Decision No. 26146

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Petition of the second class of the CITY OF TULARE, a municipal corporation, that the Railroad Commission ascertain and determine the just compensation to be paid for the distributing system of the Southern California Edison Company, Ltd., existing in the City of Tulare.

Application No. 18122.

F. J. Heid, Jr., City Attorney, for the Applicant.

Roy V. Reppy, B. F. Woodard, E. W. Cunningham and Gail C. Larkin, by B. F. Woodard, for the Southern California Edison Company.

BY THE COMMISSION:

O P I N I O N

This is a proceeding under Sec. 47(b) of the Public Utilities Act, in which the City of Tulare asks the Railroad Commission of the State of California to fix and determine the just compensation to be paid by the City to Southern California Edison Company, Ltd. for the taking of certain property and rights of the Company, such property and rights being described in the exhibits attached to the application and made a part thereof, as supplemented by amendments thereto, offered and accepted by the Commission and which, in brief, comprise the electric distributing system and franchise rights of the Company in the City of Tulare. In the course of the proceeding the City stated that upon acquiring the distributing system it was its purpose to purchase power wholesale from the Company and formally tendered a contract authorized by the City Council and appropriately executed providing for such purchase, at rates fixed by the Railroad Commission, for a term of seven years and thereafter unless terminated by a two years'

notice.[1] The City's application was filed on April 30, 1932, thus fixing the date as of which just compensation is to be determined.

The application has been heard before Commissioner Carr. Following the return on the order to show cause,[2] public hearings were held at Tulare on December 13, 1932, on January 12, 13, 24 and 25, and on April 7, 1933. Briefs have been filed by the parties, and the matter is now ready for decision.

Under Sec. 23(a) of Article XII of the Constitution and appropriate provisions of the Public Utilities Act consonant thereto, the Commission, departing from its usual administrative and legislative functions, here assumes the judicial attribute of determining from the evidence before it the just compensation to be paid for the property sought to be condemned. (See Marin W. & P. Co. v. Railroad Commission, 171 Cal. 706.) This is not the first instance in which

1. The Company in its brief questioned the authority of the City Council to authorize the contract and claimed that under the City Charter it should have been authorized by the Board of Public Utilities. The City in its brief argued with much show of reason that the Council was the proper body. However, to remove any question respecting the City's desire and purpose, there was attached to the City's brief a certified copy of a resolution of its Board of Public Utilities ratifying, confirming and approving the contract tendered and authorizing and instructing the execution of a similar contract by said Board on behalf of the City and further declaring the intention of the Board to purchase from the Company all power required by the City for the period mentioned in said contract. The Company also suggested that the proposed contract did not specifically provide for the City purchasing from the Company all the power it should distribute. The fallacy of this suggestion was pointed out by the City in its brief, where it was made very clear that the contract could not be given so narrow a construction. No objections, except these two, were urged by the Company against the effectiveness of the contract tendered by the City.

2. Certain objections made by the Company on the return day to the jurisdiction of the Commission to proceed and as to the form of application were by resolution adopted on August 8, 1932 overruled and the matter ordered to be placed on the calendar for hearings.

the Commission has been called upon to exercise this judicial function (see Marin W. & P. Co. v. Railroad Commission, supra; Marin W. Dist. v. Marin W. & P. Co., 178 Cal. 308; Pac. Gas & Elect. Co. v. Devlin, 188 Cal. 33; Southern Cal. Ed. Co. v. Railroad Commission, S. F. 13461 of May 13, 1929; Glendale v. Verdugo Canyon W. Co. et al., 4 C.R.C. 1011; Santa Monica v. Irwin Heights W. Co., 7 C.R.C. 444; Los Angeles v. Southern Cal. Ed. Co., 11 C.R.C. 83; Redding v. Northern Calif. Power Co., 19 C.R.C. 267; Oroville v. P. G. & E. Co., 21 C.R.C. 823; Stockton v. P. G. & E. Co., 22 C.R.C. 531; Los Angeles v. Southern California Edison Co., 32 C.R.C. 579; Fresno v. California Water Service Co., 33 C.R.C. 502; San Francisco v. Great Western Pr. Co., 33 C.R.C. 202; San Francisco v. P. G. & E. Co., 33 C.R.C. 219; Los Angeles v. Southern Cal. Ed. Co., Ltd., Decisions 24434 and 24435 of date Feb. 1, 1932), and its previous decisions and the rulings of reviewing courts upon its action therein constitute a body of precedent helpful in guiding it to a sound and reasonable determination in the instant case.

The following table outlines the estimates of just compensation and the several elements making up the total as presented at the hearings, as well as the final claims of the parties advanced in their briefs:

SUMMARY OF COMPENSATION ESTIMATES AND CLAIMS OF PARTIES

	Commission Engineers	Southern California Edison Company, Ltd.			City of Tulare				
						Ready			
		Eberle	Lewis	Kelley	Creim	Based on C.R.C. Cost	Based on Creim Cost	Company Claims	City Claims
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Reproduction Cost New One day pricing period	$214,201*	-	-	-	$199,067	-	-	-	-
Reproduction Cost New Less Depreciation	174,471*	-	-	-	147,631	-	-	-	-
Historical Cost	-	-	-	$255,214	-	-	-	-	-
Historical Cost Less Depreciation	-	-	-	217,000	-	-	-	-	-
Just Compensation exclusive of Severance	-	$174,471	-	174,471	-	$200,000**	$185,000**	$174,471	$190,000
Severance Damages:									
Physical	-	3,700	$3,700	3,700	-	3,700	3,700	3,700	3,700
Business		255,529	-	375,529	-	25,000	25,000	375,529	25,000
Total Just Compensation		433,700	464,700	553,700		228,700**	213,700**	553,700	218,700

*Use of "One Year Average Prices" results in an amount approximately $1,000 more.

** These are the lower of figures having a range of $5,000.

Evidence was also adduced by the Company as to increased severance damage upon the assumed possibility that the City, upon acquiring the property, might not purchase power wholesale from the Company, thus tending to bring about a certain amount of idle plant capacity.(3) Witnesses for the Company and the City, however, agreed that there was no other source of power in effect competitive with that of the Company.(4) The Company has dedicated its facilities to such wholesale service as the City of Tulare would require.(5)

The Company accepted as reasonably correct the estimates by Commission engineers upon reproduction cost new and less depreciation. Mr. Creim, for the City, questioned certain items for franchises, rights of way and overhead expense and was of the

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3. On such an assumption, Lewis estimated just compensation at $947,700, Eberle at $843,700, and Kelly at $1,003,700.

4. Mr. Ready, testifying for the City, was of the opinion there would be no damages because of idle plant as the Company would continue to wholesale power to the City. Mr. Lewis did not know of any source of power for the City as cheap as purchasing wholesale from the Company. Mr. Kelly's testimony was to like effect.

5. In the course of the hearings counsel for the Company stated:

"Mr. Ready, in view of an application we have recently made to the Commission which affects some of our presently filed schedules, felt some statement should be made in this case as to the effect of that application. And I am authorized to state that, so far as this proceeding is concerned, the filing of that application will not put us in a position where we will at any time use the change in our rate situation to argue against the propriety of any of the figures which have been based on the schedule as it now stands; and further, that if the City should, after acquiring the property, elect to receive service from the Company, the Company will serve them at such applicable rates as may then be in force under the jurisdiction of the Commission. In other words, we don't want them to feel, nor the Commission to feel, that that application has anything to do with this case, but that we stand ready to serve them at such rates as the Commission would feel justified in fixing." (Tr. p. 438)

opinion that accrued depreciation was greater than the amount estimated.[6] The amount of physical severance was stipulated.

The theories and elements of value presented and urged by the Company and the magnitude of its claims (as just compensation it urges an amount more than four times the cost of reproducing new the property being valued) correspond closely to theories and claims heretofore presented by this and similar companies in valuation proceedings.[7] Here, just as in these prior proceedings, the extreme result flowing from the theories and processes advanced leaves the mind unconvinced of the soundness of the bases upon which such a result is premised. These theories and elements of value have been so fully discussed and disposed of in previous decisions that further discussion of them would be a work of supererogation.

From a careful consideration of the record it is concluded that the just compensation, not including severance damages, which the City should pay to the Company for the property and rights described in the application, as amended, including going value and franchise rights, is the sum of $200,000.00, and that the amount of severance damages which the City should pay to the Company is the amount of $28,700.00, and that the total just compensation which should be paid by the City to the Company, including severance damages, is the sum of $228,700.00. It should be made clear, however, that no allowance for idle plant is included in the severance damage found. Under the record as developed it cannot be said that any idle plant

6. The City, in making its final contention in its brief, does not seem to give weight to the claim of greater accrued depreciation.

7. In Los Angeles vs. So. Calif. Ed. Co., supra, where a claim of similar magnitude was advanced, it was said "That just compensation for a property of this kind could be four times such reproduction cost is not from a practical standpoint conceivable."

will result from the taking. (See Collier vs. Merced Irrigation 213 Cal. 554, and cases cited.) The Company, by accepting the contract offered by the City, can fully and legally assure itself against any loss of load for at least seven years. Indeed, the record indicates it could not lose the load even if it so wished.

The following order is issued:

O R D E R

The City of Tulare, a municipal corporation, having filed with the Railroad Commission on the 30th day of April, 1932, a petition as above entitled, and the Commission having proceeded in accordance with the provisions of Sec. 47(b) of the Public Utilities Act to fix and determine the just compensation to be paid by the City of Tulare to Southern California Edison Company, Ltd., a corporation, for the taking of the property and rights described in the exhibits attached to the petition and the amendments thereto, public hearings having been held, the matter having been submitted and the Railroad Commission being fully apprised in the matter, makes the following findings:

1. IT IS HEREBY FOUND AS A FACT that the just compensation to be paid by the City of Tulare to the Southern California Edison Company, Ltd. for the property and rights described in the application, as amended, not including severance damages, is the sum of $200,000.00.

2. IT IS HEREBY FOUND AS A FACT that the just compensation to be paid by the City of Tulare to the Southern California Edison Company, Ltd. as severance damages to the remaining property and rights of the Company after the taking of the property and rights described in the application, as amended, is the sum of $28,700.00.

3. IT IS HEREBY FOUND AS A FACT that the total just compensation to be paid by the City of Tulare to the Southern California Edison Company, Ltd. for the taking of the property and rights described in the application, as amended, is the sum of $228,700.00.

The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 14th day of July, 1933.

C. C. Seavey

M. J. Carr

Commissioners.

I concur in the findings and order of the main opinion. On the record in this case no other reasonable result can be reached.

However, I wish to approve the view expressed by Commissioner Whitsell in his Dissenting Opinion as to the disastrous consequences of splitting utility systems into fragments. I repeat it: "If the municipalities in this state continue to condemn and take over the electrical distributing facilities within their corporate limits and thereby throw the greater burden of system maintenance and costs upon the backs of our rural population, the time is not far distant when that burden will become too great and agriculture will be compelled to forego the use of electrical energy or the utilities will be compelled to furnish electrical energy at a rate figure which would not return sufficient compensation to warrant the maintenance of the systems. Such taking of utilities' facilities with their resultant disintegration of utility systems will likewise be injurious to the urban as well as to the rural communities."

M. B. Harris
Commissioner.

I dissent:

The Commission in the foregoing decision has found the just compensation to be paid by the city for the properties to be Two Hundred Thousand ($200,000.00) Dollars, exclusive of severance damages. This was the figure given by the city's witness, Lester Ready, and exceeds the reproduction cost new of the properties, less depreciation, by some Twenty-five Thousand ($25,000.00) Dollars. In my opinion this witness did not give sufficient consideration to the earnings attributable to these properties in arriving at his estimate of just compensation. According to the witness' own testimony, the actual net earnings of the properties for 1931 - 1932, were at least Thirty-eight Thousand Two Hundred and Nine ($38,209.00) Dollars, a return of approximately twenty per cent (20%) on the just compensation as fixed by the witness. The term "just compensation" connotes the concept of an equivalent, "a full and perfect equivalent for the property taken." It is quite obvious that the figure of $200,000.00 for the properties in question, comprising as they do a most desirable part of the company's system, is not the equivalent of an annual net income of Thirty-eight Thousand Two Hundred and Nine($38,209.00) Dollars.

The Commission has allowed Twenty-eight Thousand Seven Hundred ($28,700.00) Dollars as severance damages, Thirty-seven Hundred ($3,700.00) Dollars of which is for physical severance and the balance for general business severance. This total figure is also in accord with the testimony of the city's witness, Mr. Ready. His estimates were predicated

upon the assumption that the city would purchase power from the company after the taking of the properties, and that there would be no loss in load to the company. This witness, therefore, allowed nothing by way of severance damages for loss sustained by the company through production, transmission and distribution facilities being rendered temporarily or permanently idle. I believe that the severance damages thus fixed by the witness were inadequate and predicated upon an assumption unwarranted under the authorities.

The Company's witness offered certain evidence on severance damages which evidence in part shows that the proportion of production, transmission, distribution, substation and general capital properly attributable to and dedicated to the service of Tulare for the year 1932 is the sum of Six Hundred Sixty-six Thousand ($666,000.00) Dollars. The record shows that if the city load is lost to the company this capital will remain idle for at least ten (10) years. The fixed charges on this idle capital will continue. The company's witnesses have estimated that the present worth of such fixed charges will be between Four Hundred Seven Thousand ($407,000.00) Dollars and Four Hundred Fifty Thousand ($450,000.00) Dollars. While these figures are somewhat fanciful and cannot be accepted as representative of idle plant severance, they do demonstrate that considerable severance damages will result to the company from the taking, which was not considered by the city's witness and which was not given due consideration by the Commission in the fixing of severance damages in this case.

At the last hearing in this matter, the city offered a resolution, duly adopted by the City Council, which authorized the President of the Council and the City Clerk to execute a contract on behalf of the city, said contract to provide that if and when the city should acquire the electrical distributing

system of the company, the city would purchase from the company power for the use in said system for a period of seven years, commencing on the date of acquisition of said system, and would pay for such power such rates as might be prescribed by the Commission. Pursuant to such authority an agreement on the part of the city was duly executed and filed with the Commission.

I do not believe that these filings in any manner offset or otherwise legally affect severance damages which will result to the company from the taking of the properties. The company now owns the Tulare system which furnishes a rather constant and desirable load. The taking will deprive the company of the ownership of this load and unquestionably occasion severance damages (because of idle capital) which should be allowed in the Commission's final figure of just compensation. The Public Utilities Act, Section 47, (b) 4, provides in part:

> " * * * When the proceeding has been submitted, the commission shall make and file its written finding fixing, in a single sum, the just compensation to be paid by the political subdivision for said lands, property and rights, or said part or portion thereof; provided, that if the commission finds that severance damages should be paid, the just compensation for such damages shall be found and stated separately."

Under this provision the amount fixed as severance must be stated in dollars and the statute does not permit the allowance of an off-set because of the willingness on the part of the city to purchase power wholesale from the company. In fixing reasonable rates which should be paid by the city, for power purchased under such a contract, the Commission would follow the usual standards of rate making, and it cannot be assumed that a rate would be prescribed sufficiently high to permit the company to recoup severance damages which it would sustain as a result of the taking of the properties. The Commission would not be warranted in establishing rates with

such an end in view.

In my judgment neither just compensation nor adequate severance damages have been fixed in this case. This failure on the part of the Commission will ultimately result in injury, not only to the stockholders of the company, but also to the consumers remaining on its lines after the property is taken, and particularly to those consumers remaining within the Tulare rural district. If the municipalities in this state continue to condemn and take over the electrical distributing facilities within their corporate limits and thereby throw the greater burden of system maintenance and costs upon the backs of our rural population, the time is not far distant when that burden will become too great and agriculture will be compelled to forego the use of electrical energy or the utilities will be compelled to furnish electrical energy at a rate figure which would not return sufficient compensation to warrant the maintenance of the systems. Such taking of utilities' facilities with their resultant disintegration of utility systems will likewise be injurious to the urban as well as to the rural communities.

Leon O. Whitsell
Commissioner.

I dissent:

In doing so, I concur in Commissioner Whitsell's dissenting opinion and offer these additional observations:

My conception of a fair award in this proceeding would first embrace the Commission Engineer's figure of "reproduction cost new less depreciation" $174,471. This testimony, while expert and competent, lacks the smack of advocacy, so characteristic of experts hired alike by condemning City and defending Company. I then would add a fair sum for going concern, certainly more than the arbitrary allowance of $26,000 advanced by the City's Engineer, Mr. Ready, and decidedly less than the gross demands of the Company witnesses. This figure should faithfully reflect a fair evaluation of a business capable of annually netting $38,000. If the record in this case does not offer evidence whence such values may be gleaned, it has failed in its purpose. Finally, severance damages "should be found and stated separately."

The figures found in the majority opinion are taken from the testimony of a single witness, the Engineer of the condemning party, L. S. Ready. I do not concur with his analysis of "just compensation." Mr. Ready testifies (Tr. P. 238 L. 13) "Compared with other urban districts, the revenue in this community (Tulare) is considerably higher than is generally experienced." In a word, we see in this proceeding a City forever removing some of the cream from a privately owned utility. It seems reasonable to me that when you buy cream you should pay for cream. This rule works for cities as well as for persons. Mr. Ready quotes Dr. Durand in support of his conclusions regarding fair value (Tr. P. 248 L. 6): "The offer of the highest bidder fixes the market value." In bold departure from this salubrious precept, we witness a City being offered a utility plum at the lowest figure conceived of by any

witness, and this figure fathered by the Expert hired by the purchaser. He allows $26,000 for the going concern of a business that annually nets a profit of $38,000. This does not harmonize with my concept of just compensation.

My views are likewise at variance with the majority opinion regarding severance damages. I believe that we should hold in one of two ways on the question of business severance damages. Either we should hold that there will be no business severance damages by reason of the "seven years contract," in which event no cash allowance should be made; or we should hold that there will be business severance damages, in which event we should state the same separately in a cash figure, pursuant to statutory mandate. The treatment of business severance damages in the majority opinion appears to me anomalous. First, "idle plant capacity" is eliminated therein by citing the practicability and certainty of the proposed "seven years contract." Hence, it follows nothing should be allowed for "idle plant." But, oddly, the majority decision discovers "severance damages" totaling $28,700. These are admittedly composed of "physical severance damages" in the sum of $3,700, and an unexplained additional $25,000. I fail to discern the lane of reasoning or conscience that brings us to this figure of $25,000. An examination of the record discloses its only explanation. The condemning City's witness, Expert Ready, supplies it without explanation or convincing justification. (Tr. P. 273 L. 1-6) All of this simply means that our Commission does find a substantial "business severance damage" and proposes a hybrid compensation consisting of a somewhat uncertain and possibly unenforceable "seven years contract," obligating the City to buy electric energy at wholesale rates from the Company, plus $25,000 in cash. The Commission attempts to afford the Company "just compensation" for such

"business severance damages" by providing for the disposal of energy by the Company to the City for seven years at wholesale rates, whilst the Company forever and irretrievably loses its more lucrative and profitable retail distribution of the same. Any such contract, enforceable or otherwise, for the wholesale load of energy, falls short of the just compensation vouchsafed in our Constitution and Statutes, and presents a dangerous departure from the principles which have ever assured to the owner whose property is taken under eminent domain a compensation "full, ample, and adequate." Such procedure is unwarranted in law and appears unsafe in practise.

In support of the majority opinion, it is contended that 15 per cent additional is added to reproduction cost new less depreciation for going concern. From this fact it is argued that were the entire holdings of the Company to be similarly condemned, such a liquidation would afford the owners generous compensation. This reasoning is only specious. Much of the property of this Company is confined to lean territory. No condemnation threatens any of these lean holdings, for no city or political subdivision cares to own and operate any utility business in unprofitable territory. Such property isn't sought at any price. Hence, the Company would be frittered away if, in selling out, it loses its richest holdings for a scant 15 per cent premium over reproduction cost new less depreciation. And thus we see the collapse of the 15 per cent theory.

It is likewise argued, in support of the majority opinion, that the owners of the Company made their investments charged with knowledge that through condemnation proceedings they might lose all or various parts of their utility assets. While it is true that these owners made their investments in the light of such knowledge, a corresponding truth exists that the same investors

had a right to feel secure with their Constitutional guaranty of "just compensation" in the event of condemnation proceedings, a compensation which would be "full, ample, and adequate."

Let us reverse this picture. Supposing the Company desired to purchase from the City of Tulare a flourishing portion of a business devoted to the distribution of electrical energy and annually netting the City over $38,000. Is it conceivable that Tulare would accept $228,700? The City in analyzing this figure would find it included reproduction cost new less depreciation plus $54,229 for going concern and severance damages. Inquiry into the analogous situations would reveal to the City the fact that this same Company had offered to buy similar businesses from the Cities of Colton, Azusa and Anaheim at prices exceeding in each case more than "twice the reproduction cost of the physical properties". (Tr. P. 311, L. 26) In each instance the Cities flatly refused to sell. By the same token, I believe Tulare likewise would decline to sell. These observations, partially gleaned as they are from the record, suggest a value of $348,942 for the Tulare property. This arbitrary figure is just twice the reproduction cost new less depreciation and happens to reflect a fair evaluation of capital capable of $38,000 annual net profit. Such figure might be closer to "just compensation" than the equally arbitrary total concluded upon in the majority decision.

Commissioner Whitsell has sounded, in his dissenting opinion, the danger to agricultural consumers in the event of widespread operation of this policy of sharp-shooting the lucrative spots of utility properties at the City's lowest bid. Such practise works greater havoc upon the legitimate investor in utility securities. The general enactment of this plan would threaten the stability of hundreds of millions now soundly invested and might imperil the perpetuity of utility structures throughout the entire

State. These comments emanate from a simple recognition of the fact that a regulation primarily conceived to safeguard the consumer must likewise afford impartial refereeing when the consumers become the aggressors.

I believe the estimates of Mr. Ready are too low. I also believe the estimates of the Company witnesses are too high. The majority opinion embraces in toto the former. I cannot concur in this with any greater comfort than I could find myself erring on the side of extreme generosity. No tribunal is justified in deciding issues on records that fail to carry conviction. I believe the matter should be reopened for the purpose of receiving accurate and convincing figures that would demonstrate fair value for each and every factor involved in property taken, going concern, and severance damages. Until this is done, no one will enjoy the proper solution.

Commissioner.