

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the matter of the petition)
of the CITY OF PALO ALTO, a)
municipal corporation, for an)
order fixing and determining)
the just compensation to be)
paid to PALO ALTO GAS COMPANY)
for its property.)

ORIGINAL

Application No. 1760.

Decision No. 2212

Norman E. Malcolm, City Attorney, for City of Palo Alto.
Allen L. Chickering for Palo Alto Gas Company.

THELEN, Commissioner.

OPINION ON MOTION TO DISMISS.

This is a motion made by Palo Alto Gas Company to dismiss the petition of the City of Palo Alto herein, on the ground that this Commission does not have jurisdiction to entertain the same.

The petition of the City of Palo Alto herein was filed under the provisions of Section 47 of the Public Utilities Act, providing in part that if any county, city and county, incorporated city or town, municipal water district, county water district, irrigation district, public utility district or any other public corporation may file with the Railroad Commission a petition setting forth the intention of petitioner to acquire under eminent domain proceedings, or otherwise, the property of any existing public utility, whereupon the Railroad Commission is charged with the duty of fixing and determining the compensation to be paid by petitioner to the public utility affected. This compensation is made conclusive in eminent domain proceedings.

The petition herein alleges, in effect, that City of Palo Alto is a municipal corporation organized and doing business under a freeholders charter; that Palo Alto Gas Company is a public utility corporation engaged in the business of distributing and selling gas to the inhabitants of the City of Palo Alto; that on September 17, 1904, the Town of Palo Alto, petitioner's predecessor, granted to D. O. Druffel a gas franchise which was thereafter assigned to Palo Alto Gas Company, a copy of said franchise being attached to the petition and marked "Exhibit A"; that on May 10, 1915, the Council of the City of Palo Alto passed a resolution declaring that it is the intention of the City to acquire, under eminent domain proceedings, or otherwise, the property and rights of Palo Alto Gas Company within said city; and that it is the intention of the City of Palo Alto to acquire under eminent domain proceedings, or otherwise, the existing utility known as Palo Alto Gas Company, together with its property and rights, which said public utility and its property and rights consist of a gas distributing system partially completed, located in the City of Palo Alto, and consisting of all pipes, mains and service laterals laid in the streets and avenues of said city, together with meters. Petitioner asks that the Railroad Commission fix and determine the just compensation to be paid by the City of Palo Alto for said public utility, its property and rights.

Attached to the petition as Exhibit "A" is a copy of Ordinance No. 105, of the Town of Palo Alto, adopted on September 17, 1904, granting to D. O. Druffel, his heirs, executors, administrators and assigns the franchise, for a term of 50 years, to

construct, equip, operate and maintain a gas plant in the Town of Palo Alto, and to lay gas pipes for the purpose of carrying gas for light, heat and power in and along the streets and thoroughfares of the Town of Palo Alto, and to manufacture, distribute and sell gas to the inhabitants of the town, and to receive and collect charges therefor. The franchise was granted upon certain terms, conditions, restrictions and limitations, of which it is necessary for the purpose of this decision, to refer to only the first condition, reading as follows:

"First: That said Town of Palo Alto shall, at any time after the expiration of ten(10) years from the granting of said franchise, have the option to purchase said gas manufacturing plant and distributing system, together with all other property both real and personal used in connection with the operation of or appurtenant to said gas manufacturing plant and distributing system, at a reasonable price, to be arrived at in the manner following, to wit: A committee shall be appointed consisting of Five (5) persons, two of whom shall be selected by the grantee hereof, or his heirs, executors, administrators or assigns, two by the Board of Trustees or other governing body of the Town of Palo Alto, and the fifth by the four thus selected. Said committee or a majority of it shall investigate the condition and value of said gas manufacturing plant and distributing system, together with all other property both real and personal used in connection with the operation of or appurtenant to said gas manufacturing plant and distributing system, and report the same to the Board of Trustees or other governing body of said Town of Palo Alto, and if said Board of Trustees or other governing body of said Town of Palo Alto should then determine to acquire said gas manufacturing plant and distributing system at the valuation so reported to it by said committee, the grantee hereof, or his heirs, executors, administrators or assigns, shall thereupon and upon the payment of said valuation so fixed as aforesaid convey said gas manufacturing plant and distributing system, together with all other property both real and personal used in connection with the operation of or appurtenant to said gas manufacturing plant and distributing system, to said Town of Palo Alto."

It will be observed that the franchise refers to a "gas plant" in the Town of Palo Alto as well as to a distributing system therein. The description of the property contained in the petition refers to "a gas distributing system partially completed," and makes no reference to a gas plant. A gas plant has never been constructed in the Town of Palo Alto under this franchise, the rights exercised thereunder being limited to the construction and operation of a gas distributing system.

The sole point urged by Palo Alto Gas Company in opposition to this Commission's jurisdiction is that Ordinance No. 105 having set forth one method by which the Town of Palo Alto might purchase the property to be installed under the franchise, the Town of Palo Alto and its successor, the City of Palo Alto, are precluded from availing themselves of any different method. It is urged that by reason of the provisions with reference to arbitration contained in said ordinance, the City of Palo Alto has no power to acquire the Palo Alto Gas Company's property by the exercise of the power of eminent domain.

I am unable to agree with this contention. The Town of Palo Alto did not contract to buy the property to be installed under the franchise. The Town merely reserved to itself the option to buy the property, if it desired so to do, at a price to be fixed by a board of arbitration.

There is nothing in Ordinance No. 105 showing the slightest intention on the part of the Town of Palo Alto to deprive itself of the right at any time to acquire by eminent domain proceedings the property to be installed under the franchise.

Furthermore, under the uniform current of authority, the Town of Palo Alto had no power to contract away its right to exercise the power of eminent domain. Pond--Public Utilities.

Section 574; McQuillin--Municipal Corporations, Volume 4,
Section 1457; Lewis--Eminent Domain, (3rd Edition) Section 406;
15 Cyc 557.

It being admitted that the present proceeding falls within the provisions of Section 47 of the Public Utilities Act, and the Town of Palo Alto having in no way estopped itself from the exercise of the power of eminent domain and from the filing of this proceeding under the provisions of said Section 47, I conclude that the Palo Alto Gas Company's contention that this Commission does not have jurisdiction in this proceeding is not well taken.

The motion to dismiss should be denied and the petition herein should be set down for hearing on the merits.

I submit the following form of order:

O R D E R.

The motion of Palo Alto Gas Company to dismiss the petition in the above entitled proceeding 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.

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 20th day of November, 1915.

Marc Thelem
H. D. Rowland
Alex. G. Ord
Edwin C. Edgerton
Francis R. DeWitt
Commissioners.