

Decision No. 29398

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application of
PACIFIC GAS AND ELECTRIC COMPANY, a
corporation, and C. B. JACKSON, for
an order of the Railroad Commission
of the State of California authoriz-
ing applicants to consummate, in
accordance with its terms, a certain
agreement of sale and purchase exe-
cuted by applicants under date of
December 7, 1926, etc.

Application No. 13429

The Berkeley Olive Association,

Complainant,

vs.

California Water Service Company and
Pacific Gas and Electric Company,

Defendants.

Case No. 3292

ORIGINAL

S. T. Harding, for Berkeley Olive Association.
Allan P. Mathews, for California Water Service
Company.
Ralph W. DuVal, for Pacific Gas and Electric
Company.
Hubert I. Townshend, for Thermalito Irrigation
District.

BY THE COMMISSION:

OPINION AND ORDER ON
PETITION FOR REHEARING

The Commission on August 6, 1935, rendered its Decision
No. 28162 in the above entitled proceedings. Berkeley Olive

Association, complainant herein, petitioned for rehearing and requested an opportunity to present oral argument on such petition. It urges a modification of said decision upon the grounds that it is contradictory, does not meet the issues of the complaint in Case No. 3292, and that it is indefinite in its conclusions. The argument requested was granted and was held in San Francisco before the Commission en banc, but rehearing has not been granted.

It will not be necessary to enter into an extended review of the evidence heretofore presented, the facts having been sufficiently set forth in the original decision. In general, however, it may be stated that under Application No. 13429 and in compliance with an earlier order of this Commission, a supplemental petition was filed asking for approval and establishment of the specific amount of water which Pacific Gas and Electric Company⁽¹⁾ was obligated to deliver to California Water Service Company for use in connection with its Oroville water works. Berkeley Olive Association, an irrigation consumer now served solely by the Water Company but formerly by Pacific Gas, filed a formal complaint against the Water Company demanding reparation for extra costs incurred through being required to purchase water under a new contract to make up for the shortage in the Water Company's deliveries during the abnormal drought of 1931. This water was indirectly supplied by Pacific Gas. Protests were filed by Berkeley Olive and Thermalito Irrigation District against

1. Hereinafter Pacific Gas and Electric Company will be referred to as "Pacific Gas"; California Water Service Company as "Water Company"; Berkeley Olive Association as "Berkeley Olive"; and Thermalito Irrigation District as the "District."

the approval of the supplemental petition in Application No. 13429, principally upon the ground that such approval would seriously restrict their respective rights to water. Determination of these issues involved the question of the dedication to the public use in the Oroville area of the most important water rights on the West Branch of the North Fork of the Feather River.⁽²⁾

Considering first the major contention of Berkeley Olive that the original decision should have definitely held that, in addition to the Miocene Water Right, certain waters from the Dewey and Miners rights in the same West Branch had also been dedicated to the public use generally throughout the Oroville area, we wish to state most definitely that no such finding was made nor could have been made from the evidence. The record clearly indicates that the Dewey, Miners and Hendricks ditches from their original construction all diverted the waters to which they were respectively entitled from the West Branch and transported such waters first for mining and later for power generation into the foreign Butte Creek watershed. Upon acquisition of these three ditches and their water rights by Pacific Gas, this company continued the diversion of water under these three rights for generating electric energy in its power plants, Centerville and DeSabra, located on Butte Creek where tail waters discharged into said creek could not again reach the Oroville district. In order to dispose of any conjecture as to the dedication of the waters of the Dewey and Miners rights to the water users, or any of them, under the Powers Canal, other than such contractual rights as may

2. Hereinafter referred to as "West Branch."

accrue under and by virtue of the agreement entered into between the District and Pacific Gas, it is hereby found as fact that none of the water rights appurtenant to said Dewey and Miners ditches has ever been at any time or at all, in so far as the evidence presented in these proceedings is concerned, dedicated to the use of the public generally, or any portion thereof under the Powers Canal.

There is nothing in the record which would warrant changing any finding first made to the effect that the various contracts for water entered into by Berkeley Olive and its predecessors confine its claims to water service to the Miocene right. The original agreements for this water were made in 1912 with Oro Water, Light and Power Company⁽³⁾ at a time when it owned and controlled only the Miocene water right in the West Branch. At no time thereafter did this company ever acquire any other rights to divert additional waters from the West Branch. Two subsequent contracts between Berkeley Olive and Pacific Gas made in 1918 after acquisition by the latter of the Oro Company properties incorporated by reference the provisions of the former agreements for this water service made by their predecessors in interest. There was no enlargement of the source of water supply in either of these two later agreements which provided for continuation of the former water service under practically identical terms by the new owner. As stated in the original decision: "There is no denying the fact that under the above contracts Pacific Gas must be conceded to have escaped the legal duty and obligation of supplying water to the Berkeley Olive except from such waters as

3. Hereinafter referred to as "Oro Company."

accrue to the Miocene Water Right."

The attempt is again made to have this Commission definitely fix and establish certain rights arising out of the agreement between Pacific Gas and the District covering the sale of certain water properties and water rights to the latter. The transfer was made years ago, approved by this Commission in Decision No. 11887, dated April 4, 1923. The Commission did not consider it necessary or proper in these proceedings to pass upon the right claimed by the District under that contract to receive a definite quantity of water from Pacific Gas regardless of the source from which such water is obtained. Whether the contract compels Pacific Gas in all events to deliver more water than is obtainable from the Miocene diversion is a matter primarily for the courts to determine. But, because of the insufficient supply of Miocene water in years of subnormal runoff to fully meet the demands of the District under its contract of purchase and at the same time to meet the needs of water users supplied by the Water Company, the task of prorating the Miocene water between all classes of users in times of shortage may be and should be undertaken by this Commission. Except as hereafter may be ordered as emergencies arise, the Water Company will be expected to equitably prorate the available Miocene water delivered to it at the head of the Powers Canal to all entitled to the use of such water on the basis of previous consumption.

In one respect the original Order of the Commission in these proceedings requires modification. The maximum quantity of water which Pacific Gas is required to deliver at the head of the Powers Canal was fixed at the maximum operating delivery capacity

of the Miocene Canal, not to exceed a rate of forty-eight (48) cubic feet per second. Upon agreement by all interested parties, this provision will be modified in the following Order to require Pacific Gas to deliver upon demand to the head of the Powers Canal all water available under the Miocene Canal diversion right, subject to reasonable and proper transmission losses and such obligations as it may have to supply those consumers entitled to service from the Miocene Canal above the head of the Powers Canal.

Several other matters were discussed by counsel for complainant but, as they were minor in nature and considered properly disposed of in the original decision, they need not again be considered at this time.

O R D E R

The Commission having granted oral argument upon the petition of Berkeley Olive Association for a rehearing of Decision No. 28162 in the above entitled proceedings, arguments having been made by various parties to the proceedings concerning the issues raised therein, and the Commission now being fully informed in the premises,

IT IS HEREBY ORDERED that the first provision contained in the second paragraph of the Commission's Order in its Decision No. 28162 which limits the maximum quantity of water to be delivered to California Water Service Company by Pacific Gas and Electric Company to forty-eight (48) cubic feet of water per second be and it is hereby modified to read as follows:

1. The full and entire Miocene Ditch water right shall be subject to demand for use if required by the Oroville system now operated by said California Water Service Company, subject to seepage loss and reasonable use of utility consumers above the Powers Canal.

IT IS HEREBY FURTHER ORDERED that, except as herein modified, the Commission's Decision No. 28162 be confirmed and that the petition of Berkeley Olive Association for a rehearing of said decision be and hereby is denied.

Dated at San Francisco, California, this 21st day
of December, 1936

MRS. Hani
Leon O. Hani
Attest:
Samuel P. Ware
Commissioners.

Commissioner Ware feels himself disqualified and therefore has not participated in this decision.