Decision No. 582

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BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the matter of the application of THE SOUTHERN SIERRAS POWER COMPANY for the determination of whether it is necessary for said Company to secure from this Commission a certificate of public convenience and necessity or a permit under the provisions of Section 50 of the Public Utilities Act, for the prosecution of its operations in San Bernardino County, and if so, for an order granting such certificate or permit.

Application No.485.

Charles F. Potter and John R. Dixon for applicant.
H. H. Trowbridge for Southern California Edison Company, Intervenor.

THELEN, Commissioner.

O P I N I O N.

This is an application on the part of The Southern Sierras Power Company for a determination by this Commission as to whether or not a certificate of public convenience and necessity or a permit of any kind must be secured from this Commission before said Company may continue certain operations in the County of San Bernardino, and if so, for an order of this Commission granting a certificate of public convenience and necessity or a permit, as the case may be, for authority to proceed with the completion of applicant's work in the County of San Bernardino.

Applicant was incorporated in June, 1911, under the laws of the State of Wyoming. The Company contemplates the construction of a transmission line from near Bishop, in Inyo County, to San Bernardino and Riverside Counties and the construction of distributing lines radiating therefrom. In October, 1911, the Company commenced construction work on two hydro-electric plants in Inyo County, of a capacity respectively of 1500 and 2000 kilowatts. This work was commenced under contracts made in June

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and July, 1911, and has been prosecuted continuously without interruption subsequent to said time. Transmission lines into San Bernardino and Riverside Counties have now been completed and some two hundred miles of distributing lines have been constructed, whereof some twenty miles are located in San Bernardino County. The transmission and distributing lines in San Bernardino County are built in part along and across public highways. The cost of the entire system to date has been some three million dollars, whereof between four and five hundred thousand dollars have been spent in the County of San Bernardino, outside of incorporated cities and towns.

On the 29th day of March, 1913, the Southern California Edison Company filed with this Commission an affidavit of Horace S. Williamson, an employee of the Company, alleging in effect, that The Southern Sierras Power Company had commenced the construction of an electric trahsmission line along Highland Avenue, outside the corporate limits of the city of San Bernardino, toward the property of the Lytle Creek Water and Improvement Company. The affidavit alleged on information that it was the intention of The Southern Sierras Power Company to complete this line to said property, a distance of some six miles. The affidavit further alleged that the Lytle Creek Water and Improvement Company has heretofore been served and was at the date of the affidavit being served by the Southern California Edison Company, and that said extension was an extension into territory not theretofore served by The Southern Sierras Power Company. The affidavit further alleged that The Southern California Edison Company was supplying the Lytle Creek Water and Improvement Company under contract which was to expire on April 11, 1913, and it appears from other evidence in this proceeding that The Southern Sierras Power Company had entered into a contract with the Lytle Creek Water and Improvement Company to serve that company at a reduced rate after the expiration of the Southern California Edison Company's

contract on April 11, 1913. This Commission thereupon telegraphed The Southern Sierras Power Company that the affidavit had been filed and that if the facts as stated were true, the Company could not continue its extension without having first secured the consent of this Commission, under the provisions of Section 50 of the Public Utilities Act. The Southern Sierras Power Company ceased its construction work on the Lytle Creek Water and Improvement Company line and filed with this Commission the application in the present proceeding. As heretofore stated, the application prays that this Commission determine whether or not it will be necessary to secure a certificate of public convenience and necessity or a permit for the completion of the work, and if so, that this Commission make its order permitting the prosecution of the work.

A determination of the issues in this proceeding depends upon a proper interpretation of the provisions of Section 50 of the Public Utilities Act, sub-sections (a) and (b) whereof read as follows:

> "Sec.50.(a) No street railroad corporation, gas corporation, electrical corporation, telephone corporation or water corporation shall henceforth begin the construction of a street railroad, or of a line, plant or system, or of any extension of such street railroad, or line, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction; provided, that this section shall not be construed to require any such corporation to secure such certificate for an extension within any city and county or city or town within which it shall have theretofore lawfully commenced operations, or for an extension into territory either within or without a city and county or city or town, contiguous to its street railroad, or line, plant or system, not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business; and provided,further, that if any public utility, in constructing or extending its line, plant, or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility, already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants or systems affected as to it may seem just and reasonable.
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> (b) 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; and provided, further, that this section shall not be construed to validate any right or privilege now invalid or hereafter becoming invalid under any law of this state."

The Southern Sierras Power Company relies on an alleged franchise from the County of San Bernardino, assigned to it prior to March 23, 1912, and claims that under said franchise the Company has contract rights now beyond the power of the State of California, and, also, that the provisions of Section 50 of the Public Utilities Act do not apply to its condition.

The Southern California Edison Company intervened in the proceeding, and claims that the franchise on which The Southern Sierras Power Company relies is void, and that whether it is void or not, it is necessary for applicant to secure a certificate of public convenience and necessity, under the provisions of Section 50(a) of the Public Utilities Act.

The franchise on which applicant relies was granted by the Board of Supervisors of San Bernardino County to F. A. Worthley, by Ordinance No. 146, which was adopted on the 24th day of July, 1911. This ordinance became effective on August 14, 1911. On September 5, 1911, Worthley filed with the Board of Supervisors his acceptance of the terms of said ordinance. On September 1, 1911, Worthley assigned his rights under said ordinance to The Southern Sierras Power Company, which assignment was filed in the office of the Board of Supervisors on September 5, 1911. The ordinance grants to Worthley, his successors and assigns, the right to erect, construct, operate and maintain for the period of fifty years, an electric, pole-tower and wire system, consisting of poles, towers,

wires and all other apparatus and appliances necessary or convenient for transmitting electricity, electrical energy, light, heat and power, over, along and upon all of the public roads and highways in San Bernardino County, outside of incorporated cities and towns, for light, heat and power purposes, and for any other purpose to which electricity may be applied, together with the right to furnish, distribute and sell electrical energy for light, heat and power, and for any other purpose to which electricity may be applied, and to collect rents, tolls and charges for such electrical energy so supplied. The grant was made on the express condition that a sum not less than ten thousand dollars should be expended within one year after the award of the franchise. The ordinance provided that work should commence in San Bernardino County within not more than four months from the date of the granting of the franchise and that the work should be completed within not more than three years thereafter, and that the franchise should be forfeited if the work was not commenced and completed as specified. The ordinance provided for a payment after the first five years to the County of San Bernardino of 2% of the gross annual receipts and contained other provisions which it is not necessary to recite in this connection.

It was stipulated at the hearing that construction work in excess of ten thousand dollars was performed under this franchise prior to March 23, 1912, being the effective date of the Public Utilities Act.

The Southern California Edison Company points to that portion of the franchise which grants the right to construct "over, along and upon all of the public roads and highways" in San Bernardino County, outside of incorporated cities and towns. The company contends that it will manifestly be impossible to construct pole lines over, along and upon all of such public roads within the three year period, and contends that under the forfeiture clause, the entire franchise will at the expiration of said three

years be declared void. In this connection the Company relies on the case of Los Angeles Railway Co. vs. City of Los Angeles, 152 Cal. 242, and Kaiser Land & Fruit Co. vs. Curry, 155 Cal.636, and the cases therein cited.

Even if the Company were correct in its contention, as to which it is unnecessary to pass judgment in this proceeding, and even if it were possible to declare the franchise forfeited now because of the improbability of being able to comply with its alleged requirements within the three year period, such action, if taken at all, must be taken by the courts and not by this Commission. Until the courts have passed upon this matter the Commission will act on the supposition that the franchise is valid.

The Southern Sierras Power Company claims that under said franchise a contract right has arisen in its favor with the result that the State of California cannot confer upon this Commission the right to take jurisdiction and to determine such rules and regulations as it may desire to prescribe, under the police power, with reference to the exercise and enjoyment of the rights under the franchise. That this position is not well taken appears clearly from the case of Home Telephone and Telegraph Co. vs. Los Angeles, 211 U.S. 265, in which case a similar claim was made by the Home Telephone and Telegraph Company with reference to an ordinance of the city of Los Angeles prescribing the maximum rate to be collected by said Company for telephone service. The franchise which the Telephone Company had theretofore secured from the city of Los Angeles prescribed a higher maximum rate, and the Telephone Company contended that this franchise constituted a contract which was not subject to regulation thereafter by public authority. The franchise in that case was granted under the provisions of the Act of March 11, 1901, which, in so far as affects the present proceeding, is practically the same as the act of March 22, 1905, commonly known as the Broughton Act, under which applicant's franchise was granted by the County of San Bernardino. Referring to the surrender by contract of the powers

In the Home Telephone case of government, the Supreme Court, at page 273 of the Reporter, uses the following language:

> "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. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point."

Continuing on the same page, the court says:

> "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 power to make it, must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

The court concludes this branch of the case with the following language, which is to be found on page 277 of the Reporter:

> "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 contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied."

This decision of the highest court in the land conclusively establishes the right of the State of California, under the conditions herein appearing, to provide that the Railroad Commission shall have the right, after hearing, to establish rules and regulations affecting the exercise by public utilities of rights under franchises theretofore granted. It becomes unnecessary in this proceeding to express an opinion as to whether, if a contract had arisen, the contract could stand as against the police power of the State. It becomes unnecessary, furthermore, to decide whether or not this Commission would have the right to refuse to a

utility the right to proceed under a franchise granted prior to March 23, 1912. The question at issue here, as will hereinafter appear, is ~~xx xx~~ whether it is necessary for the applicant to apply to this Commission for its finding under the proviso in Section 50(b) of the Public Utilities Act, and for the establishment of such rules and regulations, if any, as the Commission may deem necessary in the exercise of the State's police power for the exercise of the rights and privileges granted by the franchise here under consideration.

The Southern California Edison Company claims that even if it is not necessary, under the provisions of Section 50(b) of the Public Utilities Act, to make application to this Commission for a certificate of public convenience and necessity to exercise the franchise rights heretofore granted to applicant or for a permit, after a hearing, prescribing the rules and regulations under which applicant may proceed, nevertheless, it is necessary, under the provisions of Section 50(a), to secure a certificate of public convenience and necessity to authorize applicant to construct the extension contemplated. The Southern California Edison Company is correct in its contention that Section 50(a) refers to certificates of public convenience and necessity for the purpose of actual construction work and that Section 50(b) refers to certificates of public convenience and necessity and to permits for the exercise of franchise rights and privileges. This distinction should be clearly noted. It may well be that construction may be made in cases in which no franchise or permit is necessary from any public authority. In that event, Section 50(a) clearly applies. On the other hand, it is just as necessary to scan closely the provisions of franchises and permits and to have this Commission pass thereon. For that reason, Section 50(b) was inserted. I am of the opinion, however, that the main contention of the Southern California Edison Company in this connection is not correct. The construction work concerning which the Southern California Edison

Company complains is construction work which is being done under an alleged franchise or permit. If it is not necessary to secure this Commission's authority to exercise the rights granted by such franchise or permit, what reason can there be for securing a certificate of public convenience and necessity to do the very acts which the franchise or permit authorizes? If the law, in effect, gives to a utility the right to go ahead under a franchise or permit without securing this Commission's consent, it certainly does not intend to make it necessary for the utility nevertheless to secure the Commission's consent to do the very thing which is already authorized by the franchise or permit.

I come now to the most important question in this proceeding, which is, whether or not Section 50(b) or any portion thereof is applicable to the facts now under consideration. The determination of this question will depend upon a proper interpretation of the words "not heretofore actually exercised", which are found twice in sub-section (b).

The attorneys both for the applicant and for the intervenor contend that applicant actually did exercise its franchise prior to March 23, 1912, and that consequently the entire sub-section does not apply to applicant. The attorneys for both sides contend, in effect, that the construction work which applicant did prior to March 23, 1912, before it served a single customer, amounts to an actual exercise of the franchise, as those words are used in sub-section (b).

Applying sub-section (b) to the facts of this proceeding, it will read about as follows:

> "No electrical corporation shall henceforth exercise any right or privilege under any franchise or permit heretofore granted but not heretofore actually exercised without having first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege; provided, that ~~xxx~~ the commission shall find, after hearing, that such electrical corporation 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 electrical corporation 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 attorneys in this proceeding contend that the performance under a franchise of any of the work thereby authorized amounts to the "actual exercise" thereof, as those words are used in this connection. If this contention is correct, the proviso in section 50b would read in part as follows:

> "When the commission shall find, after hearing, that a public utility has heretofore begun actual construction work .....under any franchise or permit heretofore granted but under which no construction work has been performed",

the public utility may proceed as therein provided. The statement of this proposition is its own refutation. It is impossible for the Commission to find that a public utility has begun actual construction work under a franchise under which it has not begun actual construction work. It is evident either that the suggested interpretation is incorrect or that the legislature has meant to enact a provision which is impossible.

It seems clear from the other provisions of the section that the words "actually exercised" mean "completely exercised." That this is the proper interpretation seems to follow from the provisions of Section 50 (b), providing that in the cases specified in the proviso the 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. If it had been intended that the proviso should apply only to a case in which nothing had been done under the franchise, the section would not have provided that a public utility may proceed to the completion of the work, but rather that the public utility might, under such circumstances, enter upon said work and thereafter complete the same. The use of the word "completion" implies that something has been started but has not been finished. What the legislature said, under what seems to me to be a proper interpretation, is that if a utility had begun actual construction work

under a franchise or permit under which its work had been partially completed, it might proceed under such rules and regulations as the Commission might prescribe, to the completion or the complete exercise or the rights which had been granted.

Applicant also contended that the franchise was "actually exercised" when it no longer was possible to forfeit the same because of the failure to perform conditions subsequent. In other words, it was contended that in this case the franchise was "actually exercised" at the moment when the ten thousand dollars had been expended within the County of San Bernardino prior to the expiration of the four months' period. If the "actual exercise" of a franchise means the performance of the conditions subsequent, I do not understand why it is not necessary to look to the other conditions subsequent in the franchise, including the conditions that the work must be entirely completed within three years, and to say that the franchise is not "actually exercised" until the work shall have been entirely completed within the three years. I am of the opinion that the compliance with these conditions can not be what is meant by the "actual exercise" of the franchise. Those words either mean that some right granted by the franchise be exercised in whole or in part or that all the rights have been exercised. I find no reason for holding that they apply to some half way period between the first exercise of a right and the complete exercise of the rights granted.

I find on the facts developed in this proceeding, that the Southern Sierras Power Company comes within the provisions of the proviso of Section 50 (b) in so far as affects the exercise of its franchise rights in the County of San Bernardino, outside of incorporated cities and towns. At the hearing, evidence was introduced with reference to the beginning and prosecution of construction work by the applicant in said county. I find from the evidence that The Southern Sierras Power Company, prior to March 23, 1912, began actual construction work in said county under said franchise, and that thereafter it prosecuted its said

work, in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude or its undertaking under said franchise, but that said company had not prior to March 23, 1912, actually exercised its rights under said franchise under the provisions of section 50 (b) of the Public Utilities Act. Section 50(b) of the Public Utilities Act gives to The Southern Sierras Power Company, after a hearing before this Commission, the right to proceed to the completion or its work, under such rules and regulations as the Commission may prescribe. Those rules and regulations will hereafter from time to time be prescribed as occasion therefor demands.

I submit herewith the following form of order:

O R D E R.

THE SOUTHERN SIERRAS POWER COMPANY having filed with this Commission its application for a determination of the question whether or not it is necessary to secure from this Commission a certificate of public convenience and necessity or a permit for the continuance of its construction work in the County of San Bernardino, outside of incorporated cities and towns, and, in case such certificate or permit be necessary, for an order authorizing the Company to proceed with the said construction work, and SOUTHERN CALIFORNIA EDISON COMPANY having appeared in opposition to said application, and a public hearing having been held on said application,

THE RAILROAD COMMISSION HEREBY FINDS that The Southern Sierras Power Company, a public utility, prior to the 23rd day of March, 1912, began actual construction work in the County of San Bernardino, and subsequently thereto has prosecuted such work in good faith uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking, under a franchise therefofore granted to F. W. Worthley by the Board of Supervisors of said San Bernardino County by Ordinance No. 146, and thereafter by him assigned to The Southern Sierras Power

Company, and that said franchise was not prior to March 23, 1912 actually exercised by said Company,

BASING ITS ORDER ON THE FOREGOING FINDINGS OF FACT and on the further findings contained in the opinion which precedes this order,

IT IS HEREBY ORDERED that The Southern Sierras Power Company is hereby permitted to proceed to the completion of its work anywhere in said San Bernardino County to the extent permitted by said franchise, subject to such rules and regulations as this Commission may from time to time prescribe.

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 18th day of April, 1913.

John M Eshleman

Max Thelen

Edwin O Edgerton

Commissioners.