Decision No. 28951

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Application of MT. SHASTA POWER CORPORATION, a corporation, for an order of the Railroad Commission of the State of California authorizing applicant to obligate itself, in appropriate manner, to release and discharge, or cause to be released and discharged, into Pitville Pool certain waters referred to in this petition.

Application No. 19511.

ORIGINAL

Wm. B. Bosley, Thos. J. Straub, C. P. Cutten, R. W. Du Val, Chenoweth & Leininger by Orr M. Chenoweth, and Athearn, Chandler & Farmer by A. E. Chandler, attorneys for Applicant.

Jesse W. Carter and Dallas L. Barrett, attorneys for Protestants.

WARE, Commissioner:

OPINION

In this proceeding Mt. Shasta Power Corporation, a public utility engaged in the generation, transmission and sale of electric energy in the State of California, applies to the Railroad Commission for authority to obligate itself, in each of nine civil actions pending and also in any like suit or suits that may hereafter be instituted against it, by consent, stipulation, pleading, or in any other appropriate manner, to release and discharge, or to cause to be released and discharged, into Pitville Pool so much of the waters naturally flowing in Fall River and its tributary, Tule River, as may be required from time to time to maintain the level of the water in said Pitville Pool substantially at its natural level.

Three separate protests were entered against the issuance of the authorization prayed for. One group of protestants is comprised of nine separate plaintiffs in the nine civil actions now

pending against the utility; another group is comprised of fourteen riparian owners on Fall River who recovered judgment against the utility in a civil action to enjoin said utility from fluctuating the waters of Fall River; and the other group is comprised of eleven residents of Fall River Valley who are consumers of applicant's electric energy. These three protests are similar in their general allegations and pray that the application be denied.

Public hearings in this proceeding were held at Redding and the matter submitted on briefs.

The evidence shows that Fall River Valley, in which are located the various points referred to herein, is in the northeastern portion of Shasta County, California. It comprises some 50,000 acres of agricultural land, being divided into three sections, namely, those lands bordering Fall River, those bordering Pit River, and those lying in the floor of the valley and not bordering either stream.

Fall River, which winds through the valley in a southerly course, has its source in large springs at the valley's north end. These springs are naturally controlled outlets from large underground basins and the flow from them is very constant. Supplementing the springs, Fall River is fed by tributaries such as Tule River, Squaw Creek and other streams whose sources are also in springs. The channel of Fall River has a very slight grade as far as the Pit One[1] diversion and, consequently, it flows very slowly. From the point where the diversion to Pit One takes place to its confluence with Pit River, Fall River, in a state of nature, dropped more rapidly and just at the confluence tumbled over fifty-foot falls into Pit River. This stretch of channel is now dry except for small amounts of water released from time to time to satisfy two old established appropriative rights recognized by applicant. Because of its

1. Pit One is the name of the power plant owned and operated by the Mt. Shasta Power Corporation and is located on Pit River seven miles below the confluence of Fall River and Pit River, and being in Shasta County, California.

sources being in large springs of constant flow, the river does not vary much in its yearly runoff, its average flow being about 1,200 cubic feet per second.

Pit River, which runs into Fall River Valley from Big Valley in Modoc County, has a southwesterly course and is in the south end of Fall River Valley. Its flow depends upon seasonal runoff which assumes flood proportions in the late winter and spring with practically no flow in summer. In the southeastern part of the valley, where Pit River enters, is a point known as Young's Falls. From the base of these falls westerly for a distance of eight and a half miles to a point about 500 feet below its confluence with Fall River, Pit River is an elongated pool. This pool has an average width of about 135 feet and an average depth of about 13.5 feet and, at normal stage, holds about 2,012 acre feet of water.

The Mt. Shasta Power Corporation's diversion dam for its Pit One power plant is situated across Fall River about two miles above its confluence with Pit River. Pit One power plant, through which the entire flow of Fall River is diverted, is situated on Pit River and on the west side of Saddle Mountain bordering Fall River Valley on the west. Fall River water is conveyed through a tunnel to Pit One and, after passing through the plant, is spilled into Pit River channel about seven miles below the confluence of the two streams.

The evidence shows further that prior to the time when the Mt. Shasta Power Corporation, in 1922, diverted all of the water flowing in Fall River for the operation of Pit One, that Fall River flowing over the falls into the Pit River Pool sustained the water in the pool at a constant level due to a combination of natural conditions. At a point about 500 feet below the mouth of Fall River there is a lava reef across Pit River which acted as a natural dam. In this lava reef there was a V-shaped notch which acted as a

spillway allowing surplus water to flow down Pit River channel. In a state of nature, during the summer season when there was little or no flow in Pit River over Young's Falls, the large quantity of Fall River water spilling into this pool sustained it at a very constant level.

In 1922, when the Mt. Shasta Power Corporation diverted Fall River away from Pit River, the water level of the pool dropped five feet. When the Company discovered what had happened, it proceeded to close the V-shaped notch in the lava reef dam and build a concrete coping upon the reef. This caused the water level to return to its normal elevation in Pit River Pool, also known as Pitville Pool.

The landowners bordering the Pit River Pool not being satisfied with the artificial condition so created filed suits for damages against the Mt. Shasta Power Corporation. Nine such suits have been filed. In them the plaintiffs allege that their lands bordering the Pit River Pool are riparian not only to Pit River but also to the waters of Fall River, which, in the summertime, flowed over and by their lands in a state of nature; that by reason of the diversion of Fall River away from Pit River Pool they have been deprived of their riparian rights in and to the waters of Fall River; that the values of their lands, by reason of the diversion of Fall River, have been materially depreciated; and that the Company, except for the construction of the coping on the lava reef, had made no effort to correct other unsatisfactory conditions created by the diversion of Fall River. Damages prayed for by the nine plaintiffs in the aggregate amount to $875,000.

Five of these cases were tried individually before different juries in the Superior Court of Shasta County and in each case the jury found for the plaintiffs and awarded substantial damages to them. All of the five cases have been taken on appeal to the State Supreme Court and two of the cases consolidated for hearing by that court (Crum v. Mt. Shasta Power Corporation and Albaugh v. Mt. Shasta Power

Corporation, 87 Cal. Dec. 365) have been remanded to the Superior Court for retrial on the amount of damages only, the findings of fact having been sustained. The other three cases appealed are pending and there still remain four cases to be tried in the Superior Court.

During the course of the trial of the cases of Crum v. Mt. Shasta Power Corporation and Albaugh v. Mt. Shasta Power Corporation in the Superior Court the Mt. Shasta Power Corporation submitted and offered in evidence a written offer and consent as follows:

"To the above entitled Court and to the plaintiffs in the above entitled cause:

"Mt. Shasta Power Corporation, defendant herein, in view of the decision of the District Court of Appeal in the above entitled cause, hereby admits that said plaintiffs, by virtue of their ownership of the lands described in their complaint and riparian to that part of Pit River known and designated as the Pitville Pool, are entitled to the maintenance of the water in that pool, at all times, substantially at its natural level as such level would be if the waters of Fall River should continually flow into it at the natural confluence of said rivers.

"This defendant asserts that, by virtue of its ownership of the riparian rights and the riparian lands described in its answer, it has the right to continue to divert and use at all times the waters of Fall River as it is now doing for the operation of its Pit No. 1 Power Plant, provided only that its diversion and use of such water shall not actually result in substantially lowering the level of the water in said Pitville Pool below its aforesaid natural level.

"This defendant declares that it does/now not intend and never has intended or purposed to infringe or violate the right of said plaintiffs to the maintenance of the aforesaid natural level of the water in said pool; and does hereby undertake and promise to maintain and operate the dam which it has heretofore constructed at the rock reef in the channel of said Pit River, a short distance below the natural confluence therewith of Fall River, and to maintain the level of the water in said Pitville Pool substantially at its aforesaid natural level and not lower than the top of the aforesaid dam by means of its maintenance and operation of said dam and by discharging or causing to be discharged into said Pitville Pool so much of the waters naturally flowing in said Fall River and its tributary, Tule River, as may be required for that purpose from time to time, so long as this defendant shall continue to divert water from Fall River above its natural confluence with Pit River; and does hereby irrevocably consent that the judgment to be entered herein shall require this defendant to maintain and operate said dam and to maintain the natural level of the water in said Pitville Pool as it has herein undertaken and promised to do.

"In witness whereof said Mt. Shasta Power Corporation has caused its corporate seal to be hereunto affixed and has caused its corporate name to be hereunto subscribed by its officers thereunto duly authorized on this 27th day of May, 1932.

Mt. Shasta Power Corporation,

By P. M. Downing,
Its Vice-President.

(Seal)

and by Chas. L. Barrett,
its Secretary, Assistent."

The trial court ruled that the foregoing stipulation could not be admitted without the consent of plaintiffs. In its review of the case, the Supreme Court in 87 Cal. Dec. 365, at pages 374 and 375, held as follows:

"During the course of the argument over this stipulation, counsel for defendant further agreed that if the waters of Pitville pool ever became insufficient to maintain the level of the pool, defendant would agree that Fall river water should be released sufficient to keep the level of the pool at the height existing before the diversion. The trial court refused to admit this stipulation into evidence, or to instruct the jury in reference thereto. The trial court's refusal was based on the theory that the stipulation was ineffectual for any purpose unless the plaintiffs agreed thereto.

"It is to be noted that this stipulation contains two very important concessions on the part of the defendant. First, it is agreed, that defendant will maintain the level of the pool by a release of Fall river waters if necessary; and second, it is agreed that the defendant will always maintain the dam and that the judgment may contain a provision to that effect.

"As to the first concession, it is our opinion that it was beyond the power of the defendant to make without first securing the consent of the railroad commission. The evidence clearly shows that defendant is a public utility and that a public use has attached to all but an immaterial portion of the flow of Fall River. For the ten-year period immediately preceding the trial of this action substantially the entire flow of Fall river has been diverted by defendant and devoted to a public use. In effect the stipulation amounts to an offer to reconvey a portion of this water to plaintiffs. This, defendant cannot do without the consent of the railroad commission. A public utility cannot thus convey its property which has been dedicated to a public use without the consent of that commission. Section 51 of the Public Utilities Act (Stats. 1927, p. 78) expressly provides:

"'No public utility shall henceforth sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public *** without first having secured from the railroad commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void. ***.'

"There are many cases holding, in accordance with that section, that a public utility cannot convey or transfer its property which has been dedicated to a public use without the consent of the railroad commission. (Napa Valley Electric Co. v. Calistoga Electric Co., 38 Cal. App. 477, 176 Pac. 699; Water Users etc. Assn. v. Railroad Commission, 188 Cal. 437, 205 Pac. 682; Baldwin v. Railroad Commission, 206 Cal. 581, 275 Pac. 425.)

"Appellant relies on Collier v. Merced Irr. District, 213 Cal. 554, 2 Pac. (2d) 790, and Colorado Power Company v. Pacific Gas & Electric Co., 86 Cal. Dec. 116, 24 Pac. (2d) 495; as establishing a contrary doctrine. It is true that those cases recognized that in water cases a defendant may minimize the damages by guaranteeing a water supply to the plaintiff, but that is as far as the rule established by those cases goes. The Collier case did not involve a public utility so that the consent of the railroad commission was not required. In the Colorado Power Company case, although the defendant was a public utility, it does not appear that the point here involved was discussed or mentioned. That case cannot, for that reason, be considered as authority on the point. We emphasize the fact that the stipulation here involved was offered after the public use had attached. We, therefore, hold that the trial court properly excluded this part of the stipulation from consideration."

Applicant wishes to resubmit the stipulation in the trials and retrials of the cases enumerated above so as to minimize any judgment for monetary damages that may be found against it. With that purpose in view, it asks the Railroad Commission for authority to make the offer set forth above.

In support of its request applicant has presented many and voluminous records and much testimony. The protestants have done likewise. Therefore, the evidence herein contains practically a complete record of each of the five civil actions already tried.

For the purposes of this proceeding some of that evidence is material and a great deal of it is not material. It appears that the only issue herein, with which the Railroad Commission is concerned, is whether or not it is in the public interest to permit applicant, a public utility, to abandon and reconvey a portion of its operating property for the sole purpose of minimizing the amount of monetary damages which may beawarded in a civil action against it.

The only prior proceeding before the Railroad Commission which has any connection with the matter herein was held in Application No. 6044. This was an application by the Mt. Shasta Power Corporation for a certificate of public convenience and necessity to operate Pit One power plant and other plants on Pit River which it proposed to build. The application was made on August 19, 1920, and at that time the power plant to be operated directly by the diversion of Fall River water was named Fall River No. 1. This name was subsequently changed to Pit One. The application contains the following information with respect to this plant:

Average Low Water Flow in Fall River - Cubic Feet per Second--	1,400
Available Net Head in Feet ----------	425
Available KW at average Low Water Flow at 80% plant efficiency-	42,000
KVA to be installed ----------	70,000

After a public hearing the application was granted and a certificate of public convenience and necessity issued as prayed for. This was done by the Railroad Commission's Order in Decision No. 8212, dated October 6, 1920.

Applicant contends that, in all probability, no water will ever have to be released from Fall River to satisfy the riparian owners on the Pitville Pool. To support this contention, it has introduced evidence intending to show that the level of the pool is adequately maintained by the inflow from artificial sources and natural tributaries; that these existing inflows will provide sufficient water for irrigation; that the return flow from irrigation is not

waste water, and, therefore, the pool cannot be deprived of it; that five-tenths of an acre foot per acre is sufficient for the irrigation of the riparian lands involved; and that the quality of the water in the pool is entirely satisfactory for irrigation purposes.

Protestants strongly deny applicant's contention and argue that, when the needs of the riparian lands are considered, the release of a substantial quantity of water from Fall River will be required; that the only natural source of supply for Pitville Pool, without Fall River, is the flow in Pit River which, at times, is as low as one and eight-tenths cubic feet per second in the summer months; that the McArthur Canal and Knoch pipe line are not sources of supply for the Pool and the waste water discharged from them may be stopped with impunity at any time; and that the required quantity of water for the irrigation of the riparian lands is far in excess of applicant's estimate.

The evidence presented on the foregoing points is conflicting. Consequently, the questions as to how much water need be abandoned and the extent of the respective rights of plaintiffs and defendant in the Pitville Pool, with particular regard to the inflow of McArthur Canal and Knoch pipe line water, remain yet to be decided. To determine such matters is the function of the civil courts and not of this Commission.

Contrary to the implication contained in the briefs of counsel for applicant, the Supreme Court of the State of California in Crum v. Mt. Shasta Power Corporation and Albaugh v. Mt. Shasta Power Corporation, supra, did not instruct this Commission in any manner regarding the stipulation. It simply said that, if the utility wishes to make an offer of reconveyance of a part of its operative property, it must first secure the authority of this Commission so to do. Supplementing the conditions contained in Section 51(a) of the Public Utilities Act, this Commission has made the rule that an application to sell, lease, mortgage or otherwise encumber public utility property must contain

a detailed description of the property to be sold, leased, mortgaged or otherwise encumbered, together with the original cost to applicant and present value thereof. That rule was made for a very definite reason and is pertinent in the application herein. This Commission cannot authorize the abandonment of utility property unless the utility clearly describes the property authorized to be abandoned. Moreover, such abandonment must be justified in the public interest.

All of the waters diverted by applicant, and constituting the subject matter herein, are vital to the operation and performance of applicant's hydroelectric plant designated Pit One. This great plant comprises capital investment in excess of $10,000,000. Its maximum production of power reaches 70,000 K.V.A. Here it becomes both appropriate and necessary to enunciate: First, the applicant utility has failed in this record to present a clear description of the property sought to be abandoned. Secondly, there is no proof as to the extent of benefit or harm which the public may anticipate and which would result from such abandonment."

It does not appear to be in the public interest for this Commission to join with this utility in the pending civil litigation. Such joinder would occur if the applicant were granted the authorization sought herein to submit an offer to release an undetermined quantity of its operative property.(1a) Such an act would place this Commission in the civil courts on the side of one litigant only - a position that would be untenable.

Applicant takes the position that this Commission should determine whether or not any water will have to be released into Pitville Pool and, if any, it should also determine the quantity. For this purpose, it introduced in evidence the transcripts on appeal in

1a. Applicant asserts that there is no likelihood that it will ever be required to discharge any water from Fall River to maintain the natural level of the Pool.

five of the civil cases and a portion of the reporter's transcript in the Crum and Albaugh cases. Protestants, in support of their contention that the application should describe a definite quantity of water, adduced through their witness Roderick McArthur that as much as 136 cubic feet per second continuous flow for five months in every year would be required from Fall River to satisfy the riparian owners on Pitville Pool. In its argument applicant says that it is likely no water will have to be released but that, if sufficient water were released to satisfy the entire area riparian to Pitville Pool, such released water would amount to only twenty-three cubic feet per second continuous flow. The evidence shows that on this point there is grave conflict. To decide what the quantity, if any, shall be amounts to an adjudication of the rights of the respective parties and that function is not within the jurisdiction of this Commission.(2)

If the judgment of a court of competent jurisdiction decreed that a definitely described quantity of Fall River water released into Pitville Pool in lieu of the payment of monetary damages would satisfy the riparian owners on that Pool, and if the utility presented such a judgment in an application to this Commission, there would be no question of the Commission's competency to decide whether or not it would be in the public interest to authorize the abandonment of that quantity of water. The Commission could then continue in its well-established precedent of accepting a situation as it finds it.

This must not be construed to imply that this Commission would favor the policy of authorizing a utility to abandon a portion of its operating property and reconvey it for the satisfaction of a

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2. See Wax et al. v. Sierra and San Francisco Power Company, 21 C.R.C. 806, 811.

debt.[3] A precedent of this nature would have far-reaching effect, and a general indulgence in such practices would be decidedly against public interest. In the instant case it appears from the evidence that for about thirteen years applicant has held its right in Fall River water adversely against the rights of lower riparian owners; it now finds, through civil judgment, that the lower owners must be satisfied.

In its closing brief applicant cites the Supreme Court's recent decision in Peabody v. The City of Vallejo, 89 Cal. Dec. 165, and contends that the rules of law set forth therein will require this Commission, in many instances, to proceed upon applications similar to the one herein and suggests that a practice of approving such applications informally be developed. Apparently, this suggestion is made on the theory that the riparian owner has no right to be heard by this Commission, but that the utility has such right. Such a practice would violate the fundamental rights of an individual under our Constitution. A tribunal where only one party in a controversy has a right to be heard would not have competent jurisdiction over the party whose rights were not heard, and its acts in such a proceeding would be invalid and ineffectual. The case of Peabody v. The City of Vallejo, supra, deals entirely with the respective rights of individuals and a publicly-owned utility, and all phases of this case are subject to interpretation by the civil courts and not by this Commission.

The application herein is one without precedent before this Commission. Moreover, the applicant has failed to comply with that portion of Rule 24 of the Rules of Procedure of the Railroad Commission, as revised to February 1, 1935, which states: "The petition must be made by all of the parties to the proposed transaction * * *."

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3. The State Supreme Court Decision in Collier v. Merced Irrigation District, 213 Cal. 554, may be pertinent to a settlement of the issues in a civil action but it fixes no precedent affecting utility regulation by this Commission.

It is very apparent that protestants' opposition to the application herein is prompted by their desire for monetary damages rather than for water in lieu thereof. Should applicant have requested them to join in the application, it undoubtedly would have been met with flat refusal.

" It is conclusive that it is not in the public interest for this Commission to authorize the abandonment and conveyance of an unknown quantity of a public utility's operating property to preclude the payment of monetary damages that may be assessed in a civil court action. This record fails to show anything in the public interest which would justify this Commission to stand on the side of one litigant in a civil action for the express purpose of influencing the court in that litigant's behalf. There is no alternative, therefore, but to deny the application herein.

The following form of Order is recommended.

O R D E R

Mt. Shasta Power Corporation, a corporation, having made application to this Commission as entitled above, public hearings having been held thereon, the matter having been submitted and the Commission now being fully advised in the premises,

IT IS HEREBY ORDERED that the application herein be and it is hereby denied.

For all other purposes the effective date of this Order shall be twenty (20) days from and after the date hereof.

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 17th day of June, 1935.

Leon O. Whitsell

Wm. J. Carr

M. B. Harris

Matthew Sterr.

Commissioners.

Commissioner Devlin, being disqualified, did not participate in this decision.