Decision No. 6635

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC LIGHT AND POWER CORPORATION, a corporation,
Complainant,

vs.

Case No. 926.

CITY OF PASADENA, a municipal corporation, and CITY OF SOUTH PASADENA, a municipal corporation,
Defendants.

Gibson, Dunn & Crutcher, James A. Gibson, for complainant.
J. H. Howard for defendants.
H. H. Trowbridge and John R. Dixon, amici curiae on behalf of complainant.

EDGERTON, Commissioner.

O P I N I O N

This case is presented upon an agreed statement of facts, the question at issue being solely one of law. Briefly, the facts are that from about September, 1900, complainant, Pacific Light and Power Corporation, itself and through its predecessor San Gabriel Electric Company, has been supplying electric energy for light and power purposes to the inhabitants of the City of South Pasadena. In so doing complainant is admittedly a public utility subject to the provisions of the Public Utilities Act and the jurisdiction of the Railroad Commission.

101

Defendant, City of Pasadena, a municipal corporation, for many years has owned and operated an electric utility system used to supply electric energy for light and power purposes to the inhabitants of that municipality. On December 10, 1909, the City of Pasadena commenced the service of electric energy for light and power purposes to the Raymond Hotel situated within the municipal limits of the City of South Pasadena, and has greatly increased the number of its consumers within that city, until at the time this proceeding was instituted the City of Pasadena was serving over 100 consumers within the municipal limits of the City of South Pasadena. The agreed statement of facts recites: "That since the 10th day of October, 1911 the City of Pasadena has been furnishing electricity for heating, lighting and power to the inhabitants of the City of South Pasadena under and by virtue of the provisions of Section 19 of Article XI of the Constitution of the State of California as then amended; that on April 7, 1914 and pursuant to an act of the Legislature of the State of California, entitled 'An act granting to municipal corporations of the State of California the right to construct, operate and maintain water and gas pipes, mains or conduits, electric light and electric power lines, and telephone and telegraph lines along or upon any road, street, alley, avenue or highway or across any railway, canal, ditch, or flume,' approved April 10, 1911 (Statutes 1911, p.852), the governing body of the City of South Pasadena, to-wit, the Board of Trustees thereof, by order made and passed by more than a two-thirds vote of said body, granted to the City of Pasadena the right to use and occupy the streets, alleys,

avenues and highways of the City of South Pasadena for the construction, operation and maintenance of overhead and under-ground electric light and electric power lines."

The basis of the complaint of Pacific Light and Power Corporation is that the City of Pasadena in so far as it supplies electric energy for compensation to consumers outside the territorial limits of the municipality, is a public utility subject to the provisions of the Public Utilities Act and the jurisdiction of the Railroad Commission. The complaint prays for an order requiring the City of Pasadena to obtain from the Railroad Commission, under Section 50 of the Public Utilities Act, a certificate of public convenience and necessity before serving electric energy within the limits of the City of South Pasadena, complainant already being engaged in the public utility business of supplying electric energy within that area. The complaint also prays that the City of Pasadena be required to file with the Railroad Commission its rates for electric energy supplied within the limits of the City of South Pasadena.

As to the necessity of obtaining a certificate of public convenience and necessity the agreed statement of facts shows that the City of Pasadena commenced the service complained of prior to March 23, 1912, when the Public Utilities Act became effective, and under the provisions of Section 50 of that Act a certificate of public convenience and necessity is not necessary to a continuance of the service already initiated when the Act became effective. The question still remains, however, as to the necessity of the City of Pasadena filing with the Railroad Commission its rates

for electric energy supplied to consumers within the City of South Pasadena. The answer to this question depends upon the extent, if any, to which the City of Pasadena is subject to the provisions of the Public Utilities Act and the jurisdiction of the Railroad Commission when engaged in a public utility service outside the municipal limits. No question is presented in this proceeding as to the amenability of the City to the provisions of the Public Utilities Act and the jurisdiction of the Railroad Commission in so far as public utility service is rendered within the municipal limits. And counsel have suggested distinctions in fact and in law which might result in the adoption of a different conclusion as to the jurisdiction of the Railroad Commission over intra-municipal service from that applicable to extra-municipal service. Accordingly, I shall in this opinion confine myself solely to the issue presented, namely, the jurisdiction of the Railroad Commission over the rates charged by the City of Pasadena for a public utility service supplied by the municipality to consumers outside the municipal limits.

The argument against the Commission's jurisdiction is based almost entirely upon the use of the words "private corporation" in Section 23, Article XII of the State Constitution. That section provides in part:-

> "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipeline, plant, or equipment, or any part of such railroad, canal, pipe-line, plant or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production,

> generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, 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, and 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 control and regulation. 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."

It is contended that the use of the words "private corporation" in this section of the Constitution absolutely precludes the Legislature from vesting in the Railroad Commission any jurisdiction, whatever, with reference to the public utility operations of any municipality or public corporation. Reliance is placed in part upon Section 19, Article XI of the Constitution, which gives to municipalities the right to establish and operate certain defined public utilities and, under the conditions therein specified, to operate these utilities beyond the municipal limits. It is contended that this section gives to municipalities the right to operate public utilities without any supervision or regulation by the State.

I am unable to agree that these provisions of the Constitution prohibit the Legislature from vesting the Railroad Commission with any jurisdiction, whatever, over public utilities owned and operated by municipalities. At the outset Section 23 of Article XII of the Constitution defines certain businesses conducted by "a private corporation, and every

individual or association of individuals" to be public utilities subject to such regulation by the Railroad Commission as may be imposed by the Legislature. Under decisions of our Supreme Court to which I shall later refer, it appears to be perfectly proper to hold that municipal corporations, in so far as they engage in public utility enterprises as distinguished from the exercise of governmental functions, must be regarded as falling within the phrase "a private corporation, and every individual or association of individuals", as that phrase is used in Section 23 of Article XII of the Constitution. Aside from this point, however, it should be noted that after specifically defining these businesses to be public utilities, Section 23 of Article XII continues:

> "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."

Also Section 22 of Article XII, after specifically bringing within the jurisdiction of the Railroad Commission, "railroad and other transportation companies," continues:

> "No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are notinconsistent with the powers conferred upon the railroad commission in this Constitution, and the authority of the legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Under these plenary provisions of the Constitution the Legislature is given unlimited power to vest the Railroad Commission with jurisdiction respecting public utilities. The provisions are not limited in their applicability to the particular utilities specifically defined in the Constitution itself, but give to the Legislature unlimited power irrespective of all other provisions of the Constitution to vest in the Railroad Commission any jurisdiction, whatever, respecting any or all public utilities. In other words, under these plenary constitutional provisions the Legislature can if it so desires vest in the Railroad Commission jurisdiction over any or all classes of public utilities whether privately or publicly owned and operated.

Accordingly we must look to the Public Utilities Act (Statutes 1915, p. 115) to see what the Legislature has done. The classes of public utilities subject to the provisions of that Act and the jurisdiction of the Railroad Commission are defined in various subdivisions of Section 2.

Section 2 (bb) provides in part:

> "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."

This subsection declares every "electrical corporation" where the service is performed for or the commodity delivered to the public or any portion thereof to be a public utility.

Section 2 (r) provides:

"The term 'electrical 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 electric plant for compensation within this State, except where electricity is generated upon or distributed by the producer through private property alone solely for his own use or the use of his tenants and not for sale to others."

Section 2 (c) and (d) provide:

(c) "The term 'corporation' when used in this act includes a corporation, a company, an association, and a joint stock association."

(d) "The term 'person' when used in this act includes an individual, a firm and a co-partnership."

In each of these definitions the Legislature has subjected to the jurisdiction of the Railroad Commission every corporation supplying electric energy for compensation generally to the public. There is nothing in these definitions which purports to limit their effect only to privately owned and operated corporations. The term "corporation" is used without any qualifying limitation, and is equally applicable to a corporation publicly owned as to one privately owned. The contention of complainant, therefore, that the term "private corporation" used in Section 23 of Article XII of the Constitution defeats the jurisdiction of the Railroad Commission in the present proceeding, is untenable inasmuch as the Legislature, which, under the Constitution, has unlimited power to define public utilities subject to the jurisdiction of the Railroad Commission, has not qualified the term "corporation" to exclude those which may be municipally owned. The legislative definition does not apply to private corporations only, but to every corporation.

Furthermore, there is a well established rule that when a municipal corporation engages in the public utility business it ceases to act in its governmental capacity and is to be regarded, as to its rights and obligations, on exactly the same plane as any person or private corporation engaged in the same business. Our own Supreme Court definitely announced this principle in South Pasadena v. Pasadena Land and Water Company, 152 Cal. 579. In that case the Supreme Court had before it for decision the character of the obligations of the City of Pasadena in supplying water to the inhabitants of South Pasadena, which decision is, of course, peculiarly pertinent in the present proceeding. The Court decided that in performing this public utility service the City of Pasadena was acting--not in a governmental capacity, but in a proprietary capacity, and was subject to the rights and obligations which would be imposed upon any privately owned public utility performing the same service including the obligation of having its rates fixed by the City of South Pasadena in accordance with the provisions of Section 19, Article XI of the Constitution, which at that time vested the control of public utility rates in the municipalities of the State. I call attention to the fact that the power of municipalities to regulate rates of public utilities operating within their limits as provided by Section 19 of Article XI of the Constitution was transferred to the Railroad Commission by an amendment adopted November 3, 1914, to Section 23 of Article XII of the Constitution. It is important to bear this fact in mind in considering the decision of the Supreme Court in the Pasadena case. The conclusion of the Court in the Pasadena case under the

constitutional provisions then existing is stated on page 592 as follows:

> "Under the constitution South Pasadena has power to fix the rates to be charged for water supplied to its inhabitants and to control the manner of laying and repairing pipes in its streets for that purpose. Necessarily it has this power as against another city engaged in supplying such water, as well as when an individual or water corporation does so. It is suggested that the two cities each represent the sovereign power and would have equal authority in all municipal affairs, that a conflict would ensue, and that such consequences cannot be considered as intended, unless the intention is expressly and unmistakably declared. In this connection the rule is invoked that there cannot be two municipalities exercising the same powers at the same time within the same territory. But the two cities would not be of equal authority with respect to the use of water in South Pasadena, in such a case. South Pasadena would have the power above stated, under the constitution, and Pasadena, so far as that service is concerned, would be subject to those powers, to the same extent as the Pasadena Land and Water Company is now subject thereto. In the carrying on of the water service to the people of South Pasadena the city of Pasadena will not be acting in its political, public, or governmental capacity as an agent of the sovereign power equal in all respects to the city within which it operates. In administering a public utility, such as a water system, even within its own limits, a city does not act in its governmental capacity, but in a proprietary and only quasi-public capacity. (Davoust v. Alameda, 149 Cal. 70, (84, Pac. 760); Illinois etc. Bank v. Arkansas City 76, Fed. 271, (22 C. C. A. 171); Esberg Cigar Co. v. Portland, 34 Or. 282, (75 Am.St. Rep. 651, 55 Pac. 961)). Having taken over the whole system subject to the burden of supplying a part of the water to inhabitants of South Pasadena, the city of Pasadena will have no greater rights or powers, respecting that part of the service, than its grantor previously had. It will be under the same obligation as its grantor to continue the service and supply the water to all persons who may become entitled to it in the future, so long as it retains possession and control of the property so charged. (Fellows v. Los Angeles, 151 Cal. 52,(90 Pac. 141))

> The powers of the two cities in regard to this water service will be separate and distinct, one will be subordinate to the other, and, hence, there will not be two cities exercising the same powers in the same territory at the same time; South Pasadena, within its own limits, will be the sole representative of sovereignty in the fixing of rates, and in the supervision of the streets; and Pasadena will be subject thereto, as a private person. If, by fixing too low rates, South Pasadena should attempt to compel the service to be made at a loss, Pasadena would have the same remedies, and no greater, in the courts that a quasi-public corporation or natural person would have in the same circumstances. The fact that the outside service is within another city does not appear to be a significant factor in the question of the power. If it were in a rural community, the rates charged would be subject to judicial control to make them reasonable. Being in another city, the serving city has a right to demand reasonable rates and may enforce them if not granted. The limitations would not affect the power in one case more than in the other."

The distinction between governmental and private functions of a municipality was again considered by the Supreme Court in Chafor v. City of Long Beach, 174 Cal. 478 in which the Court stated on page 486:

> "That the distinction between governmental and private functions has been adopted as the principle governing the adjudications in this State, our decisions leave no doubt. Thus in the early case of Touchard v. Touchard, 5 Cal. 306, 307, it is said: 'A corporation, both by the civil and common law, is a person, an artifical person, and although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person'. In Bloom v. San Francisco, 64 Cal. 503, (3 Pac. 129), in the conduct of the municipal hospital the city and county maintained a nuisance. Action was brought to recover damages occasioned by this nuisance, and it was held that 'the city and county of San Francisco had such proprietorship of the city and county hospital as rendered it liable for damages in the case presented.' In South Pasadena v. Pasadena Land etc. CO. 152 Cal. 579, (93 Pac. 490), it is declared that in the carrying on of a

> water service for the benefit of South Pasadena the city of Pasadena will not be acting in its political, public, or governmental capacity. And in Davoust v. City of Alameda, 149 Cal. 69, (9 Ann. Cas. 847, 5 L.R.A. (N.S. 536, 84 Pac. 760), this court reviewing our cases, and drawing the indicated distinction between governmental and proprietary functions, held that the negligent operation of an electric-light plant by the city, which light plant was operated for the twofold purpose of lighting the city and furnishing electric light and power to its inhabitants, made the city liable, upon the ground that it was not exercising any governmental power or function."

In Nourse v. Los Angeles, 25 Cal. Appeals 384, the principle was announced on page 385 as follows:

> "Under its charter the city has assumed the duty of operating a water system for the purpose of supplying water to its inhabitants. In the performance of this duty it acts, not in its sovereign capacity, but in the capacity of a private corporation engaged in like business. (Appeal of Brumm, (Pa) 12 Atl. 855; Linne v Bredes, 43 Wash. 540, (117 Am. St. Rep. 1068, 3 L.R.A. (N.S.) 707, 86 Pac. 858); 1 Wymann on Public Service Corporations, p. 187.) Like a private corporation, it is the duty of this city to furnish without discrimination to all its inhabitants who apply therefor a supply of water upon such applicants complying with such reasonable rules and regulations as it may lawfully establish for the conduct of the business."

In my opinion, these decisions clearly hold that when a municipality engages in a public utility business, certainly in so far as extra-territorial service is concerned, the municipality is to be regarded as acting in the capacity of a private corporation or individual and is subject to the same obligations and enjoys the same rights, in so far as its public utility operations are concerned, as a private corporation or individual engaged in such a business.

I believe the conclusion irrosistible therefore, that the city of Pasadena in supplying a public utility service to the inhabitants of the city of South Pasadona must be regarded as coming

within the phrase "private corporation, and individual or association of individuals" as that phrase is used in Section 23 of Article XII of the Constitution specifically defining certain public utilities to be subject to regulation by the Railroad Commission. It is my conclusion also that this service clearly comes within the definition contained in the Public Utilities Act itself.

As before stated, I am limiting my decision to municipal public utility service rendered beyond the limits of the municipality. There may be considerations which would require a different conclusion as to service rendered to the inhabitants of the municipality owning the utility. That question, however, is not presented in this case.

I submit the following form of order:

O R D E R

This case having come on regularly for hearing upon complaint and answer duly filed and argument being had upon the motion of defendants that the proceeding be dismissed for lack of jurisdiction,--

IT IS HEREBY ORDERED that the motion of defendants to dismiss the complaint herein for lack of jurisdiction be, and the same is hereby, denied.

IT IS FURTHER ORDERED that the City of Pasadena, a municipal corporation, be, and it is hereby ordered and directed

within twenty days from the date of this order to file with the Railroad Commission a complete schedule of all its rates, charges, rules and regulations for the service of electric energy to consumers within the limits of the City of South Pasadena.

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 30th day of August, 1919.

Edwin O. Edgerton

H. D. Loveland

Frank R. Devlin

H. M. Rourdieu

Irving Martin

Commissioners.