

Decision No. C343**ORIGINAL**BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA.

In the Matter of the Application)
of the SPRING VALLEY WATER COMPANY)
to discontinue preferential service) Application No. 2860.
to South Pacific Coast Railway and)
the Southern Pacific Company.)

McCutchen, Olney & Willard, for applicant
Elmer Westlake, for South Pacific Coast
Railway and Southern Pacific Company.

EDGERTON, LOVELAND and DEVLIN, Commissioners:

O P I N I O N

This application is made upon the following facts:

In May, 1888, Spring Valley Water Works, predecessor of applicant, constructed a water main to carry water from its source in Alameda County for distribution in San Francisco. South Pacific Coast Railway Company was, at that time, the owner of a line of railroad running from Oakland through Newark station to Santa Cruz, which line of railroad was leased to, and was being operated by, Southern Pacific Company. On May 10th of that year an agreement was entered into between Spring Valley Water Works, South Pacific Coast Railway Company and Southern Pacific Company whereby Spring Valley Water Works was granted the right to lay its pipe line along the right of way of the railroad through the village of Newark for a distance of approximately 4 miles. The agreement provided in part:

"KNOW ALL MEN BY THESE PRESENTS: that the South Pacific Coast Railway Company (a corporation) and the Southern Pacific Company (a corporation), Grantors, in consideration of the sum of Five Dollars (\$5.00) to them in hand paid, and in consideration of the construction and maintenance of a hydrant at Newark Station and the free use of water therefrom for fire and station and all other railroad purposes, have Granted and by these presents do grant unto Spring Valley Water Works (a corporation), Grantee, the right to lay and maintain a line or lines of iron water pipe conduit for the waters of said Grantee on and along the line situate, lying and being in the County of Alameda in the State of California, described as follows, to wit: . . ."

(Here follows a description of the line.)

The water company laid a main 3 feet in diameter along the line specified in the contract and installed a connection at Newark, through which water was supplied to the water tank of the railroad. Through this connection water was supplied to the railroad free continuously up to 1913, the amount of water supplied varying from approximately 20,000 gallons per day when the connection was first installed, to 70,000 gallons to 90,000 gallons per day during recent years. The increase in the service demanded is due to the change of the railroad from narrow to broad gauge and the construction of the Dumbarton Cut-off, which greatly increased the railroad operations at Newark.

In 1913 the water company threatened to discontinue the service of water to the railroad company unless a reasonable rate was paid therefor, whereupon the railroad company instituted a proceeding to enjoin the discontinuance of the service as a violation of the contract above mentioned. The Superior Court of Alameda County ruled in favor of the water company, whereupon an appeal was taken to the Supreme Court

of the State which reversed the judgment. Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291. In its decision, the Supreme Court stated that the contract could be enforced in accordance with its original provisions up to such time as the proper public authority (in this State the Railroad Commission) made an order revising the provisions of the contract, and that the Railroad Commission had jurisdiction to revise the provisions thereof. Referring to this question the Court stated on page 297:

"We perceive no valid reason for holding the contract void because opposed to public policy. It is not claimed that it was not freely made, or that it was procured by fraud or undue influence. There is nothing inherently wrong in such a contract to give water service upon payment in advance. No regulation or rule of any public authority empowered to control or regulate public water service in Alameda County had or has forbidden it. There is no claim that the taking of this water by the plaintiff has reduced the supply remaining in control of the defendants below the quantity necessary or convenient for the consumers entitled to it or applying for it, or that the supply to plaintiffs has not been from a surplus that would have been unused but for their taking. Where the rates for water devoted to public use have not been fixed by public authority, the person in charge of the use and the consumer may freely contract regarding the price of service and the manner of payment, and such contracts will be deemed valid by the courts and may be enforced by any appropriate mode. (Fresno Canal etc. Co. v. Park, 129 Cal. 437, (62 Pac. 87); Stanislaus W. Co. v. Sacman, 152 Cal. 725, 730, (15 L.R.A. (N.S.) 359, 93 Pac. 858); Leavitt v. Lassen, Irr. Co., 157 Cal. 82, 90, (29 L.R.A. (N.S.) 213, 106 Pac. 404).

"It is true as said in the Leavitt case, that the person in charge of the public use is a trustee in charge of a public trust, 'the agent in the execution of this public trust,' and that he cannot lawfully burden this trust, or the property devoted to and held for the purposes of that trust, by imposing obligations upon himself, or burdens upon the property, which destroy or

impair the public use or the public interest therein. And so he cannot convey it away absolutely to private use, or contract for a preference to one consumer to the detriment of others in the public use. Any contract purporting to give such preference in the public use, or to transfer a part of the dedicated public supply to private use, is subject to revision by competent public authority, to the end that the public service shall not be unjustly discriminatory, or unreasonable, and that the private use shall not interfere with the public use, and such contracts may, by such authority, be reformed accordingly, to make them conform to the public interest. (Turtle Creek Borough v. Pennsylvania W. Co., 243 Pa. 408, (90 Atl. 194); Sellewue Borough v. Ohio W. Co., 245 Pa. 117, (91 Atl. 236); see, also, Fresno etc. Co. v. Park, 129 Cal. 437, (62 Pac. 87); Stanislaus W. Co. v. Bachman, 152 Cal. 725, (15 L.R.A. (N.S.) 359, 93 Pac. 858).) In the case first cited it is said that the power to fix rates and regulate public service of water devoted to public use 'carries with it jurisdiction to determine the reasonableness of charges, irrespective of prior contracts; to that extent such contracts may be reformed.' But until such public authority has intervened and modified such prior contract, it will be recognized as valid, and enforced in the courts, as declared in our decisions above cited. The power to revise and reform contracts of public service water companies, in the interest of the public, applies as well to a contract creating or attempting to create an easement in the water held for public use as to any other disposition thereof.

"In this state this power of revision and regulation is now, and was when this controversy arose, lodged in the railroad commission by the Public Utilities Act of 1911."

The power of state commissions to revise rates specified in contracts for public utility service has also been upheld in Limoneira Co. v. Railroad Commission, 174 Cal. 232, and Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U.S. 372.

In our opinion, a contract such as that presented in this proceeding, is preferential and amounts to an unjust discrimination against the other consumers of the water company. It has been the policy of this Commission to eliminate all preferential service and rates. From the testimony introduced in this proceeding we are satisfied that the free service of water delivered under this contract has compensated the railroad company many times over for the value of the pipe line right of way granted. Our conclusion is not based upon this fact, however, for if any right of compensation remains it is not for this tribunal to adjudicate the matter. Neither are we impressed with the fact that the railroads are now operated by the United States Government, and that such rates as we may prescribe for this service will have to be paid by the Federal Government during the period of Federal control.

Our conclusions are that the free water service rendered at Newark is unjustly discriminatory and that applicant should be directed to make a proper charge for the water so furnished. Under a schedule of rates recently established by this Commission to be charged by Spring Valley Water Company for all of its consumers, the applicable schedule for the service here in question would be as follows:

Service Charge:

For each meter in use, size 2 inch, - \$4.50 per month

For Water Delivered:

Between 0 and 3300 cu. ft. at - - 0.24 per 100 cu.ft. X
Between 3300 and 33300 cu. ft. at - 0.21 " " "
Above 33300 cu. ft. at - - - - - 0.18 " " "

And we recommend that the water company be directed to apply this schedule to the existing free water service at Newark.

O R D E R

This application having come on regularly for hearing and the Commission being fully advised,--

IT IS HEREBY FOUND AS A FACT that the delivery of water free by Spring Valley Water Company at Newark in accordance with the contract above set forth is an unjust and discriminatory preference as against the other consumers of the water company:

IT IS FURTHER FOUND AS A FACT that a just and reasonable charge for said service is the following:

Service Charge:

For each meter in use, size 2 inch, - \$4.50 per month

For Water Delivered:

Between 0 and 3300 cu. ft. at -- 0.24 per 100 cu.ft.
Between 3300 and 33300 cu. ft. at- 0.21 " " "
Above 33300 cu. ft. at - - - - -- 0.18 " " "

IT IS HEREBY ORDERED that within twenty (20) days from the date hereof applicant put into effect, charge and collect for the service herein involved the schedule of rates above set forth.

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 May, 1919.

Edwin O. Edgerton
H. L. Loveland
Frank R. Taylor
H. A. Prudig

Commissioners.