Decision No. 27724

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

JAMES J. RODDY, Complainant, vs. C. O'LEARY, Defendant.	Case No. 3707.

George De Lew, for Complainant.
Carl L. Josephson, for Defendant.

BY THE COMMISSION:

OPINION

James J. Roddy, operating a public utility water works supplying certain consumers with domestic water in San Pedro Terrace-by-the-Sea, also known as Pedro Valley, in the County of San Mateo, alleges that defendant C. O'Leary without a certificate is operating a public utility water plant in the same territory in active competition with him; that said defendant has damaged and torn up complainant's pipes and equipment; and that said defendant is unable to supply adequate water and service to his consumers. The Commission is asked to order said O'Leary to cease and desist from the further operation of his water plant. By way of answer defendant denies any interference with or damage to complainant's plant and alleges that he is operating merely as a private contractor engaged in selling surplus water to his neighbors and, upon the ground that this Commission

has no jurisdiction over his water operations, asks that the complaint be dismissed.

A public hearing in this matter was held before Examiner MacKall at Pedro Valley.

In 1908 or 1909 Hensley-Smith Company subdivided a tract of land below San Francisco on the Bay Shore in San Mateo County called originally "San Pedro Terrace-by-the-Sea" and installed a make-shift water system of small and undersized pipe to supply the lot purchasers. Water was obtained from seepage and mud holes on the hillside in and above the tract, stored in a small tank and delivered to the consumers by gravity. Each summer there was a water shortage and in dry years practically no water at all. Some few years after placing the subdivision on the market Hensley-Smith Company abandoned both the tract and the water system, which latter thereafter was operated as far as possible by the residents of the tract.

In 1928 a group of the residents of the community prevailed upon complainant James J. Roddy, a property owner and resident of the subdivision, to take over the pipe lines and supply them with water. Roddy agreed and acquired or dug two wells and installed a pump and storage tank, having in 1928 two consumers; at present he serves sixteen.

At the outset Roddy commenced the sale of water under three-year contracts with all users. However, in Application No. 18599, he applied to the Commission for a certificate of public convenience and necessity to operate a water system in the tract, which was granted May 15, 1933, in Decision No. 25941, contingent upon the obtaining by Roddy of a franchise from the county authorities and acceptance thereof by Supplemental Order of this Commission.

In this connection we must take judicial notice of the record in Case No. 3786, H.C. Billings v. James J. Roddy, heard on the same date as the instant proceeding, in which complainant demanded an extension of service to certain property located at an elevation considerably above Roddy's tank. Roddy heretofore had refused to furnish this service upon the ground, according to his testimony, that he was unwilling to make any further expenditures for new tanks and booster equipment until the determination of the issues presented in this case. Subsequently, however, Roddy agreed to install the facilities necessary for rendering the service under his filed rules and regulations, and complainant thereupon agreed to the dismissal of the case, so acted upon by Order of Dismissal, Decision No. 27168, dated June 20, 1934. There is no evidence before the Commission which would indicate the additional number of new users acquired or to be acquired in the near future by the above extension; however, Roddy apparently is now in a position and is willing to serve all consumers in the tract regardless of the elevation of the premises.

Defendant testified that he has never supplied water to any one except under written contract which, among other things, purported to provide for the sale of "surplus" water at the rate of one dollar and twenty-five cents ($1.25) per month, reserving the right on the part of O'Leary to discontinue the service at any time he may desire and without notice to the consumer. One such agreement between defendant and Alfred N. Goetjen was filed as Exhibit No. 1. It was stipulated that all such agreements could be considered substantially the same as Exhibit No. 1. Fourteen other agreements also were presented without being made formal exhibits and subject to return to defendant upon demand.

Exhibit No. 1 is set out below:

"THIS AGREEMENT made and entered this 24th day of January, 1931, by and between Con O'Leary of the County of San Mateo, State of California, and Alfred N. Goetjen of the same place, second party,

WITNESSETH:

That, WHEREAS, first party is the owner of a water supply on Lot 5, Block 5 of San Pedro Terrace, County of San Mateo, State of California, primarily used by said owner for domestic purposes, and developed by him primarily for his exclusive use, and:

Whereas said water supply is taken by well from subterranean floor on said premises above stated and is of unknown source and undetermined quantity and volume, and:

WHEREAS said supply has been developed at the sole cost and expense" (of?) "said first party, and:

Whereas second party is the owner of Lot ____, Block ____ of San Pedro Terrace aforesaid and is a neighbor of said first party, and:

WHEREAS second party is without water supply necessary for their domestic use at said location, and:

WHEREAS on the date hereof said first party has a reserve supply of water constituting a surplus beyond his immediate requirements;

NOW THEREFORE in consideration of the premises and the mutual promises of the respective parties hereto and the payments hereinafter provided to be made by second party to first party, it is mutually understood and agreed as follows:

Second party agrees to install his own pipe and plumbing connections to the source of water supply owned by first party at his own cost and expense, and in such operations and work first party shall be free and clear of all obligations or liabilities of any nature or kind whatsoever.

Second party further agrees that because of the uncertainty of water supply, or for any violation of this agreement or payments herein provided, or for any other reasons or cause deemed sufficient by First Party, and at the unqualified option of First Party, the use of said water by Second Party may be ended and terminated at any time pending this agreement, or otherwise, and in such event of termination, First Party shall not be required to serve any notice whatsoever to Second Party and such termination by withdrawal of use of said water shall in no way by law, or equity, or

otherwise render First Party liable for damages or
costs, or expenses of any kind to Second Party,
and said water supply may be disconnected by
First Party at his own will or action free from
hindrance or molestation of Second Party.

Second Party further agrees to pay First Party
the sum of $1.25 per month, for each and every
month of said use of surplus water for such period
as First Party is able and willing to grant said
use of surplus water.

And in consideration of the foregoing promises,
agreements and understandings, First Party agrees
to allow the use of surplus water above referred
to Second Party.

IN WITNESS WHEREOF the said parties have hereto
set their hands the day and year in this agreement
first above written.

(Signed) Con O'Leary
First Party

Witness: ____________ (Signed) Alfred N. Goetjen
Second Party"

Witness: ____________

-oOo-

No agreements were presented covering the service now being supplied by defendant to ten of his consumers and, while counsel for complainant contends that no contracts ever were signed by any of said ten consumers, defendant O'Leary claims that each and every one of said ten consumers did sign such agreements but that they have been mislaid. The evidence on this particular point is extremely conflicting. The ten water users involved are all receiving service at the present time and it seems quite significant that defendant was unable to produce the alleged agreements covering the service to this large group of users. The failure to submit these agreements clearly warrants a rather strong presumption that no such contracts were ever made and that service was extended to these residents without the

signing of any agreement whatsoever.

The evidence shows that the water supplied by complainant has been approved by the State Board of Health as safe for drinking purposes while no evidence of approval from this source or any other was presented by defendant as to his water supply. Complainant has fully complied with all legal requirements in connection with his operation of a public utility water works; defendant has never at any time applied for or received a certificate of public convenience and necessity from the Railroad Commission nor has he ever obtained a franchise from the County of San Mateo to construct a water works and occupy the public streets, highways, roads and alleys. Although defendant stated that he had been given permission so to do by the County Board of Supervisors several years ago, he was unable to substantiate this claim by any tangible evidence.

It is obvious that this community is unable to support two water plants with an ultimate prospect for some time to come of not over sixty or seventy water users in the entire area of service. Both parties admitted they are now and have been for some time last past operating at a loss. Roddy is bound legally and is now willing to extend his service throughout the entire tract upon demand and upon compliance by any bona fide applicant with his rules and regulations. Defendant refuses to supply beyond the gravity flow of his tank and admits invasion of the complainant's territory. He can readily obtain consumers in the lower elevations of the tract by reason of the fact that he charges less than the filed tariffs of complainant, in spite of the fact that several witnesses testified that defendant's water service was poor, undependable and frequently interrupted for several days at a time. The advantage of this situation to defendant with its resulting damage to com-

plainant is self-evident.

No weight as evincing public utility status of the domestic service is given the fact that fire hydrant service is furnished occasionally and sporadically by defendant as this is rendered free of charge, the community being unincorporated and not within the boundaries of any fire district.

The large size of the plant installed by defendant, so obviously capable of producing far in excess of any reasonable demand for his own two lots, together with his continuous installation of mains in the public streets, shows that from its inception this system was designed and intended to supply water to all applicants for service under the gravity flow of the tank. While an attempt was made to confine service to agreements with individual consumers, the evidence does not show that this practice was actually followed in all cases. The designation "surplus" water is clearly a subterfuge, considering the fact that defendant supplied some twenty-four consumers at one period. Such contention obviously is in the category of "the tail wagging the dog." Neither can this service be considered as coming within the exemption clause of Section 1 of the Act for Regulation of Water Companies (Statutes 1913, Chapter 80, as amended), releasing from the jurisdiction of the Railroad Commission service rendered to neighbors as a matter of accommodation where no other supply of water is equally available. The continued expansion of defendant's operations into territory already adequately supplied by an existing public utility is conclusive of his intent to serve the public generally.

Section 1 of the Act for Regulation of Water Companies reads as follows:

"Whenever any person, firm or private corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system within this state, sells, leases, rents or delivers water to any person, firm, private corporation, municipality or any other political subdivision of the state whatsoever, except as limited by section 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility, and subject to the provisions of the Public Utilities Act of this state and the jurisdiction, control and regulation of the Railroad Commission of the State of California; provided, however, that whenever the owner of a water supply not otherwise dedicated to public use and primarily[1] used for domestic purposes by such owner or for the irrigation of such owner's lands, shall sell or deliver the surplus of such water for domestic purposes or for the irrigation of adjoining lands, or whenever such owner shall, in an emergency water shortage sell or deliver water from such supply to others for a limited period not to exceed one irrigation season, or whenever such owner shall sell or deliver a portion of such water supply as a matter of accommodation to neighbors to whom no other supply of water for domestic or irrigation purposes is equally available then such owner shall not be subject to the jurisdiction, control and regulation of the Railroad Commission of the State of California; * * *." (See also Section 2(dd) of the Public Utilities Act.)

It should be observed that in those cases of the sale of surplus water by the owner of a water supply not otherwise dedicated to public use the exemption from public utility status provided in the above Section 1 is definitely and specifically limited to a water supply "primarily" used for domestic purposes by such owner. This clearly shows the intent of this provision to draw a definite distinction between a water plant originally and fundamentally designed and operated to serve the public generally or some certain portion thereof and one designed and operated "primarily" for the owner's personal use only.

From the facts set out above, we are of the opinion that

1. Underscoring ours.

defendant is rendering a public utility water service without proper authority from this Commission and is unlawfully invading the territory which appears to be adequately served by an existing public utility which has gone to great lengths to comply with the laws of the State of California governing public utility water works operation. Defendant therefore will be directed to cease and desist from the further distribution of water as a public utility on and after the date hereinafter specified unless and until he shall have obtained a proper franchise or permit from the County of San Mateo and, in addition thereto, a certificate of public convenience and necessity from this Commission to operate a water works supplying water to the public generally in territory to be specifically defined.

While defendant contends that he is not operating as a public utility, he also takes the position that even though the Commission should so define his status it is without power to order him to cease such operation.

Section 50(a) of the Public Utilities Act provides in part as follows:

> "No * * * water corporation shall henceforth begin the construction * * * of a line, plant, or system, or of any extension of such * * * line, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction; * * *."

Under Section 50(b) no public utility of a class specified in Section 50(a) may "exercise any right or privilege under any franchise or permit hereafter granted * * * without first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege;***."

It is clear that where the regulatory statute requires that one obtain a certificate of public convenience and necessity before entering into a public utility business, and the Commission finds in a complaint proceeding that such condition has not been complied with, it may direct the person to refrain from doing the act found by the Commission to have been done in violation of the statute. The making of such a "cease and desist" order is not an unauthorized exercise of injunctive powers.

It should be noted further that under Article XII, Section 22 of the Constitution of California, and Sections 54 and 81 of the Public Utilities Act one who fails to observe, obey, or comply with any order of the Commission shall be in contempt, and is punishable in the same manner and to the same extent as contempt is punished by courts of record.

ORDER

Public hearing having been had on the above complaint and the matter submitted,

It is hereby found as a fact that C. O'Leary is rendering water service and selling and delivering water for compensation to the public, and is operating as a public utility and as a water corporation within the meaning of the Act for Regulation of Water Companies and the Public Utilities Act, without a certificate of public convenience and necessity, in and in the vicinity of San Pedro Terrace-by-the-Sea, also known as Pedro Valley, in the County of San Mateo.

IT IS HEREBY ORDERED that C. O'Leary cease and desist

rendering such public utility water service not later than June 1, 1935, unless and until he shall have obtained a proper franchise or permit from the County of San Mateo and, in addition thereto, a certificate of public convenience and necessity from this Commission.

The Secretary of the Commission is directed to cause personal service of a certified copy of this decision to be made upon C. O'Leary, and the effective date of this decision, for all purposes other than the date specified for ceasing public utility service, shall be twenty (20) days after the date of such personal service.

Dated at San Francisco, California, this 4th day of February, 1935.

Leon Whitsell

M. J. Carr

W. B. Harris

Wallace L. Ware

Frank R. Devlin

Commissioners.