Decision No. 33902

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the matter of the application of PACIFIC GAS AND ELECTRIC COMPANY, a corporation, for an order of the Railroad Commission of the State of California, granting to applicant a certificate of public convenience and necessity, to exercise the right, privilege and franchise granted to applicant by Ordinance No. 665 N.S. of the Council of the City of ALAMEDA, County of Alameda, State of California.

Application No. 22432

R. W. DUVAL, for the Applicant.

H. ALBERT GEORGE, City Attorney, and CHARLES R. SCHWANENBERG, City Manager, for the City of Alameda.

BY THE COMMISSION:

O P I N I O N

Pacific Gas and Electric Company seeks a certificate authorizing it to exercise the franchise rights granted by the City of Alameda, Ordinance No. 665 N.S., for the distribution of gas within said City.

Applicant has rendered gas service within the City of Alameda for many years, claiming the right so to do under a so-called constitutional franchise by virtue of Section 19 of Article XI of the Constitution, and also by an indeterminate franchise obtained by one James L. Bissell in 1876 and later transferred to applicant. However, to meet the demand of the City and to eliminate any uncertainty as to the company's right to main-

tain facilities in the streets for the distribution of gas for all purposes, it has obtained this new franchise to run for an indeterminate period. This franchise was granted under the general Franchise Act of 1937 and provides for the payment of an annual fee equivalent to one per cent of the revenues obtained from the sale of gas for all purposes. The sum paid therefor was $7,500.

It is evident that a certificate should issue authorizing the exercise of the rights and privileges granted by such franchise. The amount paid for the franchise, although seemingly reflecting in part the City's claim for use of the streets in prior years, must nevertheless be taken as the consideration paid for the franchise itself. It is contemplated by the Franchise Act of 1937 and by the uniform system of accounts prescribed by the Commission that any sum paid in consideration for such a franchise may be entered by the utility as a charge against its fixed capital accounts.

O R D E R

A public hearing having been had upon the above entitled application, the matter having been fully considered, and

It appearing, and being found as a fact that public convenience and necessity so require, Pacific Gas and Electric Company is hereby granted a certificate to exercise the rights and privileges granted it by the City of Alameda under Ordinance No. 665 N.S., provided that no claim of value for either such franchise or the authority herein granted in excess of the actual cost thereof shall ever be made by grantee, its successors or

assigns, before this Commission or before any court or other public body.

The authority herein granted shall become effective on the twentieth day after the date hereof.

Dated, San Francisco, California, this 11th day of February, 1941.

E. E. Baker

Ray L. Riley

Justin D. Carmen

COMMISSIONERS.

[redacted]

Although I recognize that continued service of gas in Alameda is a public necessity, and that a certificate for the exercise of franchise rights to furnish such service should be granted, I believe that the Commission should first determine whether the terms upon which the franchise was acquired were either necessary or proper. I therefore dissent from the majority opinion and order in this case.

The Commission cannot in equity as between communities properly permit the inclusion in the fixed capital account of the applicant or in its rate base of the total amount of the payment of $7,500 made to the City of Alameda as the purchase price of the franchise.

The records of the Commission, covering hundreds of franchises which have been secured in California under circumstances where the question as to damages for prior illegal use of the streets was not at issue, show that the ordinary cost of obtaining a franchise seldom exceeds $600 and averages less than $300.

It is obvious that to do justice as between communities payments made in one community in settlement of past controversies may not fairly be included in the fixed capital accounts nor in the rate base of the company's total system-wide operations and thus become a burden upon rate payers in other communities where such issues were not involved.

In order to avoid the establishment of a precedent which might encourage communities in the future to exact arbitrary payments as a condition to the granting of franchises, this Commission should at this time by appropriate procedure conduct an investigation into all of the aspects of this problem and determine a policy with respect to all such payments. This procedure would appear to be particularly important now because other applications for certificates to exercise franchise rights,

involving similar and large payments of unusual nature, are pending before this Commission.

Until an investigation is conducted and a general policy adopted with respect to proper payments for franchises I do not believe that a certificate should issue in this case.

Franck R. Havens
Commissioner.

I dissent.

Although I realize that Pacific Gas and Electric Company needs a certificate of public convenience and necessity if it is to continue to conduct its gas distributing operations in Alameda, I cannot join in the foregoing opinion and order because I believe it fails to pass on two fundamental issues involved in the proceeding.

These are: (1) The nature of the right being granted to the applicant by said order; and (2) the cost of the franchise and whether the utility should be allowed to consider all or any part of the sum it alleges it paid therefor as a capital investment.

Failure to pass on the first of these questions may make the Commission a party to what I should consider a misrepresentation to the investment officials of other states, and failure to properly dispose of the other (or to reserve the right to dispose of it later) will tend to make it possible for the applicant to charge higher rates for its gas service than I believe it entitled to. The amount paid in connection with the obtaining of this franchise, $7500.00, is not necessarily enough to appreciably affect either system rates or those in Alameda, but the total amounts which utilities will willingly add to "rate base" when they should be considered as operating expenses or not expended at all, will increase rates (or prevent reductions which might otherwise be made) unless controlled and regulated. Close scrutiny of every such item is therefore necessary.

The sum of $400,000.00 is involved in the San Francisco applications decided contemporaneously herewith (Pacific Gas and Electric Company to exercise franchise granted by Bill No. 325, Ordinance No. 413 (series of 1939), of the City and County of San Francisco, Application No. 23583; Pacific Gas and Electric Company to exercise franchise granted by Bill No. 326, Ordinance No. 414 (series of 1939) of the City and County of San Francisco, Application No. 23584).

1. The foregoing order purports to grant to the utility a certificate "to exercise the right and privilege granted it by the City of Alameda under Ordinance No. 665 N.S." - in my opinion a meaningless phrase not meeting one of the principal needs of the applicant for the franchise unless amplified or explained.

The granting portion of the ordinance in question is as follows:

"The right, privilege and franchise, subject to each and all of the terms and conditions contained in this ordinance, is hereby granted to the Pacific Gas and Electric Company, a corporation organized and existing under and by virtue of the laws of the State of California, herein referred to as the 'Grantee,' (a) to use, for transmitting and distributing gas within the City of Alameda for any and all purposes other than those authorized under said constitutional franchise, all gas pipes and appurtenances which now are or may hereafter be lawfully placed in the streets within said City, and (b) to lay and use in said streets all pipes and appurtenances necessary or proper for said purposes."

Elsewhere in the ordinance the word "streets" is defined as follows:

"The word 'streets' shall mean the public streets, ways, alleys and places (exclusive of parks, playgrounds, school property and other municipal property not constituting public thoroughfares), as the same now or may hereafter exist within said City."

The question involved here includes that of whether the Commission is granting the applicant the right to operate in Alameda or only confirming the City's grant of the right to use its streets (subject to whatever operating rights the applicant now has or may hereafter obtain), and if the first, the extent of the operating right granted.

Applicant alleges in its application in this matter: "that while applicant maintains it is in possession and ownership of valid franchises for the distribution of gas for all lawful purposes in said City of Alameda, it applied for and obtained the franchise granted by Ordinance No. 665 N.S. of the Council of the City of Alameda to more definitely establish its franchise rights in said City and to enable applicant to continue to qualify its First and Refunding Mortgage Bonds as legal investments for savings banks and trust funds; that the laws of a number of the states of the United States permit, under definite restrictions, the investment of savings banks and trust funds in public utility securities; that the law of the State of New York, as an example, permits investments by savings banks in the bonds of gas and electric corporations provided, among other things, that 'such corporation shall have all franchises

necessary to operate in territory in which at least seventy-five (75) per centum of its gross income is earned, which franchises shall either be indeterminate permits or agreements with, or subject to the jurisdiction of a public service commission or other duly constituted regulatory body, or shall extend at least five years beyond the maturity of such bonds ***"; that the statutes of other states, such as Pennsylvania, Connecticut, and Minnesota, contain substantially the same provision as that of the law of the State of New York, above quoted; that the Massachusetts Banking Act contains like provision, excepting that a three year period instead of a five year period, beyond the maturity of bonds is specified; that the most recent issue of applicant's First and Refunding Mortgage Bonds matures in the year 1966 and said date is the most remote maturity date of any issue of applicant's said outstanding First and Refunding Mortgage Bonds; that it is desirable that said issue of bonds, together with other issues of applicant's First and Refunding Mortgage Bonds previously sold, and those which may hereafter be sold, should qualify as legal investments for savings banks and trust funds in as many states of the United States as is possible; that by effecting such purpose, the market for applicant's bonds is definitely broadened and applicant is enabled to dispose of its said bonds at higher prices than would otherwise be obtainable; in other words, the matter of the legalization of applicant's bonds as savings banks investments has a definite bearing upon the cost of money to your applicant; that in order to qualify applicant's said last mentioned First and Refunding Mortgage Bonds as savings banks investments in the State

of New York and certain other states of the United States, it is essential that your applicant possess the requisite franchises and franchise rights extending to the year 1971; and that the exercise by your applicant of the right, privilege and franchise granted by the aforementioned Ordinance No. 665 N. S. of the Council of the City of Alameda (which said franchise is indeterminate) together with other rights, privileges, and franchises now possessed and exercised by your applicant and those obtained and hereafter to be obtained, is essential to enable applicant to so qualify its said bonds." (Underscoring supplied.)

In answer to applicant's alleged need (supported by the testimony in this proceeding) for a right to operate, the Commission's order grants applicant a meaningless certificate "to exercise the right and privilege granted it by the City of Alameda". I think it is clear that the City has no authority to authorize the utility to operate. Its authority is limited to the control of its streets and public places and the use by the utility thereof.

If it be conceded that the majority of the Commission means by its ambiguous order to grant the applicant the right to operate, we are still faced with the question of the extent of the operative right. There is nothing in the order to make the operating right apply to any of applicant's Alameda facilities not embraced within the franchise ordinance and the ordinance does not even purport to embrace facilities other than those "lawfully placed in the streets" as defined.

If an operative right is certificated, it is limited to that portion of applicant's plant (further limited to "gas pipes and appurtenances") within the public streets, ways, alleys and

places exclusive of parks and other municipal property not constituting public thoroughfares. Much of applicant's plant and facilities in Alameda (as in every community) is not located in streets (as defined), and I believe that no possible stretching of the wording of this order can make it cover this portion of the utility's gas distributing facilities.

Yet the order is issued knowing from the allegations of the petition and from the testimony in the proceeding that applicant intends to use it for the purpose of representing to the public officials of other states that it has all authority necessary to operate in Alameda, which in my opinion is not the fact.

This matter will be further discussed in connection with the disposition of applicant's petition for amendment and modification of the Commission's Decision No. 32751 in Application No. 21744, "Pacific Gas and Electric Company, for certificate to exercise franchise granted to it by Ordinance No. 258 of the Board of Supervisors of the County of Mendocino", now before the Commission for decision, where the question of the territorial extent of the rights granted as well as the facilities covered is involved, and the necessity of the Commission's passing on this question will be more fully set forth in connection with that matter.

I should state that in the past I have prepared orders in substantially the form of the foregoing order which have been adopted by the Commission. At that time the question of the

nature of the right being granted the utility had not been raised. It has now been raised, particularly in connection with the Mendocino and other county franchises, and having been raised, should be squarely met.

2. Applicant is now engaged in a program of obtaining or renewing franchises from cities and counties in most, or all, of the territory in which it operates. The amounts it has paid,or agreed to pay, in connection with the granting of such franchises varies from nothing except the amount expended by the city or county for necessary publication costs, or some small amount in excess thereof, to $400,000 in the case of the San Francisco franchises hereinbefore referred to. As stated, $7500 was the amount involved in the case of the Alameda franchise.

In most, if not all, of the cases, however, where the sum paid exceeded a nominal amount, some factor entered into the negotiations between the city officials and the company's representatives, other than the proper amount to be paid for a new franchise. In the case of the Alameda and San Francisco franchises, a controversy of considerable duration had existed prior to the consummation of the negotiations leading to the granting of the franchise over the question of whether the company needed franchises, and whether without obtaining new franchises the company was not unlawfully using the streets of these respective cities in having its facilities installed therein and thereon, and liable to damages therefor. Each city was demanding reimbursement for <u>past</u> use of its streets. The proper cost of a

new franchise is a capital expenditure on which the utility should be entitled to earn a reasonable return for the life of the franchise, except to the extent the cost is eventually amortized, but the very process of amortization would repay to it the expenditure. Sums expended for prior use of the streets would be an operating expense on which it would not be entitled to earn any return.

In each instance the controversy was ended by the applicant company obtaining new franchises and the cities waiving reimbursement for the past use of the streets. But the sums paid are alleged to be for the new franchises only, and none of it in settlement of the old demands. This claim is made in the Alameda case in spite of the fact that the evidence shows that the basis of arriving at the amount paid was to decide what was an equitable sum to be paid in settlement of the old demands, with nothing added for the value of the new franchise.

As stated by the late Justice Cardoza in Dayton Power and Light Co. vs. Public Utilities Commission, 292 U.S. 290:

> "* * * what the public utility has done belies what it has said. We shall hardly go astray if we prefer the test of conduct."

The applicant alleges that it did not concede the validity of the city's claim, and for that reason must be allowed to consider the payment as for a new franchise. Why then did it pay more for the franchise in Alameda than in other cities of comparable size, and where its revenues and the value of its facilities are comparable?

It has been stated that the utility had to meet the city's

demands, whatever they might be, or be subjected to proceedings to cease the distribution of gas in the City. In my opinion, the value of the service rendered by the utility was too valuable to its consumers for any summary action to be within the realm of sane thought, and any city administration which undertook such action would be just as summarily removed from office. Payment by the company to forestall a more long range program involving the construction of a substitute service would seem to be in the realm of building or retaining good will which might be better paid for by its stockholders than by its future rate payers.

A controversy existed between the City of Alameda and the company regarding the past use of streets and it should have been settled. If it could not have been settled by negotiation and the officials of the company did not believe it owed the amount demanded by the City, it should not have paid until compelled to do so. The only effective way in which it could have been compelled to do so would have been for the City to sue the company. Even if compelled to pay by judgment rendered in such a suit, the expenditure would not properly be added to its capital investment, or accounted for in capital accounts.

The settlement of this controversy and the obtaining of a new franchise were separate transactions (related perhaps but nevertheless distinct), which should have been completed as separate transactions. Then no doubt would exist regarding the cost of the franchise.

Unless the Commission gives close scrutiny to transactions such as these, the way will be wide open to utilities to expend any amount they please for any purpose under the guise of obtaining new franchises and the cost, or a return on it, will have to be paid by the rate payers. "Controversies" can always be created or assumed. Friendly city administrations can be favored or unfriendly ones mollified by the utility paying substantial sums to the city for franchises, enabling the city administration to show a "record" for "bringing the utility to terms." I do not allege or mean to infer that these considerations entered into the transactions discussed here or that this applicant has been guilty of such practices, but I point to these possibilities to show what may result from the "hands off" policy which the majority of the Commission has adopted in this order.

The present record in this proceeding may not afford a basis for properly dividing the cost between the amount paid for the franchise and that paid for past use of the streets, but, if not, the matter should be reopened for further consideration or the Commission should retain jurisdiction to pass on the question later. Instead, the opinion of the majority finds: "The amount paid for the franchise, although seemingly reflecting in part the City's claim for use of the streets, must nevertheless be taken as the consideration paid for the franchise itself." I cannot agree that any such conclusion is justified.

Commissioner.