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Decision No. 34501

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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 heretofore granted to applicant's predecessor in interest San Joaquin Light and Power Corporation by Ordinance No. 213 of the Board of Supervisors of the COUNTY OF MERCED, State of California.	Application No. 22726

R. W. DuVal, Attorney, for Applicant.

BY THE COMMISSION:

O P I N I O N

Pacific Gas and Electric Company has applied for authority under Section 50(b) of the Public Utilities Act to exercise rights and privileges pertaining to electric service expressed in a franchise granted it by the County of Merced.

This franchise is for a term of fifty (50) years and provides that during said term the grantee shall pay to the County of Merced two per cent (2%) of its gross receipts arising from the use, operation, or possession thereof.

A hearing in this matter was held and from the testimony received it appears that Applicant or its predecessors for many years have rendered electric service and that it is the only distributor of electric energy within the county except in that area served by Turlock Irrigation District as described in an

agreement dated January 11, 1932 which was approved by this Commission in Decision No. 24552. This agreement provided that the district will not distribute electric energy outside the described area except to one or two customers not in the county and covered by other agreements.

The application and the evidence introduced by Applicant indicates that, while possessing valid franchise rights under which to continue this service, it had obtained the present franchise primarily for the purpose of extending its franchise rights for a period commensurate with the life of its mortgage bonds.

Applicant has stipulated that, if the requested authority be given, it will not, without an order of this Commission, exercise any of the rights and privileges granted by said franchise for the purpose of competing with Turlock Irrigation District.

Applicant also has stipulated that it will never claim before this Commission, or any court, or other public body, a value for said franchise in excess of the actual cost thereof, which cost, exclusive of the fee of fifty dollars ($50) paid this Commission at the time of filing this application, consists of two hundred ninety dollars ($290) paid the county for the franchise and for publication.

The Commission is of the opinion that the requested authority should be granted with appropriate restrictions concerning Turlock Irrigation District.

O R D E R

A public hearing having been had upon the above-entitled application of Pacific Gas and Electric Company, and the matter considered, and

It appearing and being found as a fact that public convenience and necessity so require, it is ordered that Pacific Gas and Electric Company be and it is hereby granted a certificate to exercise the rights and privileges granted by the County of Merced, by Ordinance No. 213, adopted May 16, 1938, within such parts or portions of said county as are now served by it or as hereafter may be served by it through extensions of its existing system made in the ordinary course

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of business as contemplated by Section 50(a) of the Public Utilities Act, provided, further, that this certificate shall be subject to the following conditions:

1. That extensions of Applicant's electric distribution lines in said County of Merced may be made only in accordance with such applicable rule or rules as may be prescribed or approved by the Commission and in effect at the time covering such extensions, or in accordance with any general or special authority granted by the Commission;

2. That, except upon further certificate of this Commission first obtained, Applicant shall not exercise such franchise for the purpose of supplying electricity in those parts or portions of said county now being served by Turlock Irrigation District.

3. That the Commission may hereafter, by appropriate proceeding and order, limit the authority herein granted to Applicant as to any territory within said county not then being served by it; and

4. That no claim of value for 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 effective date of this Order shall be the twentieth day from and after the date hereof.

Dated at San Francisco, California, this 12th day of August, 1941.

Commissioners

We dissent

Commissioners.

DISSENTING OPINION

We dissent from the majority decisions in the following seventeen (17) Section 50 certificate applications, all filed by Pacific Gas and Electric Company, viz:

Decision No.	Application No.	
34488	22216	(electric service in Butte County),
34496	22217	(gas service in Butte County),
34495	22218	(electric service in Plumas County),
34497	22379	(electric service in Yolo County),
34498	22440	(electric service in Napa County),
34499	22458	(electric service in Sutter County),
34503	22642	(electric service in Fresno County),
34502	22712	(gas service in Sutter County),
34501	22726	(electric service in Merced County),
34504	22733	(electric service in Santa Barbara County),
34500	22751	(electric service in Madera County),
34489	23083	(electric service in Kings County),
34490	23142	(electric service in Tehama County),
34491	23154	(electric service in Kern County),
34492	23155	(gas service in Kern County),
34493	23435	(electric service in San Luis Obispo County),
34494	23442	(electric service in Mariposa County).

Although the facts, circumstances and issues are not in all respects similar in each of these seventeen (17) proceedings, the majority decisions make no distinctions and the same form of order appears in each case. We may, therefore, summarize our dissent and apply it to each of the seventeen decisions.

The decisions, we think, are erroneous and should be amended in the following particulars:

(1) The majority has failed to give consideration to the controlling issues in these cases and has refused the repeated requests of the presiding Commissioner (now resigned) and of the undersigned Commissioners for proper consideration and determination of such issues, and the Commission has failed to exercise its authority lawfully and properly and has made its decisions contrary to the record in these proceedings.

(2) The record made in each of these proceedings fails to establish adequate grounds upon which to base findings that certificates of public convenience and necessity should be granted and it is apparent that the record in each of the seventeen (17) applications is insufficient and inadequate in this respect.

(3) The orders granting certificates of public convenience and necessity are ambiguous and uncertain in language and effect and fail to make definite whether operating and service certificates are granted or whether the Commission's grants are confined to the mere certification of county franchises permitting the occupancy of county roads and highways, without conveying any operating or service rights and privileges.

(4) The Commission, while granting new certificates, has failed to cancel and annul existing prior certificates, with the result that there will be outstanding, and apparently simultaneously in effect, numerous certificates and grants conflicting in terms and conditions and overlapping in space and time.

(5) The granting of certificates of public convenience and necessity, which may be construed as conveying operating and service rights and privileges in any of these seventeen (17) proceedings, is contrary to applicant's prayers and results in the Commission's making of grants to applicant, Pacific Gas and Electric Company, which that utility company has not asked for and specifically states it does not need.

A substantiation of the five items summarized above is necessary.

As to (1): All of these applications were assigned by the Commission to Commissioner Wakefield for hearing and either heard by him or referred to examiners of the Commission for the taking of testimony. In addition to the seventeen (17) applications referred to above, Commissioner Wakefield also had assigned to him other similar applications made by the same applicant, including Application No. 21744 for an electric certificate in Mendocino County.[a] A more voluminous record was made in the latter proceeding

(a) Decision No. 33946, decided February 25th, 1941.

than in any of the other similar applications. That record leaves no doubt of Commissioner Wakefield's careful consideration of all issues, facts and testimony in that case nor of the complete presentation of his findings and conclusions to the Commission. In the memorandum by him dated November 13, 1940, addressed to the attorney of the Commission he said, in part:

" * * * it seems to me that one of three alternatives is open to us:

"1. To grant a certificate finding that public convenience and necessity require that applicant exercise the franchise granted, but pointing out that this franchise has no legal effect, otherwise than authorizing it to use the streets, and that other authority is necessary to permit it to operate.

"2. To treat the application as an application for certificate to exercise the franchise and also to construct, maintain and operate, in which event the order could be in substantially the same form as the present form. I think, however, if we adopt this alternative, we should point out what we are doing and that we are in effect granting a certificate under both Sections 50(a) and 50(b).

"3. To deny the applications on the ground that by their terms they seek an application under 50(b); that the principal evidence produced in support thereof was the need to comply with the eastern statutes regulating the investments of savings banks, etc., and that since the franchise and certificate would not meet the requirements of those statutes that no case has been made for the issuance of the certificate. In this case the denial should be without prejudice and perhaps a suggestion made to the company that they should file an amended application asking for a certificate to construct, maintain and operate, as well as exercise the franchise.

"I favor the last course because I believe it will not work any hardship on the company and will create the least confusion. In the case of the County of Mendocino at least, they do not need the franchise in order to use the roads at the present time, as they now have a general county franchise which runs until 1961. No matter how carefully we worded the order granting the certificate it might soon become a number and title such as 'Decision No. 32751, a certificate of public convenience and necessity to exercise a franchise in Mendocino County,' and become considered a certificate to operate, no matter how carefully we pointed out that such was not intended.

"Alternative No. 1 is open to the objection that it does not give the company what it wants or needs, and alternative No. 2, that it is giving the company something it does not ask for."

More than a year prior to the date of the memorandum from which we have quoted, Commissioner Wakefield, on July 27, 1939, addressed a memorandum to the Commission and asked for a determination of several

questions and issues which to him seemed controlling in these proceedings.

We quote:

"It is my understanding that under the present law, the only authority remaining in cities and counties pertinent to this discussion is the right to control the use of the streets and highways, and so far as I know, none of the ordinances involve purport to grant any other authority than the right to use the streets and highways. * * * * * * * * * * * It may be that operating rights and the right to exercise franchises to use streets and highways are so interwoven that this Commission cannot make an order certifying franchise rights without, in effect, certifying operating rights, but if this is true, of which I am not yet convinced, the orders should make it clear what is being done, rather than as I think has been the case in the past of not clearly passing on the question. If operating rights are involved, perhaps it should be suggested to the utility that the title and prayer of its petitions be so worded as to clearly indicate this fact. Notice of hearing has been published in these proceedings, setting forth the title of the proceeding and the date of the hearing. There would be no notice to interested parties from this form of notice that operating rights were involved. Moreover, in my opinion, by reading the petition one could not obtain that information.

"It is, therefore, my suggestion in this connection that the orders issued make it clear in some appropriate manner that the Commission is not passing on operating rights in these proceedings, and stating specifically that only the right to use the streets and highways where operating rights already exist in the utility, or are hereafter in an appropriate manner acquired, is involved.

II

"The allegations in Application 21008, relating to qualifying the applicant's First and Refunding Mortgage Bonds as legal investments for savings banks and trust funds is as follows:

'* * *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 laws of the State of New York, as an example, permit 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."'

"If the purpose is to comply with a statute which provides 'such corporation shall have all franchises necessary to operate, etc.,' and the franchises merely granting the right to use the streets and highways are the types of franchises intended, our orders granting a certificate to exercise the rights and privileges of such franchises may improve the P. G. & E. Company's position in this matter. However, if the position is correct, that in addition to having such a county franchise, it is necessary for the company to have a certificate from the Commission to operate (in the absence of a constitutional franchise obtained prior to 1911), then little if anything is accomplished in the way of improving the company's position in this matter by an order authorizing the use of the

"franchise. * * * * * * I think our duty in the matter will be fully performed if we make it clear what we are doing. On the other hand, if the order is ambiguous, permitting the representation that operating rights are granted when only the right to use the streets and highways is involved, I think we should be subject to considerable criticism."

We find then this situation: The presiding Commissioner (Mr. Wakefield), to whom this large number of important cases was assigned, after hearing some of them and after consideration of the issues involved, repeatedly, over a period of two years or more, presented to the Commission certain controlling questions together with his recommendations. When Commissioner Wakefield, in March of this year, left the Commission, the seventeen (17) applications here under consideration remained undecided before the Commission. Decisions were later prepared and presented for the Commissioners' signatures. The undersigned Commissioners, upon a review of the record, found the conditions as herein referred to. We found the basic questions raised and presented by Commissioner Wakefield had been ignored and left undecided, that his recommendations had been given no consideration by the majority and that the decisions presented to us were ambiguous, contrary to the evidence and, although presumably granting what applicant sought to have granted, made a grant contrary to applicant's petitions and different and much wider in scope than applied for by the utility company. We are, therefore, unwilling and unable to sign these decisions.

We asked for further consideration by the Commission of the applications in the light of the record and the presentations made by the presiding Commissioner. Before decisions contrary to the record were to be handed down we asked for a re-assignment of the applications to one or more Commissioners or for a consolidation of all seventeen (17) proceedings before the Commission en banc, when the undetermined and controlling questions might be gone into and a more complete record established.

On May 22nd, June 2nd and July 2nd, of this year, Commissioner Sachse addressed memoranda to the Commission dealing with the matters here

referred to and making specific requests and recommendations. Commissioner Havenner verbally made substantially similar recommendations and requests. The majority gave no consideration to our presentations and the issues raised were not gone into by the Commission.

Of the six Commissioners who during the last two years have had these seventeen (17) applications before them for decision, we find therefore three (the presiding Commissioner in these cases, Mr. Wakefield, now resigned, and the two undersigned Commissioners) opposed to the order in the present majority decisions.

Upon this record, we think that proper and lawful procedure requires a reopening and consolidation of these seventeen (17) applications into one proceeding with notice to all parties of the questions at issue, with a hearing before the entire Commission and, thereupon, decisions by an informed Commission based upon an adequate and complete record.

As to (2): Applicant in each of the seventeen (17) applications alleges and insists that it does not ask for and does not need certificates of public convenience and necessity authorizing the operation of its electric or gas plants and the furnishing of service to its consumers and ratepayers. Applicant insists it is at present in possession of such rights (existing certificates and franchises are listed in the respective applications) and does not intend to surrender them in exchange of new operating and service certificates from the Commission. 1/

1/ In Application No. 22216 the following allegation appears:

> "Applicant and/or its predecessors in interest originally constructed and subsequently extended the said electric system in the County of Butte and engaged in and conducted the business of furnishing and supplying electric service in said county under and pursuant to the following general county franchises granted to applicant's predecessors by the Board of Supervisors of the County of Butte, State of California, namely:

All that applicant asks for in every one of these applications is, not for an operating or service certificate but for a certification of the franchises granted by the respective counties. 2/

1/ (continued)

Ordinance No.	Adopted	Expiring	Granting Franchise to:
159	July 7, 1899	July 7, 1949	Butte County Electric Power and Lighting Company
161	August 10, 1899	August 10, 1949	Yuba Electric Power Company
Resolution	January 10, 1902	January 10, 1952	Oroville Light and Power Company
Resolution	November 15, 1904	November 15, 1954	Park Henshaw
214	March 10, 1905	March 10, 1955	E. W. Sutcliffe
242	February 15, 1908	February 15, 1958	Great Western Power Company
281	June 2, 1913	June 2, 1963	Great Western Power Company

And further:

> "In this connection applicant alleges that it now is and for a number of years last past has been in possession and ownership, among other things, of all necessary rights, permission and authority to construct extensions of its said electric system into any and all parts of the unincorporated territory of said County of Butte, not presently served by another electric public utility, and to furnish and supply electric energy and service therein for all lawful uses and purposes."

2/ In Application 22216 it is alleged:

> "That while applicant is in possession and ownership of valid franchises of erecting, constructing and maintaining electric lines in the public highways, streets, roads and places of said County of Butte, and of using such electric lines for the purpose of transmitting, conveying, distributing and supplying electricity to the public for light, heat, power and all lawful purposes, it applied for and obtained the franchise granted by said Ordinance No. 349 of the Board of Supervisors of the County of Butte primarily to enable applicant to continue to qualify its First and Refunding Mortgage Bonds as legal investments for savings banks and trust funds; * * * * * * and that the exercise by your applicant of the right, privilege, and franchise granted by the aforementioned Ordinance No. 349 of the Board of Supervisors of the County of Butte (which said franchise expires on or about February 11, 1988) 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."

Similar allegations appear in the other applications.

The record is conclusive, therefore, on the following points:

First, applicant insists that it is now in possession of all necessary operating and service rights and does not desire from this Commission certificates granting such rights;

Second, applicant is now in possession of valid county and city franchises, of various unexpired terms and granting all necessary rights for the use and occupancy of county or city streets, roads, and highways;

Third, the only apparent reason advanced by applicant for the issuance of a certificate limited to road occupancy, as heretofore indicated, is stated by applicant as follows:

> " * * * * * it applied for and obtained the franchise granted by said Ordinance No. 349 of the Board of Supervisors of the County of Butte primarily 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 laws of the State of New York, as an example, permit 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 franchise 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; 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;"

Similar allegations appear in the other applications.

There is nothing in the record, aside from applicant's allegations, pertaining to the significance or scope of the legal requirements in the several states in connection with the sale of public utility bonds or other securities. There is no evidence on the comparative cost of bond money to this applicant or to other utilities in so far as such cost is influenced by various franchise terms or conditions. The Commission's staff did not investigate and report on the facts in these matters nor was any evidence presented from any other source. To us it seems that this argument in favor of the granting of the particular and limited certificates asked for must, on close inspection, lose whatever validity it may appear to have. The laws of the State of New York, as cited by applicant in the foregoing quotation, clearly require operating franchises or certificates and not merely franchises authorizing the occupancy of streets or roads. The New York law, as cited by applicant, reads 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 *******" (emphasis supplied).

We conclude, upon the record as it stands, that these applications should either be dismissed or reopened and consolidated into one proceeding so that an opportunity may be given to applicant for submission of new and additional evidence, and that an independent investigation be made by our own staff on the items in question.

As to (3): The order in the majority decision No. 34488 reads, in part, "IT IS ORDERED that Pacific Gas and Electric Company be and it is hereby granted a certificate to exercise the rights and privileges granted by the County of Butte, by Ordinance No. 349, adopted January 12, 1938, within such parts or portions of said County as are now served by it or as hereafter may be served by it through extensions of its existing system made in the ordinary course of business as contemplated by Section 50(a) of the Public Utilities Act;"

Similar language is used in the orders pertaining to the other applications of this series. The important question, we think, is: does the Commission here authorize merely the exercise of the limited right and privilege granted by the counties in their county franchises, it being understood that the counties have no authority over operation and service, or are these Commission certificates also grants of operating and service rights? We have asked the majority repeatedly to decide whether their grant in each application is to be for a certificate limited to the approval of the county franchise or for the much broader operating and service certificate. Former Commissioner Wakefield, as we have said, repeatedly raised the same question in these proceedings. The majority continues in its refusal to meet and decide that basic issue. They prefer the ambiguous language of their order. They are satisfied to leave to the utility the interpretation of whether the order means the one thing or the other.

We are told that this Commission's orders must be strictly construed and that the order here made does not specifically grant operating and service rights. This might also be inferred from the language in the majority opinion reading as follows (Decision No. 34488, pages 4 and 5):

> "However, it is further declared in paragraph (b) of Section 50 that no utility shall 'exercise any right or privilege under any franchise' obtained after March 23, 1912, 'without first having obtained from the Commission a certificate that public convenience and necessity require the exercise of such right and privilege.' No exemption from this requirement is given to any utility. Each must apply to the Commission for a certificate to exercise each new franchise obtained, whether or not the rights already secured to it may be equally extensive with the rights and privileges expressed in the new franchise grant."

And further, (pages 5 and 6 of the same decision):

> "Each of these certificates is carefully phrased to say that public convenience and necessity require no more than that applicant be permitted to exercise the newly acquired franchise to the extent of facilities existing today and as hereafter expanded in the ordinary course of business to contiguous areas. It follows, therefore, that the certificate here given is not one particle broader than the applicant may rightfully demand by virtue of the provisions contained in Section 50 of the Public Utilities Act."

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But, in its order in decision No. 34488, in condition No. 2, the majority stipulates

> "2. That, except upon further certificate of this Commission first obtained, Applicant shall not exercise such franchise for the purpose of supplying electricity within those parts or portions of said County now being served by the City of Biggs or the City of Gridley;"

This exception, it will be noted, refers to the exercise of such franchise "for the purpose of supplying electricity." We think that this language may certainly be construed as permitting the supplying of electricity outside of the restricted area.

The majority opinion presents the matter as one of simple principle and procedure and as well settled by uniform Commission practice and a long line of decisions by this Commission. 3/

3/ The majority opinion in Decision No. 34488 reads, in part, as follows:

> "To us, it would appear almost self-evident that the requested authorization should be granted. Yet, in a former proceeding, involving a similar franchise issued to the said utility by the County of Mendocino, a dissent was voiced to our Decision No. 33946 rendered therein. And we might as well frankly acknowledge a present divergence of opinion among the members of the Commission. Fourteen like applications, which have been under consideration for some time, are being decided concurrently with this application. In view of the circumstances indicated, we feel impelled to incorporate within the decision of one of such proceedings a clear statement of the reasons prompting our action with respect to the entire series.
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> "This Commission has so many times considered utility applications arising under Section 50 of the Public Utilities Act, and has so consistently followed the principles and procedure originally enunciated, that there would seem to be little if any occasion for an extended re-statement thereof in this instance.
>
> "Franchises issued to electric and gas utilities by county authorities are granted in accordance with the powers given them by law, powers which the counties possessed long before March 23, 1912, the effective date of the Public Utilities Act as first enacted, and powers which were expressly reserved to them thereafter. Paragraph (e) of Section 50 explicitly so declares. So the Commission may neither approve nor disapprove the action taken by the fourteen counties which have issued new franchises to the applicant herein. However, because it is provided in paragraph (b) of the same section that a utility shall obtain from the Commission a certificate of public convenience and necessity for the exercise of each franchise obtained, the question has been raised whether the Commission properly exercises the authority thus committed to it.
>
> "We are convinced that there has been neither misconstruction of these provisions of the Act nor any abuse of the authority thereby

A careful reading of these quoted portions of the majority opinion, and indeed of the entire opinion, indicates, we think, that the majority has failed to understand, and to meet, the real issues in these cases and that its decisions are contrary to the record in every one of these applications. It is erroneous to characterize the present applications

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3/ (continued)

"vested in the Commission. We are supported in such conviction by the Commission's uniform interpretation and application of those provisions over all the years.

"The rights vested in public utilities in existence on March 23, 1912, are quite clearly expressed in the constitutional and statutory changes of that time. And those must be read in the light of contemporary judicial decisions. Of the many proceedings first coming before the Commission, arising under the several subdivisions of Section 50, those involving the extent of the rights secured to utilities existing on that date predominated. There were many others involving the proposed entrance of a new operator into the utility field. Those of the first group predominated because the Commission was then called upon to determine whether each existing or contemplated utility enterprise had in fact qualified itself as of that date for the protection which the law expressly gave to those which had met the required specifications. The prescribed conditions were that the utility system be either actually constructed or a construction program undertaken in good faith by virtue of a franchise previously obtained. The protection accorded to a utility which could thus qualify is clearly enough expressed in Section 50 itself. It is the right to continue in business and to expand that business to the extent set forth in subdivision (a), namely, to expand its utility facilities into areas contiguous to that already served, provided only that such expansion be made in the ordinary course of business and not result in the invasion of a field occupied by another utility of like character. That was a right secured to the utility without limit as to time, and without obligation to secure any further grant of authority from the state, except that cities and counties might continue to exercise their power to exact franchises for the occupancy of their streets and highways. * * * * * * * * * * * * * *

"All of the county franchises which are now before the Commission for consideration must be accepted as lawfully granted. It must be acknowledged also that in all these counties the applicant has, by itself or its predecessors, perfected its right to engage in the electric utility business. Some of such rights were perfected by operations begun before 1912, and some by certificates thereafter issued by the Commission itself. True, there may not now be distribution facilities existing throughout each county. But the Commission is not issuing a certificate to the effect that public convenience and necessity require the extension of applicant's facilities and service throughout the entire county. Nor did it do so in the Mendocino decision. Each of these certificates is carefully phrased to say that public convenience and necessity require no more than that applicant be permitted to exercise the newly acquired franchise to the extent of facilities existing today and as hereafter expanded in the ordinary course of business to contiguous areas. It follows, therefore, that the certificate here given is not one particle broader than the applicant may rightfully demand by virtue of the provisions contained in Section 50 of the Public Utilities Act.

as similar to or indistinguishable from the many Section 50 proceedings before this Commission in the past. Reviewing past applications and decisions of this character, we have been unable to find any, apart from this recent series of applications by this applicant, wherein the specification appears that operating and service rights and privileges are not needed and apparently not wanted. In all of the applications we have found the applicants have been concerned not merely with a certificate by this Commission approving limited county or city franchise grants. On the contrary, such applicants have been concerned with the securing of a grant of operating and service rights out of the exclusive authority of this Commission. And this, we are satisfied, is not a theoretical or meaningless differentiation or distinction. It is, we think, one of the controlling matters in such cases. The refusal of the majority to recognize this essential difference must, of necessity, result in erroneous and unlawful decisions.

The majority apparently does not question the correctness of the allegation that applicant is in present possession of all necessary operating and service rights "without limit as to time and without obligation to secure any further grant of authority from the state, except that cities and counties might continue to exercise their power to exact franchises for the occupancy of their streets and highways." The majority says: "It must be acknowledged also that in all these counties the applicant has, by itself or its predecessors, perfected its right to engage in the electric utility business."

3/ (continued)

"It cannot justly be held, therefore, that in such applications as this the Commission improperly grants a blanket certificate covering an entire county, and that no factual basis exists for the finding made that public convenience and necessity so require. This phrase has no precise meaning, but must be viewed in the light of its statutory setting. The Commission makes its finding of public convenience and necessity because this is the requisite finding imposed by the statute in all such cases. The mere fact that such finding is made does not connote that some generous discretionary grant has been conferred upon the utility. The applicant utility has been given no more than the law contemplates that it receive. In our opinion, on the basis of the record in these applications, we have no legal right to do otherwise."

We think this is taking altogether too much for granted. The record, beyond applicant's allegations, by no means substantiates these assumptions. The so-called constitutional grants referred to by the majority have not been proven so sweeping and all embracing as to relieve a utility from all "obligation to secure any further grant or authority from the state." In several of this series of applications by this applicant, testimony was given that there is some question as to what the constitutional franchise really covers and that, if it merely covers lighting service, only a part of the utility's operations and service would rest secure.

Equally unsupported by the evidence and unsound are the majority pronouncements that "the certificate here given is not one particle broader than the applicant may rightfully demand" and that "The applicant utility has been given no more than the law contemplates that it receive."

We agree that a county or a city, within the limits of their authority, may grant or refuse to grant utility franchises. We deny that this Commission, when such a city or county franchise is granted, thereupon has no choice but to approve in toto. The state's political subdivision, county or city, may exercise its limited powers within the law governing its authority. This Commission, acting within its powers, may grant or withhold certificates of public convenience and necessity and may attach to them its own terms and conditions as to time, territorial extent and other matters as the public interest may dictate and the record substantiate.

As to (4): According to the record, there are now outstanding and in effect numerous county and city franchises with various terms and conditions granted partly prior to and partly subsequent to the enactment of the Public Utilities Act. There are also outstanding many orders of this Commission granting certificates of public convenience and necessity either corresponding to or supplementing city and county franchises.

Such franchises are usually, though not always, fixed term grants, while this Commission's operating and service certificates usually are indeterminate as to time. Prior to the enactment of the Public Utilities Act, county and city franchises often contained lawful provisions concerning operation, service and rates. The Public Utilities Act divested the counties and cities of authority over such matters and placed such authority in this Commission. In some instances the granting of new county and city franchises is made conditioned upon the cancellation or surrender of prior franchises; in other cases there is no such condition. We think a consistent and non-discriminatory policy and practice should be adopted by this Commission in the granting of its certificates. New certificates of public convenience and necessity should be granted on condition that

(a) prior and conflicting certificates be surrendered and cancelled;

(b) certificates granted by this Commission should, except in extraordinary cases, be indeterminate in duration and not for fixed terms;

(c) the Commission should not indirectly, or by implication, approve or ratify or make lawful any condition in any city or county franchise when it appears that the imposition of such condition is unlawful and beyond the authority of such city or county. 4/

4/ In Application No. 22216 the franchise granted by the Supervisors of Butte County (Ordinance 349) contains the following clauses:

"Section 1. The right, privilege and franchise of erecting, constructing and maintaining electric lines consisting of poles or other suitable structures and wires, crossarms and other appliances installed thereon, including wires for the private telephone and telegraph purposes of the grantee, in so many and in such parts of the public highways, streets, roads and places of said County of Butte as the grantee of said right, privilege and franchise may from time to time elect to use for the purposes hereinafter specified, and of using such electric lines for the purpose of transmitting, conveying, distributing and supplying electricity to the public for light, heat, power and all lawful purposes, are hereby granted, by said County of Butte, to Pacific Gas and Electric Company, its successors and assigns."....

"Section 8. The said right, privilege and franchise are granted under and pursuant to the provisions of the laws of the State of California which relates to the granting of rights, privileges and franchises by counties." (Emphasis ours). We think the county has no authority to grant the operating and use rights and privileges referred to in the emphasized portion of Section 1, and we believe that provision of the franchise to be unlawful. The utility may argue, however, that the implied acceptance and approval by the Commission in its decision and order of the entire county franchise, including the unlawful portion, constitutes a granting of an operating and service certificate.

As to (5): Applicant in these proceedings, we have shown, asks for orders from this Commission granting "a certificate declaring that the present and future public convenience and necessity require, and will require, the exercise by it of the right, privilege and franchise granted by said Ordinance 349 of the Board of Supervisors of the County of Butte, State of California, all as provided for in Section 50(b) of the Public Utilities Act of the State of California" and is on record stating it does not ask for nor desire an operating or service certificate. The majority has issued certificates that may be construed as granting rights and privileges much greater than asked for, the difference being between, in the one case, the right and privilege to occupy city and county streets and roads, and the right and privilege, in the other case, to carry on the operation of electric or gas utilities for the production, transmission, distribution and sale to the public of gas or electricity for light, heat, power and other purposes and the carrying on of a complete electric or gas utility business. Notwithstanding the essential and far reaching difference between the two kinds of rights and privileges, the majority does not see fit in the cases here considered, and in similar cases affecting other utilities, to make clear what kind of a certificate is being granted and apparently does not wish to eliminate a deliberate ambiguity in orders of this nature. Such ambiguity, we are convinced, cannot be justified in view of the language of Section 50 of the Public Utilities Act and obviously is against the public interest. The majority has advanced no reason why the important issues raised in these proceedings should not be considered on their merits and determined on an adequate record.

Concluding we desire to express our conviction that the provisions of the Public Utilities Act dealing with certificates of public convenience and necessity constitute part of the very foundation of

public utility regulation. They were so considered when the public utility law was enacted and during the early years of the Commission's activity. We think they should not be taken as a matter of routine at the present time.

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Francis X. Haggerty

Richard Lackse

Commissioners.

Two of our associates are filing this day (October 21, 1941) the foregoing statement purporting to be in support of their dissent formally noted to the Commission's Decision No. 34488 issued on August 12, 1941, granting Pacific Gas and Electric Company a certificate to exercise an electric franchise obtained from Butte County, as well as sixteen other decisions of a similar nature issued on the same date.

Those decisions, of course, have long since become final, and we would not now have occasion to make any comment upon the statement being filed by our associates were it not for the very decided misstatement of fact which they make in support of their contentions. Our Decision No. 34488 in the Butte County matter speaks for itself and needs no further defense upon our part. But, when the dissenters now state that the majority of the Commission have for more than two years refused the repeated requests of former Commissioner Wakefield for a proper consideration and determination of the issues involved, implying that such former Commissioner had recommended the denial or some other disposition of all such applications, it becomes incumbent upon us to point out the utter falsity of that statement.

The fact is that during the term of Mr. Wakefield upon this Commission he joined in more than one hundred decisions granting this utility certificates to exercise city and county franchise rights, nearly all of which were decisions prepared under his supervision. Nineteen of these were certificates authorizing the exercise of county franchises. Never, except in one instance, did the Commission disagree with his recommendation in any county franchise decision he prepared, and that was his proposed revised amended opinion and order in respect to Application No. 21744 involving the Mendocino County franchise, and this

proposed amended opinion and order was not submitted by him for final consideration by the Commission until the middle of January, 1941. And his recommendation in this instance, in which the majority of the Commissioners did not join, was not that a certificate be denied the applicant utility but that the certificate first issued as prepared by him be reaffirmed with only slight modification. At no time during his term of office did he present any proposal for the disposition in one way or another of any of the applications herein involved, although all had been assigned to him and many of them had been ready for decision for more than two years. The implication made by the two dissenters that the Commission failed to give full consideration and thorough discussion on the issues involved in a multitude of like franchise matters coming before it, during the past two years or at any time, is simply untrue. The references made by the two dissenters to certain memoranda seemingly prepared by the former Commissioner aid them little in their contention when those statements are viewed in the light of what the record shows to have been that Commissioner's real action. And such private memoranda are not, of course, part of the record in any of these proceedings.

OCT 21 1941

C. C. BAKER

RAY L. RILEY

JUSTUS F. CRAEMER

Commissioners

Certified as a True Copy

SECRETARY, RAILROAD COMMISSION
STATE OF CALIFORNIA

The majority members of the Commission have made the allegation that the statements contained in our dissenting opinion concerning the attitude of former Commissioner Wakefield toward the issuance of certificates in the Pacific Gas and Electric Company franchise cases are false. This charge of falsehood is apparently based upon a technical contention that the various memoranda prepared by former Commissioner Wakefield, and referred to in our dissenting opinion, are not properly a part of the Commission's official record in these proceedings.

The question of veracity is not at issue. It is a fact that all of the memoranda quoted in our dissent were admittedly written by Commissioner Wakefield and submitted by him in some instances for the consideration of the Commission itself and in others for the consideration of the Commission's legal and technical staffs, who are the expert advisers of the Commissioners in all such matters. The mere fact that the majority members of the Commission did not see fit to allow all of these memoranda to be included in the official files of these proceedings simply strengthens our belief that the majority have failed to give proper consideration to the important questions raised by Commissioner Wakefield and by us.

It is our earnest belief that the persistent refusal of the majority to permit their decisions to deal with the all important question whether operating rights are or are not conferred by the certificates of public convenience and necessity granted to the Pacific Gas and Electric Company inevitably tends to nullify the spirit and the intent of the Public Utilities Act.

In the record and in repeated conferences with the Commission the attorneys for the Pacific Gas and Electric Company have asserted that the company does not desire or require in these cases any grant of operating rights from this Commission. Recently one of the attorneys for the company, in a hearing before the Commission, stated it as his opinion that his company did not need any certificates to operate in the cities and counties involved. This question, he added, could only be determined finally by the courts.

We disagree profoundly with this interpretation of the Public Utilities Act by the attorney for the company, and with the acquiescence of the majority members of the Commission in this contention, and we earnestly hope that an early determination by the courts of this important issue may be had.

OCT 21 1941

Frank R. Havenner

Richard Lachse

Commissioners