San Francisco on May 20, 1915, at which time and place evidence and argument on the question of the Commission's jurisdiction were received. A stipulation with reference to certain of the facts was filed and it was agreed that the entire testimony in Application No. 1141, being application of Marin Municipal water district for an order of the Railroad Commission fixing and determining the just compensation to be paid to Marin Water and Power Company for its lands, property and rights, should be considered as being in evidence in the present proceeding. Time was granted for the filing of briefs. The briefs have been filed and the matter is now ready for decision.

The Water Company urges two main objections to this Commission's jurisdiction. In the first place, the Water Company urges that in the service of water by it to the Town of Sausalito, the Water Company acts entirely in a private capacity, and not as a public utility. The Water Company further contends that if it should be in error on this point, nevertheless this Commission cannot establish the rate at which water is to be sold by the Water Company to the Town, on the ground that the State has authorized the Town to contract away the State's power to regulate the rates for water supplied, and that the Town, in pursuance of such authorization, has contracted away the State's power for a term of ten years from March 8, 1909.

I shall first consider the point that the Water Company is not a public utility with reference to its sale of water to the Town of Sausalito..

Marin Water and Power Company was incorporated under the laws of this State on March 8, 1906. Among the purposes for which the company was incorporated, as shown by its articles of incorporation, are the following:

(a) To supply water to the County of Marin and other counties in the State of California, and to all the incorporated towns in said counties and State, and to all the inhabitants of said counties or said towns, for domestic, irrigation and all other purposes.

(b) To engage in and carry on in all their branches and in all places, a general water, lighting, power and irrigating business.

(c) To so serve the public under the purposes specified in the articles as to entitle the company to the right of eminent domain provided for in title VII of part 3 of the Code of Civil Procedure of the State of California.

In 1908, Marin Water and Power Company purchased the entire property of Marin County Water Company, which latter company was engaged in the sale of water to a number of cities and towns and the inhabitants thereof and in certain unincorporated territory, in Southern Marin County. Marin Water and Power Company sells water for compensation to the incorporated towns of San Rafael, Ross, San Anselmo and Larkspur and the inhabitants thereof, the residents of intervening and adjacent unincorporated territory, the State Penitentiary at San Quentin, the municipal water plant of Sausalito, the Northwestern Pacific Railroad Company in Sausalito, the United States Military Post at Fort Baker and the United States Immigration Station at Angel Island.

The water thus sold by the Water Company is storm water which is collected by the company by means of two dams and reservoirs, located on the northerly slope of Mt. Tamalpais, and known respectively as Lagunitas and Phoenix Gulch. From these reservoirs, transmission mains lead to the respective communities which are served by the company. The Town of Sausalito is supplied by means of an 18 inch main which leads from the Water Company's mains at Corte Madera in a general southerly direction to the Town of Sausalito.

Marin County Water Company, the predecessor of Marin Water and Power Company, claimed and exercised the right of eminent domain, as appears in the decision of the Supreme Court of this State in Marin County Water Company vs. County of Marin, 145 Cal. 586.

For many years, the rates to be charged for water by Marin Water and Power Company and its predecessor have been established by the various incorporated towns in southern Marin County, which have been supplied with water by these two companies. On April 25, 1912, Marin Water and Power Company filed with this Commission the following documents to show its rates, rules and regulations:

1. Ordinance No. 409, City of San Rafael, adopted April 15, 1912.
2. Ordinance No. 95, Town of San Anselmo, adopted April 10, 1912.
3. Ordinance No. 63, Town of Ross, adopted March 14, 1912.
4. Copy of contract with Town of Sausalito.
5. Printed form of Rules and Regulations governing water supply of the Marin Water and Power Company.

The company reported that all charges for water supplied in territory outside of incorporated towns are based on the ordinances passed by the towns of San Anselmo and Ross.

Thereafter, on May 28, 1914, the Water Company filed the ordinances of San Rafael, San Anselmo, Ross and Larkspur for the year 1913-1914 and the ordinance of Ross for the year 1914-1915.

The Water Company has regularly filed with this Commission its Annual Reports, required to be filed by all public utilities, which reports cover the company's entire business without segregating the Town of Sausalito business.

That Marin Water and Power Company is a public utility subject to the jurisdiction of the Railroad Commission can hardly be denied. The Water Company, however, urges that with reference to the Town of Sausalito business, it has acted in a private capacity and not as a public utility. The Water Company urges that its main from Corte Madera south was constructed for the specific purpose of serving Sausalito under its contract with the Town and that it has never held itself out as a public utility with reference to the service of the Town of Sausalito. It is, of course, conceivable that a water utility may appropriate certain water for public use and at the same time make a separate and distinct appropriation of water for its own private use or for disposition in some manner other than as a public utility. This theoretical possibility, however, is being stretched to the breaking point by utilities which are trying to escape the jurisdiction of this Commission. Carried to its logical conclusion, this claim may result in the remarkable spectacle of having water companies which have always been understood by everybody to be public utilities claiming that although the exact amount of water which has hitherto been sold to the public, is still impressed with a public use, the company now reserves and sets aside every additional drop of water under its control and refuses to dispose of the same to anyone unless a contract is signed. And the moment a contract is signed, the company claims that the very fact that a contract is signed shows that the company exercises the right of selection and that the water referred to in the contract is no longer to be regarded as water devoted to a public service, but rather as private water withdrawn from regulation by public authorities. If this argument is sound as to water companies, there is no reason why gas, electric and telephone companies cannot refuse to serve any new customers unless contracts are signed and then urge that

by reason of the fact that the company refused to render service unless a contract was signed, it had withdrawn itself from public regulation with reference to all new customers.

As already indicated, the waters collected by Marin Water and Power Company in its two reservoirs are all storm waters. There is here no room for the doctrine of the appropriation of waters from the banks of a living stream. Although it is theoretically possible, as already indicated, that a public utility water company may appropriate and hold out certain waters for private purposes, there is nothing to show that any particular water collected by Marin Water and Power Company has been held out for the Town of Sausalito service. There is no way to segregate this water from the other storm waters which are collected in Lagunitas and Phoenix Gulch reservoirs. The waters which are sold to other communities under an admittedly public service are gathered in the same reservoirs and flow from those reservoirs into the same pipe lines which are used for the collection and transmission of the waters which eventually are sold to the Town of Sausalito. When the flow of water starts from Lagunitas and Phoenix Gulch reservoirs, through the Water Company's transmission mains, there is no way to distinguish the water which will be delivered in Ross, San Anselmo or San Rafael from that which will ultimately be delivered in Sausalito. The main which leads through Ross to Corte Madera conveys water for distribution in Ross as well as water sold to the Town of Sausalito. Even the Water Company's most southerly main, leading from Corte Madera south toward Sausalito, is not devoted exclusively to the transmission of water to be sold to the Town of Sausalito. This main carries in part water which is sold by the Water Company to the Northwestern Pacific Railroad Company in Sausalito, to the United States Government at Fort Baker and to the United States Government for use on Angel Island. The Water Company has laid its mains on the streets of

Sausalito leading to the property of Northwestern Pacific Railroad Company and has extended the same to the southerly limits of the Town, where a connection is made with the main laid by the United States Government from the Fort Baker Reservation, and to the easterly limits of the Town and beyond to a wharf, at which point the Federal authorities take water for conveyance to Angel Island. That the service to Northwestern Pacific Railroad Company in the Town of Sausalito is a public utility service as to which this Commission has the power to establish the rates was practically admitted by the Water Company at the hearing and would seem to be clear. The Water Company itself, in July, 1914, filed its petition (Application No. 1223) asking this Commission's authority to increase the rate charged to the Federal Government for water used on Angel Island, which petition was granted on July 6, 1914. Application for this authority could only have been made on the theory that this is a public utility service over which this Commission has jurisdiction. Although it is claimed by the Water Company that the height of Phoenix Gulch Dam was raised 15 feet for the purpose of enabling the Water Company to supply water to the Town of Sausalito, there is nothing to show that the entire increase in the height of this dam was necessary to serve the Town of Sausalito or what portion of the water impounded as the result of this increased height of the dam ultimately finds its way to the Town of Sausalito. It is absolutely impossible to point to any water which has been segregated from the waters admittedly devoted to a public service and applied as a private venture to the service of the Town of Sausalito.

The case of Marin Water and Power Company vs. Town of Sausalito, 48 Cal.Dec.399, decided by the Supreme Court of this State on October 6, 1914, does not help the Water Company in its present contention. In this case, the Water Company sued the Town of Sausalito on its contract to recover payment under the terms of the contract for water delivered. As was said by Mr. Justice Shaw in his concurring opinion—

"The case, as presented, is the very simple and ordinary

case of an action to recover a sum due upon a contract as the purchase price of property sold and delivered in pursuance thereof."

The question whether the Water Company acts as a public utility in the sale of water to the Town of Sausalito was not necessary to the decision of the case and was not decided, although the matter was referred to incidentally by Mr. Justice Melvin. The question was expressly reserved, as is shown by the concurring opinion which was written by Mr. Justice Shaw and concurred in by Mr. Justice Sloss. In this connection, Mr. Justice Shaw says:

"What the effect would be if a rate were fixed by competent authority for the government of said company in its supply to consumers, is a question not here involved. Nor does the question arise whether the Town of Sausalito could, by ordinance, fix rates for the Marin Water and Power Company different from those fixed by this contract. It has not fixed such rates."

In the absence of the establishment of rates by competent public authority, it would seem to follow logically and conclusively that the Water Company has the right, in the absence of a showing of fraud, abuse, excess of authority or inequity, to stand on its contract and to recover thereunder, at least until competent public authority establishes a different rate.

Section 23 of Article XII of the Constitution of California, as amended on October 10, 1911, provides in part that--

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any......plant or equipment.......for the production, generation, transmission, delivery or furnishing of.........water, either directly or indirectly, to or for the public.......is hereby declared to be a public utility subject to such control and regulation by the railroad commission as may be provided by the legislature."

The section also provides that--

"Every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such regulation and control."

The section further provides as follows:

"The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the

rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Section 2 (w) of the Public Utilities Act reads as follows:

"The term 'water system,' when used in this act, includes all reservoirs, tunnels, shafts, dams, dikes, head-gates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, controlled, operated or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment or measurement of water for power, irrigation, reclamation or manufacturing, or for municipal, domestic or other beneficial use."

Section 2 (x) of the Public Utilities Act reads as follows:

"The term 'water corporation,' when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system for compensation within this state."

Section 2 (bb) of the Public Utilities Act reads as follows:

"The term 'public utility,' when used in this act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger and warehouseman, where the service is performed for or the commodity delivered to the public or any portion thereof. The term 'public or any portion thereof' as herein used means the public generally, or any limited portion of the public including a person, private corporation, municipality or other political subdivision of the state, for which the service is performed or to which the commodity is delivered, and whenever any common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger or warehouseman performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger or warehouseman is hereby declared to be a public utility subject to the jurisdiction, control and regulation of the commission and the provisions of this act. Furthermore, when any person or corporation performs any service or delivers any commodity to any person or persons, private corporation or corporations, municipality or other political subdivision of the state, which in turn either directly or indirectly, mediately or immediately, perform such service or deliver such commodity to or for the public or some portion thereof, such person or persons, private corporation or corporations and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the

commission and to the provisions of this act."

Section 1 of Chapter 80 of the Laws of 1913, approved April 25, 1913, reads as follows:

> "Whenever any person, firm or private corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system within this state, sells, leases, rents or delivers water to any person, firm, private corporation, municipality or any other political subdivision of the state whatsoever, except as limited by section 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility, and subject to the provisions of the public utilities act of this state and the jurisdiction, control and regulation of the railroad commission of the state of California."

Unless these constitutional and statutory provisions should for any reason be held to violate some provision of the Federal Constitution, it would seem that there can be no doubt whatsoever that the Water Company is a public utility with respect to its service to the Town of Sausalito as well as its service to other customers. That the people of California had the right to enact Section 23 of Article XII of the Constitution, and that the Legislature of this State had the right to declare such companies as the Water Company to be public utilities with reference to their entire business is, in my opinion, clearly established by a long line of decisions of the Supreme Court of the United States, beginning with _Munn_ vs. _Illinois_, 94 U. S. 113, and ending for the present with _German Alliance Insurance Company_ vs. _Lewis_, 233 U. S. 389, decided on April 20, 1914. These authorities are analyzed in this Commission's Decision No.1688, in Case No. 551, _Becker_ vs. _Holabird_ (Vol. 5, Opinions and Orders of the Railroad Commission of California, p. 153).

I find as a fact that Marin Water and Power Company is a public utility with reference to its sale of water to the Town of Sausalito, as well as with reference to its sale of water to its other customers. It follows that this Commission has jurisdic-

tion to establish the rate to be charged by the Water Company for water sold to the Town of Sausalito, unless the State has in some way foreclosed itself from exercising such jurisdiction.

This brings me to a consideration of the second point urged by the Water Company.

In its brief herein, the Water Company assumes, for the sake of the argument, that it is a public utility with reference to its sale of water to the Town of Sausalito, but contends that even if this is the case, the company is not subject to this Commission's jurisdiction. This contention is based on the claim that the Town of Sausalito has been granted authority by the State to contract away the State's power over the rate at which water is sold to the Town of Sausalito and that the Town has, by contract, actually bartered away the State's power in this respect. In view of the constitutional provisions of this State, conferring authority upon the Railroad Commission, this question is really a Federal question. In passing upon the Water Company's contention in this regard I shall accordingly confine myself largely to the decisions of the Supreme Court of the United States.

Since the decision of the Supreme Court of the United States in the case of Munn vs. Illinois, 94 U. S. 113, it is generally agreed that the power of the State to supervise and regulate public utilities is based on the police power. Whenever the State supervises and regulates a public utility, in establishing rates, removing discriminations, regulating service, extensions and facilities, supervising the issue of securities, or in other respects affecting the relationship between the utilities and their customers, such action is taken under the State's police power. See also Dillon on Municipal Corporations, 5th Edition, Section 1324, and the authorities there cited. Formerly, there was some doubt as to whether a state, even under the police power, might change a rate which had been established by a utility by

contract. Now, however, it is unanimously held that the provisions of the Federal Constitution forbidding laws impairing the obligation of contracts and declaring that property shall not be taken without due process of law, have no application to the regulation and supervision of public utilities by the State, under its police power. No public utility can, by the simple device of entering into contracts with its customers, withdraw itself from the State's control. All such contracts, whether made before or after the State actually undertakes the supervision and control of public utilities, must be taken to have been made subject to the State's right to exercise its power of supervision and control whenever it sees fit to do so.

The general principle is clearly set forth in Odd Fellows' Cemetery Association et al. vs. City and County of San Francisco, 140 Cal. 226; Chicago, Burlington and Quincy Railroad Co. vs. Nebraska, 170 U. S. 57; and Manigault vs. Springs, 199 U. S. 473.

In the Odd Fellows' Cemetery Association case, the Supreme Court of this State says:

> "It is the settled law that all property is held subject to the exercise of the police power, and that the provisions of the constitution forbidding laws impairing the obligation of contracts, and declaring that property shall not be taken without due process of law, have no application in such cases."

In the Chicago, Burlington and Quincy Railroad Company case, it was held that a contract between the City of Omaha and two railroad companies providing for the building of a viaduct in Omaha at the expense of the railroad companies, though valid when made, was subject to the supervisory power of the legislature of Nebraska, which thereafter enacted a statute changing the terms of the contract with reference to the duty of keeping the viaduct in repair. Mr. Justice Shiras, in ruling against the claim of the railroads that this statute impaired the obligation of their contract, says, at page 72:

"Usually where a contract, not contrary to public

policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such contract is constitutionally protected from hostile legislation."

Referring then to the distinction between a contract between private individuals and a contract between public or quasi-public individuals or corporations, Mr. Justice Shiras continues:

"When, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and **welfare** of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the federal constitution which protects contracts from legislative action can not in every case be successfully invoked. The presumption is that when such contracts are entered into, it is with the knowledge that parties can not, by making agreements on subjects involving the right of the public, withdraw such subjects from the police power of the legislature."

In the <u>Manigault</u> case, plaintiff contended that a certain contract by which the defendant had agreed with him to remove a certain dam over a navigable river had been impaired by a subsequent act of the state legislature authorizing the defendant to erect and maintain a dam across this river. In deciding that the principle of the impairment of the obligation of the contract does not apply to the exercise by a state of its police power, the Supreme Court of the United States, at page 480, says:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contract between individuals."

See, also, the analogous cases of <u>Louisville and Nashville Railroad Company</u> vs. <u>Mottley</u>, 219 U. S. 467, and <u>Armour Packing Company</u> vs. <u>United States</u>, 209 U. S. 56.

In a number of recent cases, the United States Supreme Court has held that the contract clause in the Federal Constitution does not prevent a state from altering or modifying a rate established by a public utility by contract.

In Knoxville Water Company vs. Knoxville, 189 U. S. 434, the water company made the claim, among others, that an ordinance of the City of Knoxville establishing maximum rates for water, impaired the company's contracts with its consumers. In ruling against this claim, Mr. Justice Holmes, at page 438, says:

> "But such contracts, of course, were made by it (the water company) subject to whatever power the city possessed to modify rates."

The city's power in this behalf was that portion of the city's police power in the premises which had been delegated by the State to the city.

In Portland Railway, Light and Power Company vs. Railroad Commission of Oregon, 229 U. S. 397, decided on June 10, 1913, it appears that the Railroad Commission of Oregon found that discrimination existed in the fares charged by Portland Railway, Light and Power Company between Portland and Milwaukee as contrasted with the fare charged between Portland and Lents. The Commission reduced the fare between Portland and Milwaukee from ten to five cents, so as to remove the discrimination. Referring to the claim of the railroad that the discrimination was justified by reason of a contract which the railroad had entered into providing for a five cent fare between Portland and Lents, Mr. Justice Day, at page 412, says:

> "The contract set up by which the fares from Lents were required to be not greater than five cents cannot be held to justify the discrimination, as such contracts must be taken to have been made in view of the continuing power of the state to control the transportation of common carriers subject to its jurisdiction."

The same principle was applied by the Supreme Court of

this State in Pinney and Boyle Company vs. Los Angeles Gas and Electric Corporation, 168 Cal. 12, decided on June 10, 1914. In this case, after Los Angeles Gas and Electric Corporation had contracted to supply Pinney and Boyle Company with electric energy at a certain rate, the City of Los Angeles established the rates which the Electric Corporation was authorized to charge, which rates were higher than those established in the contract with Pinney and Boyle Company. Pinney and Boyle Company refused to pay the higher rate and defendant declined to furnish electricity except at the rate prescribed by the ordinance of City of Los Angeles. In holding that the contract rate must yield to the rate established by public authority, Mr. Justice Henshaw, at page 18, says:

> "A word perhaps should be added touching the asserted violation of the provision of the contract between the company and plaintiff by the enforcement of the terms of the regulatory ordinance. Upon this it is sufficient to say that it will be conclusively presumed that the parties contracted in contemplation of the power of the proper board or tribunal to fix the rates in every case where such power exists and may have been thereafter legally exercised (Citing cases)."

The Water Company in its brief recognizes this general rule as follows:

> "We recognize the general rule that where a public utility contracts for service at a fixed rate for a definite term, ordinarily the rate may be modified during the term provided by the contract without impairing the obligation thereof, and this on the theory that such regulation is an exercise of the state's police power inherent in its sovereignty and that the parties must be deemed to have contracted with reference to such possibility of regulation by the state in the exercise of such power."

In view of this admission, I shall not pursue the subject further, but shall content myself by referring to this Commission's Decision No. 536, in Application No. 118, being application of Murray and Fletcher for an order authorizing an increase in water rates (Vol. 2, Opinions and Orders of the Railroad Commission of California, p. 464), and Decision No. 1309, in Case No. 483, Town

of Ukiah vs. Snow Mountain Water and Power Company (Vol. 4, Opinions and Orders of the Railroad Commission of California, p. 293), in which cases the authorities bearing on this question are collected.

The Water Company, however, contends that its contract is taken out of the general rule by reason of the fact that the contract is made with a municipality instead of with a private corporation or person. In this connection, the Water Company first urges that the Town of Sausalito is exercising a private function and is a private water seller. Davoust vs. City of Alameda, 149 Cal. 72; South Pasadena vs. Pasadena Land and Water Company, 152 Cal. 579. If this is true, it is difficult to understand why the contract of the public utility with this private consumer should stand on any different footing from its contract with any other private consumer. As already indicated, the rate specified in every contract between a public utility and a private corporation or person as consumer, is subject to alteration at the hands of the State under its police power. I can see no distinction in this respect between a private corporation which is a consumer and a municipal corporation which acts in the capacity of a private corporation as a consumer. Hence, if the Town of Sausalito be regarded as exercising a private function and as being a private consumer, its case falls within the general rule and the State has the right to regulate the rate at which the service is rendered by the public utility.

The Water Company also relies on a number of authorities dealing with the right of the State to regulate a public utility rate in cases in which the State has delegated or is claimed to have delegated to a municipality, acting in its governmental capacity, the right to contract away the State's power of regulation over a utility's rates. In these cases, the municipality acts not in a private capacity but as agent of the State in a governmental capacity. It certainly cannot be contended that the

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municipality, acting as a private corporation, can be authorized to barter away a power of government.

The principle on which the Water Company relies, namely, that the State may authorize a municipality to contract away a part of the State's police power in the supervision and regulation of public utilities, is established by a number of decisions of the Supreme Court of the United States. Los Angeles vs. Los Angeles City Water Company, 177 U. S. 558; Detroit vs. Detroit Citizens Street Railway Company, 184 U. S. 368; City of Cleveland vs. Cleveland City Railway Company, 194 U. S. 517; Vicksburg vs. Vicksburg Waterworks Company, 206 U. S. 496; City of Minneapolis vs. Minneapolis Street Railway Company, 215 U. S. 417. In each of these cases, the Supreme Court of the United States held that an ordinance establishing the rates to be charged by a public utility amounted to a contract, that such contract had been authorized by the State itself and that the municipality could not thereafter reduce the rate established in the original ordinance. In two of these cases, the Los Angeles case and the Minneapolis case, the Legislature had expressly ratified the original ordinance. In the other three cases, the court found that the State had expressly authorized the municipality to contract away the State's power with reference to the regulation of the utility rate. In none of these cases was there any constitutional provision prohibiting the action taken by the Legislature, either directly or through the instrumentality of a municipality, and in each of these cases, the later action attempting to reduce the rate, was taken by the municipality itself and not by the Legislature or a State commission.

In a number of other cases, including the more recent cases, the Supreme Court of the United States has held that on the facts of those cases, the local authorities had not been granted the power to barter away the State's right to regulate a utility's

rate. In these cases, later ordinances reducing the rates have been upheld by the Supreme Court.

In Freeport Water Company vs. Freeport City, 180 U. S. 587, the water company brought an action against the city to recover compensation for water delivered. The city replied that it had reduced the rates established in the original ordinance and offered to pay the lower rates. The water company replied that the later ordinance impaired the company's contract rights growing out of the original ordinance, and hence, was void under the Federal Constitution. The water company relied on a statute, enacted prior to the original ordinance, authorizing cities and villages to "contract" with water companies "for a supply of water for public use, for a period not exceeding thirty years." This language is practically identical with the portion of the Municipal Incorporation Act of this State, on which the Water Company herein relies and to which reference will hereinafter be made.

The Supreme Court of Illinois, in holding that this language was not sufficient to authorize a municipality to contract away the State's power to regulate the rates established by ordinance, says:

> "The language of the statute does not necessarily imply the power to make a fixed rate. The authority 'to contract for a supply of water for public use for a period not exceeding thirty years' does not necessarily imply that the price of the supply should be fixed for the entire period. The supply could be made for the entire term, but the price is to be determined from time to time, and the rates to be settled by the rules of the common law."

The Supreme Court of the United States, by a divided court, sustained the decision of the Supreme Court of Illinois, thus holding that the power of a municipality to "contract" for a supply of water for public use for a definite term does not give the municipality the right to contract away the power of the State, or the municipality's own power as the agent of the State, in its governmental capacity, to regulate the rate.

In Rogers Park Water Company vs. Fergus, 180 U. S. 624, a similar conclusion was reached by the Supreme Court of Illinois and sustained by the Supreme Court of the United States, again by a divided court.

The leading case on this question is Home Telephone and Telegraph Company vs. City of Los Angeles, 211 U. S. 265, decided on November 30, 1908. This was a complaint by the telephone company for an injunction against the City of Los Angeles to prevent the city from enforcing certain ordinances establishing maximum rates for telephone service. The ordinance originally granting the franchise to the telephone company had prescribed a certain maximum rate which was higher than the rate which the city council thereafter undertook to establish by the ordinance which the telephone company tried to enjoin. The telephone company claimed that the later ordinance, establishing lower maximum rates, violated its contract with the city as expressed in the ordinance originally granting the company's franchise. The Supreme Court of the United States held that the State of California had not delegated to the City of Los Angeles the power to contract away the city's right, as agent of the State, to supervise and regulate the rates of the telephone company, and that consequently, as no binding contract establishing rates had been entered into, the case presented was not one of the impairment of contract obligations. At page 273, Mr. Justice Moody says:

> "The surrender, by contract, of a power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required."

Again, at page 273, he continues:

"It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit vs. Detroit Citizens' Street Railway Company, 184 U.S. 368, 382, Vicksburg vs. Vicksburg Water Works Company, 206 U.S. 496, 508. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." (Citing cases).

Referring then to the clause in the charter of the City of Los Angeles authorizing the city to establish telephone rates, the court, at page 274, says:

"This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself."

After analyzing most of the cases upon which the defendant in this proceeding relies, the court, at page 277, concludes:

"All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied."

In Wyandotte County Gas Company vs. State of Kansas, 231 U. S. 622, decided on January 5, 1914, the State of Kansas filed a complaint for an injunction against Wyandotte County Gas Company to enjoin the company from charging its domestic consumers in certain cities in Kansas, a rate for natural gas in excess of 25 cents per 1000 cubic feet. The gas company insisted that its contract rights had been impaired. The company relied on an ordinance passed by Kansas City in 1904, prescribing a rate for natural gas higher than the 25 cent rate later established by

an act of the legislature. The gas company relied on a statute of 1903, which gave to cities of the first class, including Kansas City, the power to make all contracts necessary to the exercise of the city's corporate or administrative powers, to fix maximum rates for certain public utility services, including gas, and to secure a supply of natural gas and to contract for laying pipes for such service. Although the ordinance granting a franchise to Wyandotte Gas Company was undoubtedly became, upon acceptance, in certain aspects a legal contract, the Supreme Court of the United States held that Kansas City had not been authorized to contract away the governmental power of regulating utility rates and that the legislature had the right thereafter to decrease the rates originally established by ordinance.

In the very recent case of Milwaukee Electric Railway and Light Company vs. Railroad Commission of Wisconsin, 238 U.S. 174, decided on June 14, 1915, the electric railway company operating in Milwaukee filed a complaint against the Railroad Commission of Wisconsin to enjoin the enforcement of an order directing the company to sell street car tickets in packages of 13 for 50 cents. The electric railway company claimed that this order amounted to an impairment of a contract in that the original franchise ordinance provided for the sale of tickets in packages of 25 for one dollar, or 6 for 25 cents, this rate being higher than that established by the Railroad Commission. The judgment of the Supreme Court of Wisconsin, sustaining the Railroad Commission's order, was affirmed by the Supreme Court of the United States by a unanimous decision.

Referring to the general principle that the renunciation of the sovereign right of establishing public utility rates must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction, Mr. Justice Day says:

"The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed."

Mr. Justice Day holds that it is necessary, in order to establish a case of impairment of contract obligations, under circumstances such as those shown by the record, to show that a contract has been entered into clearly excluding any further right of the State to act upon the subject in the exercise of its legislative authority. After reviewing the decision of the Supreme Court of Wisconsin, Mr. Justice Day concludes as follows:

"In view of the weight which this court gives in deciding questions involving the construction of legislative acts to decisions of the highest courts of the states in cases of alleged contracts, and our own inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the legislature of the right to exercise in the future an acknowledged function of great public importance, we reach the conclusion that the judgment of the Supreme Court of Wisconsin in this case should be affirmed."

Turning now to the particular constitutional and statutory provisions under which this question must be decided in California, I desire to direct attention, first, to Section 1 of Article XIV of the Constitution of this State, as adopted in 1879, reading as follows:

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that

other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process, to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation, to the city and county, or city or town where the same are collected, for the public use."

This section specifically provides that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied "to any city and county, or city or town, or the inhabitants thereof" shall be fixed annually by the appropriate legislative body. The section provides further that any such body failing annually to pass the necessary ordinances or resolutions fixing water rates shall be subject to peremptory process to compel action, and shall be liable to such further process and penalties as the Legislature may prescribe. It thus appears clearly that the Constitution itself, prior to the transfer of supervisory powers over public utilities to this Commission, required that the local authorities should establish, each year, the rates to be charged by public utility water companies "to any city or town, or the inhabitants thereof." The supply of of water by Marin Water and Power Company to the Town of Sausalito falls squarely within the language of this constitutional provision. That the framers of the Constitution had in mind the possibility of the sale of water by a municipality through the instrumentality of a publicly owned and operated distributing system appears from Section 19 of Article XII of the Constitution, as originally adopted in 1879.

In Spring Valley Water Works vs. Board of Supervisors

of San Francisco, 61 Cal. 18, the Supreme Court, in referring to Section 1 of Article XIV of the Constitution of this State, says:

> "The provisions contained in the above Article, to the effect that 'the rates of compensation to be collected by any person, company, or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed,' etc., is as broad and comprehensive as the English language could make it, and gives to the Board of Supervisors of the city plenary power over the subject matter to which the Article relates. Water supplied to the city and county is as fully covered by the express language of the Article as is water supplied to the individual consumers, and the whole matter of rates or compensation is placed within the power and control of the Board of Supervisors."

While the rates established by the Board of Supervisors in the Spring Valley case were for water supplied to the municipality, to be used for its municipal purposes, it is no more illogical to say that the Board of Supervisors shall have the power to prescribe the rates to be collected for the public utility for water sold to the municipality for one purpose than for another purpose. If the municipality has the right to prescribe the rates which it shall pay for water which it uses for flushing its sewers, or for fire service, there would seem to be no logical reason why it should not also prescribe the rates to be paid for the water which it thereafter sells to its inhabitants. In either event, the party buying the water fixes the rate at which he may buy it. The language of the Constitution is broad enough to cover the establishment by the municipality of the price at which water is to be sold to it for resale to its inhabitants. Any act of the Legislature undertaking to authorize a municipality to contract away its right to establish public utility water rates would seem to be in absolute defiance of the mandate of the State as expressed in Section 1 of Article XIV of the Constitution, which requires the local authorities, each year, under penalties to be prescribed by the Legislature, to establish the rates for which water may be sold to the municipality and to the inhabitants thereof.

In accordance with the provisions of Section 1 of Article XIV, the Legislature, by Act of March 7, 1881, authorized and empowered the various local legislative bodies, and made it their official duty, to fix, annually, the rates "that shall be charged and collected by any person, company, association or corporation, for water furnished to any such city and county, or city or town, or the inhabitants thereof." The Act provides that any board of supervisors, or other legislative body, of any city and county, city or town, which shall fail or refuse to perform any of the duties prescribed by the Act, shall be deemed guilty of malfeasance in office, and upon conviction thereof, at the suit of any interested party, in any court of competent jurisdiction, shall be removed from office. It would seem that this statute, like Section 1 of Article XIV of the Constitution, is entirely inconsistent with any grant of power by the Legislature to any municipality of the right to contract away its power and duty, as agent of the State, to establish water rates annually.

Section 548 of the Civil Code of this State reads as follows:

> "No corporation formed to supply any city, city and county, or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city, city and county, or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city, city and county, or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

The Legislature thus provided that contracts for the supply of water, while they are valid and binding, "do not take from the city, city and county, or town the right to regulate the rates for water." Thus, the Legislature declared, in most unmistakable terms, that contracts entered into by municipalities for the supply of water should not deprive the local authorities of the right to regulate the rates.

The Water Company relies solely on Subdivision 3 of Section 862 of the Municipal Incorporation Act, referring to the powers of municipal corporations of the sixth class, and reading as follows:

> "The board of trustees of said city shall have power; 3. To contract for supplying the city or town with water for municipal purposes or to acquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of such city or the inhabitants, or for irrigating purposes therein."

The Water Company urges that by granting to cities of the sixth class the power "to contract for supplying the city or town with water for municipal purposes," the Legislature intended to grant, and did grant to cities of the sixth class, the power to contract away the right of the State, and their own right as agents of the State in their governmental capacity, to establish, from time to time, the rates to be charged for water sold to such municipalities by water companies. In the light of the decisions of the Supreme Court of the United States, to which I have referred, and of the specific constitutional and statutory provisions of this State, I am of the opinion that there is no merit in this contention. The construction suggested by the Water Company would do direct violence to the mandate of the Constitution itself and would be at entire variance both with the law of 1881 and with Section 548 of the Civil Code. The contention of the Water Company is entirely inconsistent with the duty of the local authorities to establish the water rates each year, as prescribed both by the Constitution and by the statute of 1881, and is also absolutely inconsistent with the provisions of Section 548 of the Civil Code specifically providing that in case of contracts for the supply of water, the local authorities shall retain the right to regulate the rates.

After a careful review of the authorities and of the applicable constitutional and statutory provisions, I am of the

opinion that the State of California has not granted to the Town of Sausalito the right to contract away the State's power to regulate the rate at which water may be sold to the Town. The people of California, by recent amendment to Section 23 of Article XII of the Constitution of this State, have conferred upon the Railroad Commission the power, in so far as the Railroad Commission had not already acquired the same, to establish all the rates to be charged by public utilities in California. The conclusion seems irresistible that the Railroad Commission has the power to establish the rate at which Marin Water and Power Company sells water to the Town of Sausalito.

I find that there is no merit in the Water Company's contentions with reference to this Commission's jurisdiction and recommend that an order be entered directing the Water Company to file its answer, so that this case may be heard and disposed of on the merits.

I submit the following form of order:

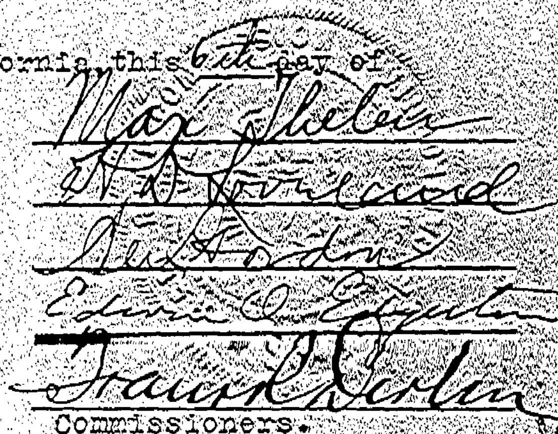
O R D E R.

Defendant's motion to dismiss the complaint in the above entitled proceeding by reason of lack of jurisdiction having come on duly for hearing, and argument having been had thereon, and said motion having been submitted,

IT IS HEREBY ORDERED that said motion be and the same is hereby denied, and that the defendant be and it is hereby directed to satisfy the complaint or to answer within twenty (20) days.

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 6th day of October, 1915.



Commissioners.