Decision No. 881

ORIGINAL

Application No. 1

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

E. PERCIVAL LEWIS,

Complainant,

vs.

PEOPLES WATER COMPANY,
a corporation,

Defendant.

Case No. 399.

B. D. M. Green for complainant.
Arthur Tasheira and McKee & Tasheira
for defendant.

THELEN, Commissioner.

O P I N I O N.

This case presents the question of the extent of a water company's liability to furnish facilities and water sufficient for fire protection purposes.

The complaint alleges, in effect, that the complainant resides on Panoramic Way in the city of Berkeley; that the defendant is engaged in supplying water to portions of Alameda county, including the city of Berkeley and its inhabitants; that in the portion of Berkeley in which complainant resides many residences are located in close proximity to each other; that in the portions of Berkeley lying east of College Avenue, north of Dwight Way and south of the grounds of the University of California, with certain exceptions, water pipes of two inches and no larger are maintained by defendant in the public streets; that at a recent fire which took place on Panoramic Way within 200 feet of respondent's residence it was necessary for the Berkeley fire department to carry its line of hose a distance of approximately 2000 feet from a six inch pipe in Dwight Way and to pump the water at an elevation of at least 150 feet; that if there had been a six inch pipe in Prospect Street, the fire could

have been prevented from spreading and the property loss would have been materially less; that all of the houses located in this district would have ample fire protection if a six inch water main were laid and maintained in said Prospect Street from the northern line of Dwight Way to the northerly terminus of said street; that it is impossible to give this neighborhood adequate fire protection from a two inch pipe; that the fire which originated near complainant's home consumed two residences and that the spread of the fire from the first residence to the second residence could easily have been prevented if a sufficient stream of water had been obtainable without the delay incident to laying 2000 feet of hose; and that if a six inch main had lain in Prospect Street at the time of the fire, sufficient water would have been immediately available to have saved the second residence. Complainant accordingly asks this Commission to order the defendant to install and maintain in lieu of the present two inch pipe, a six inch pipe in Prospect Street from the northern line of Dwight Way to the northern extremity of Prospect Street.

The defendant thereafter filed with this Commission a memorandum of alleged defects in the complaint, reading as follows:

> "The matters complained of in said complaint and the relief prayed for therein are matters not within the jurisdiction of this Commission, to be heard or passed upon by this Commission, and said complaint does not establish a prima facie or any case to be heard by this Commission, and it is not within the power or authority of this Commission to grant the relief prayed for."

The defendant accordingly asked that the complaint be dismissed.

A public hearing was thereafter held on the question of the Commission's jurisdiction and arguments were presented by both sides.

The matter is one of considerable importance and has received the serious consideration of this Commission. I shall now refer to such statutory and constitutional provisions and such decisions of the Supreme Court of this State as have bearing on this matter.

The Act of May 3, 1852, Statutes 1852, page 177, provided in effect, that the General Incorporation Act of April 22, 1850, should apply to associations formed "for the purpose of supplying any cities or towns in this state, or the inhabitants thereof, with pure fresh water." Section 4 of the Act provides in part as follows:

> "All corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure fresh ~~xxxx~~ water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire or other great necessity, free of charge."

This section made it the duty of water companies to furnish pure fresh water to "the inhabitants" of cities and towns "for family uses" and also the duty to furnish water "to the extent of their means, to such city and county, or city or town, in case of fire or other great necessity, free of charge."

When the Codes were enacted in 1872, the following provision, taken almost literally from Section 4 of the Act of 1858, was inserted as Section 549 of the Civil Code:

> "All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge. The board of supervisors, or the proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the state."

The question as to the meaning of the words "in case of fire or other great necessity" came before the Supreme Court of this State in the case of Spring Valley Water Works vs. City and County of San Francisco, 52 Cal. 111, decided in April, 1877. At page 120 the Court distinguishes between the duty of ~~xx~~ water companies to furnish water "for family uses" to the "inhabitants" of a city or town and the duty to furnish water to the extent of their means to such "city and county or city or town" in case of "fire or other great necessity, free of charge." After commenting upon this antithesis, the Court construes the words "fire or other great necessity" to include all uses which are incidental to the direct employment by the municipality of its

governmental or police powers as distinguished from the family uses of ~~[illegible]~~ the inhabitants, and holds that it is the duty of a water company to furnish free to a city, water for use for the flushing of sewers, the sprinkling of streets, the watering of parks and the extinguishment of fires. The Court also holds that water must be supplied free for the ordinary uses of the fire engines and engine houses.

The same conclusion is reached in the case of San Diego Water Company vs. City of San Diego, 59 Cal. 517, where the Supreme Court of this State holds that it is the duty of a water company to furnish to a municipality water for extinguishing fires and flushing the sewers of the city free of charge, and that consequently the board of trustees of the city of San Diego had no power to contract to pay a water company for these services.

Thereafter, in the case of Spring Valley Water Works vs. San Francisco, 61 Cal. 3, it was held that Section 1 of Article XIV of the Constitution of 1879, providing for the fixing by public authorities of the rates of compensation to be collected by water companies, had repealed Section 4 of the Act of 1856, in so far as this section made it the duty of a water company to supply water to municipalities for municipal uses free of charge. Since the decision in that case, municipalities, just like individuals, have paid for the water which has been delivered to them by water companies. There is nothing in the case in 61 Cal., however, which in any way relieves from or adds to the duties of water companies, other than in the matter of payment for water delivered to municipalities for municipal uses. Prior to the Public Utilities Act , which I shall hereinafter consider, no statute enlarged the duty of a water company to supply water to the inhabitants of municipalities for uses other than "family uses" and no statute relieved the water companies from the duty of furnishing water to municipalities for municipal purposes "to the extent of their means, in case of fire or other great necessity",

which words include all ordinary municipal purposes. It will be noted that while the statutes have imposed upon water companies the duty to furnish water, to the extent of their means, to municipalities for fire protection purposes, they have not imposed such a duty with reference to individuals. I shall now refer to and analyze three recent cases decided by the Supreme Court of this State bearing on the present proceeding.

In Town of Ukiah vs. Ukiah Water & Improvement Company, 142 Cal. 173, decided in February, 1904, the Town of Ukiah brough an action to recover against the defendant water company for the destruction of plaintiff's municipal property by fire. Defendant's liability was predicated both upon its alleged negligence and upon its alleged breach of contract with the plaintiff to supply water in its supply pipes and fire hydrants under sufficient pressure for effective use. After verdict for the plaintiff the defendant moved for a new trial, which motion was granted. On appeal by the plaintiff the Supreme Court affirmed the order granting the new trial. It appeared that hydrants for fire purposes were connected with the defendant's mains and pipes at various places in the streets of the town and that these hydrants were maintained and used by the town almost solely for the extinguishment of fires. In each of the ordinances passed from year to year by the Town Trustees, fixing the rates to be charged for water furnished the town and its inhabitants, a provision was made for fire hydrants under the head of water furnished to the town for municipal purposes, as follows:

"For fire hydrants each per month , one dollar."

In the opinion of Judge Angelotti, who presided in the trial of the case in the Superior Court, which opinion the Supreme Court adopts, he says at page 175:

> "In ruling upon the demurrer to the complaint, I stated that I had not been referred to, nor did I know of any statute or rule of law that would, independent of contract, make the defendant liable on the facts stated in the complaint; in other words, that the mere fact that a corporation was engaged in the business of furnishing water appropriated for sale, rental, and distribution would not place upon it the obligation of having constantly on hand a sufficient quantity of water available for use by the

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> town for the extinguishment of fires, for the failure to observe which it would be liable to the municipality for the value of municipal property destroyed by reason of such failure. Further thought has satisfied me that there can be no question as to the correctness of these views; that something additional is essential to the creation of such a liability; and that if there be any such liability here, it must arise from contract."

It will be observed that Judge Angelotti holds that the mere fact that a corporation has engaged in the business of furnishing water to the public does not place upon it the obligation of having on hand a sufficient quantity of water available for use by the town for the extinguishment of fires. In order to recover against the water company a distinct obligation must be shown, such as appears in case the company has contracted that it will deliver water sufficient for fire protection purposes.

While unable to find a written contract between the town of Ukiah and the Water Company, Judge Angelotti finds an implied contract for the furnishing of water for general municipal fire purposes to have arisen out of the ordinance and the supply of water thereunder by the Water Company at the rates therein established. Continuing, he says at page 179:

> "If the defendant be liable here, the only property in the town specifically protected by such a contract for water for general fire purposes, and the only property for loss, of which a recovery could be had in an action for damages based on a breach of such contract, is the property of the municipality itself.*********But it certainly needs something more than evidence showing an accepted service for 'general fire purposes' to establish such a contract, and the evidence here shows nothing more."

Judge Angelotti, at page 180, concludes that the contract was not for the protection of any particular property or person but was for the general benefit of all the property and persons within the municipal limits and that the defendant assumed no obligation ~~xxxxxxx~~ regarding the property of the town different from that assumed by it regarding all other property within the town and that the city as a property owner is without right of action. While it is assumed that the city may enter into a contract for the supply of water for fire purposes to protect particular designated property of the city, no such contract was found in this case.

The Supreme Court, in affirming the order below, after referring to certain cases from Kentucky, North Carolina and Louisiana, in which a recovery lay against a water company for failure to furnish adequate fire protection, distinguishes between those cases and the Ukiah case as follows:

> "The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in the contract between this plaintiff and this defendant, and the security to plaintiff's property was only the same security which in the exercise of its governmental functions the plaintiff had obtained for the whole town."

While Judge Angelotti stated (page 175) that

> "Doubtless, too, a water company is required, upon proper demand by the municipality, to furnish water to the municipality for the extinguishment of fires that may arise therein, at the established rates, and when, in pursuance of such requirement, it undertakes the service, a contractual relation is established, and the company is bound to continue the service it has undertaken"

there is nothing in this language to justify the conclusion that the city by merely passing an ordinance establishing rates to be charged for fire hydrants, can compel a water company to increase the size of its mains in any part of the town for the purpose of installing fire hydrants of such size as may be demanded by the city. While the water company is undoubtedly under the duty, under the provisions of Section 549 of the Civil Code, to furnish water to the extent of its means in case of fire, and while the city can probably provide for the installation of fire hydrants in the system as it finds it, there is considerable doubt as to whether, in the absence of a contract containing adequate consideration, the city can compel a water company to replace two inch mains by six inch mains, under an alleged duty to furnish water for a purpose for which the water company has never held itself out.

In Hunt Brothers Company vs. San Lorenzo Water Company, 150 Cal. 51, an action was brought to recover $124,496.98 damages resulting from the destruction of the plaintiff's cannery in Hayward, Alameda county, and loss of profits, all occasioned by fire, and alleged by plaintiff to have been caused by the

failure of defendant water company to supply sufficient water to plaintiff's premises. Plaintiff and defendant had entered into an agreement whereby defendant agreed to lay a six inch main from one of its water mains to plaintiff's premises, to install a fire hydrant in said premises and to supply plaintiff by means thereof with water for the purpose of extinguishing any fire which might occur on the premises, in consideration of the payment of $2.75 per month. No time was specified for the commencement of the work. Before its completion the fire occurred. The Court held that as there had been no agreement for fire protection to commence at or within a period of time and no payments made on the agreement, the plaintiff could not claim to rely on the protection until the actual commencement of the service. The judgment for the defendant was accordingly affirmed. The Court assumes that defendant would not be liable for failure to furnish sufficient water for fire protection unless it had contracted so to do and had installed the service.

In Niehaus Brothers Company vs. Contra Costa Water Company, 159 Cal. 305, an action was brought to recover damages against the defendant water company for an alleged breach of contract to supply water to the plaintiff's premises for fire protection. Plaintiff alleged that its planing mill in West Berkeley had been destroyed by the failure to furnish sufficient water for fire protection and recovered a judgment for $128,645.42 in the court below. The Supreme Court reversed the judgment, on the ground that there was no contract between the parties for the supply of water for fire protection purposes sufficient to justify a recovery.

The Court first finds that there was no express contract between the parties. Plaintiff then contended that an implied contract arose from the fact that plaintiff had installed fire hydrants and that under an ordinance of the city of Berkeley, 50¢ per month was payable from plaintiff to defendant for each of said hydrants. The plaintiff claimed that the ordinary relation of public distributer of water and consumer was sufficient, under the ordinance, to impose upon the defendant the obligation to supply it with water

for fire protection. Referring to this point, the Court says at page 316:

> "No liability such as the plaintiff claims was ever contemplated where the only relation shown is such as proceeds from the fact that the water company has undertaken to furnish the inhabitants of a municipality with water, has connected its mains with the premises of a consumer, and is charging ordinance rates for the water supplied or to be supplied."

Again, at page 317:

> "It would appear that in the nature of the situation itself no obligation, implied or otherwise, to have constantly on hand a supply of water for fire protection could arise."

The Court then continues as follows:

> "While it is to be presumed that the rates established by a municipal ordinance are fair and reasonable, this presumption only applies as far as such rates fix the compensation to be paid the company furnishing water to consumers as a commodity. They are not fixed as a consideration under which the company obligates itself to furnish water for the extinguishment of fires with a corresponding liability for failure to do so. And it is from the fact that under the ordinary relation of public service corporation and consumer that the only duty of the company is to furnish water as a commodity and not for the purpose of extinguishing fires that liability for damages for failure to supply it for the latter purpose can only be created by express contract."

The Court then, at page 317, refers to the well established rule that a property owner has no right of action against a water company under its contract with a city to supply water to public hydrants for the protection of his property, although his loss may have been occasioned by the negligent failure of the company to have on hand a supply whereby the loss might have been prevented. The attorney for the complainant in this proceeding admits the correctness of this rule. At the same time, while admitting that a water company is not liable in the absence of express contract for loss due to its failure to have on hand a sufficient supply of water under adequate pressure to extinguish fires, he contends that the public authorities have a right to compel a water company to enlarge its mains and increase its water supply for the specific purpose of having on hand adequate facilities and sufficient water to put out fires. In other words, he contends that the water company may be compelled to have on hand enough water at adequate pressure for fire protection purposes, but that it is under no liability to an owner of property who has

his property destroyed by reason of the failure of the water company to comply with this duty. This distinction I cannot understand. The idea of a duty without a liability in case property rights are injured or destroyed by a failure to perform the duty is foreign to my ideas of the law. If a duty exists in this case, a liability ought to exist for failure to perform the duty. On the other hand, if no liability exists, this fact is very persuasive of the conclusion that there is no duty.

Continuing, the Court says at page 318:

> "Applying the reasoning of these authorities to the relation between the company and the consumer here, it is apparent that from that relation no obligation to furnish water for fire protection is implied, nor can it be said to exist in the absence of an express contract."

Referring to the question of the increased rates which would have to be paid if water companies assume to protect against fire, the Court says at page 319:

> "In the nature of things the compensation fixed by the municipality has no relation to the assumption of any such liability; that compensation is based on the expense of furnishing water simply as a commodity; liability for destruction of premises to which the company may be required to supply water was not taken into consideration in fixing the rates, nor, we apprehend, was it even thought that xxxx any such liability could be imposed by the ordinance, or was to be assumed by the company in doing so."

Again, on the same page;

> "It would not seriously be contended xxxx where property owners have installed hydrants, stand pipes or such other facilities, upon their property as might be available to them to extinguish fire, that a water company furnishing water to the premises from connections made therewith, and at ordinary ordinance rates for water, would be liable for a loss by fire occasioned either through a deficiency or total failure of water at the time it occurred. Such a liability could not be forced upon the company by the action alone of the consumer installing these facilities."

Referring to the contention that a contract arose from the fact that the water company charged the monthly ordinance rates for the hydrants installed upon plaintiff's premises, the Court says at page 320:

> "But these were not paid by reason of any contract between it (plaintiff) and the defendant. If a voluntary contract had been made between them under which a stipulated monthly sum was charged plaintiff by defendant for connecting its mains with the hydrants of the plaintiff, it might reasonably and plausibly be argued that fire protection was contemplated as the only advantage

to be derived therefrom. Here, however, there was no such contract. While the municipality has the constitutional power to fix the rates at which a water company may supply water to its inhabitants, this applies only to the establishment of rates for the supply of water as a commodity, and while it may contract with the company for general protection against fire of the property of its inhabitants and expressly contract for protection of its own municipal property, it has no authority to arbitrarily impose upon a water company liability for the destruction of the property of the individual citizen on account of an inadequate water supply by simply fixing an ordinance rate for hydrants which the citizen may install upon his premises."

The Court then refers to the enormous liability which a water company would be compelled to assume upon the plaintiff's theory without any adequate consideration and concludes at page 322, that the only relation shown to exist between the plaintiff and defendant was that of a water company engaged in distributing water for public use to a consumer who had availed himself of his legal right to have the company connect its water system with his premises for the purpose of furnishing him with water solely at ordinance rates fixed by the town of Berkeley, and that under these circumstances,

"no liability is imposed by any statute of this state upon such public service company for failure, from whatever cause, to have a supply of water available on the premises of the consumer for use in fire protection, although he may have installed ample facilities for that purpose, and no legal liability for such failure, independent of the statute, is implied from the relation; that such liability can only be created by contract between the parties under which the water company expressly assumes the liability."

As no contract was proven, the plaintiff was held to have no right to maintain the action.

The Niehaus case is the last expression of the courts of this State bearing on the question here under consideration. It appears clearly from that case that the ordinances of the city of Berkeley establishing water rates are not sufficient to create an express contract under which the defendant is liable for loss by fire and that in the absence of such an express contract, no liability exists. In the absence of such liability it would seem equally clear that there can be no duty on the part of the water company to increase the mains on Prospect Street from two inches to six inches in diamter and to supply water through it at a sufficient pressure for fire protection purposes. In the absence of a liability it seems

difficult to find a duty. This conclusion is strengthened by the fact that if the Peoples Water Company can be compelled to increase its two inch mains to six inch mains for fire protection purposes and to deliver water at an adequate pressure through them, for all individuals who apply, the water company will have to rebuild a large portion of its system in the city of Berkeley, and will have to incur large additional expenses for the supply of water, with the result that the rates to be paid by the consumers of water in Berkeley will be increased very materially because of the additional investment. Under the decision in the Niehaus case it seems clear to me that prior to the enactment of the Public Utilities Act, there was no duty on the part of the defendant to increase the size of the pipe in Prospect Street, Berkeley, for fire protection purposes. I am not here passing on the duty of the Water Company to install such fire hydrants in its existing plant as may from time to time be required by the city of Berkeley and to permit the use of such hydrants for the purpose of flushing the sewers, sprinkling the streets and furnishing water for general fire protection purposes.

Complainant relies chiefly on the claim that under the Public Utilities Act it has been made the duty of water companies to supply sufficient water for fire protection purposes to individuals and that this Commission has the power to enforce the duty. Both parties agree that if this power vests in any public authority it vests in the Railroad Commission. It becomes unnecessary to determine this point in this proceeding. Complainant apparently relies on Section 13 (b) and Section 42 of the Public Utilities Act, reading as follows:

> "Sec.13(b) Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable."

> "Sec. 42. The commission shall have power, after a hearing had upon its own motion or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner

as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of ~~xxxxxxxx~~ appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signalling, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand."

I cannot find in these sections any intention to impose upon a water company any duty with reference to fire protection which did not exist before the enactment of the Public Utilities Act. In my opinion, the effect of these sections is not to add to the duty of a water company with reference to fire protection, but rather to declare that a water company shall perform its full duty to the public in all respects in which it is under obligation to the public and to provide that the Railroad Commission may enforce ~~xxx~~ the performance of these duties. If it had been intended to impose upon a water company additional duties demanding the very large expenditures of money which would be required to rebuild their systems in such a way as to insure adequate fire protection, the Legislature would certainly have expressed that intention in specific language clearly indicating its desire. In the absence of such language I am of the opinion that the Public Utilities Act has not added to the existing duties of water companies with reference to fire protection. I am confirmed in this view by the opinion of the Supreme Court of Wisconsin in the case of Krom vs. Antigo Gas Company, et al, 140 N.W. 41, decided on February 18, 1913, in which case a similar conclusion was reached with reference to similar provisions of the Public Utilities Act of Wisconsin. It was argued in that case that the provisions of the Public Utilities Act to the effect that each water company should furnish reasonably adequate service and facilities and imposing penalties in case of failure so to do, made the defendant water company liable for failure to furnish adequate facilities to put out a fire which occurred in Antigo. The Court held that there was no duty cast upon the water companies to furnish water for extinguishing fires

to any person other than a municipality and that the statute did not impose any new liability.

For a reference to a large number of cases from other states reaching the same conclusions which have been reached by our Supreme Court in the Town of Ukiah and Niehaus cases, I desire to refer to Wyman Public Service Corporations, Section 350, and Farnham Waters and Water Rights, Section 160-B, and cases there cited.

If the conclusions herein stated are correct, we are confronted with the practical question as to how an individual is to secure adequate fire protection for a house located in outlying sections of a territory supplied by a water company, in which the size of the mains and the pressure are not sufficient to furnish adequate fire protection. In some of the cases the courts have suggested that a loss by fire may be guarded against by insurance, and that the collection of the insurance, if a fire results, is an adequate remedy. While such remedy may seem adequate in law, it will afford little comfort to a person who is compelled to stand helplessly by and see his property destroyed.

The desired fire protection may, of course, be secured by contracts with water companies on the part of municipalities and individuals, in case the water companies are willing to enter into such agreements. Such conditions as may be deemed necessary may doubtlessly be inserted in charters and franchises and become operative as to water utilities hereafter entering the field, but this procedure could not be availed of as to companies now operating under existing charters and existing franchises not containing the desired conditions.

San Francisco and Oakland, and possibly other cities in this State, have, at public expense, installed auxiliary fire protection systems. It may be that other cities in California will find such a course to be the solution of the difficulty with reference to fire protection in cases in which the existing water plants do not in connection with their domestic service supply facilities and water

sufficient for fire protection purposes. When a city installs a fire protection system it acts under the same theory under which it acts when it installs adequate police protection. In either event, it acts in pursuance of the public safety and general welfare.

Ownership and operation of the existing water plants by the municipalities will not in and of itself provide the desired remedy, for the reason that it has been universally held that a municipality owning and operating its own water system is not liable in damages for destruction of property caused by the failure of the municipality to supply adequate facilities and water for fire protection purposes. See Town of Ukiah vs. Ukiah Water & Improvement Company, supra, at page 178, where a large number of authorities are cited.

While in reaching a conclusion in this case it has been necessary to examine the authorities at some length, it should be distinctly understood that the only point decided is that this Commission has no authority to compel the People's Water Company to increase the size of its pipes on Prospect Avenue, Berkeley, from two to six inches under the circumstances revealed in the pleadings, for the sole purpose of furnishing additional fire protection to the plaintiff.

I am of the opinion that this Commission has no jurisdiction to entertain this complaint, and recommend the following form of order:

O R D E R.

A public hearing and argument having been held on the question whether or not this Commission has jurisdiction to entertain the above entitled proceeding, and the Commission finding that it has no jurisdiction,

IT IS HEREBY ORDERED, that the above entitled proceeding be and the same is hereby dismissed.

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 15th day of August, 1913.

H. D. Loveland

Leo Gordon

Max Thelen

Edwin O. Edgerton

Commissioners.