ORIGINAL

Decision No. 36085

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of the SACRAMENTO MUNICIPAL UTILITY DISTRICT to have fixed and determined the just compensation to be paid for an electric distribution system existing within and adjacent to the boundaries of said District.	Application No. 21960

BY THE COMMISSION:

ORDER DENYING PETITIONS FOR REHEARING

Petitions for a rehearing of Decision No. 35985 in the above proceeding have been filed by the petitioner therein, Sacramento Municipal Utility District, and by the respondents, Pacific Gas and Electric Company, American Trust Company, and City Bank Farmers Trust Company. The Commission has considered both of said petitions, and each of the allegations thereof, and being of the opinion that no good cause has been shown for the granting of a rehearing, IT IS ORDERED that each of said petitions for rehearing be and it is hereby denied.

Dated, San Francisco, California, December 29th, 1942.

Justus F. Craemer

Carl I. Wheat

Commissioners

Commissioners Havenner and Sachse, dissenting

We think the applications for rehearing should be granted. Several of the questions raised by respondents involve issues that have not as yet been fully presented to the courts for determination and on such issues we think the Commission should state its position.

Among the points made by the district is its claim, in paragraph VII of the petition for rehearing, that there is no evidence in the record of idle generating and transmission plant outside of the district caused by severance and that the statement in the majority opinion to the effect that a two-year period of notice, as provided in the stipulation, Exh. No. 169, might not be adequate to allow the owners to avoid any such further damage, is not only without support of any evidence, but is directly opposed to the uncontradicted testimony of witnesses for both sides. The district also claims that there is no evidence in the record of excess capacity or idle plant in production and transmission as of the actual date of severance and no evidence of damage as of that date. These are questions of fact which we think should be definitely resolved by the Commission.

Rehearing should be granted particularly in view of the failure of the Commission, in the majority decision No. 35985, to follow the law as decided by the Supreme Court of the State in the Tulare case (Southern California Edison Company v. Railroad Commission, 6 Cal. (2d) 737). The Supreme Court here lays down the rule we are to follow in the matter of fixing compensation for the loss in estimated net earnings, over and above a fair return on a proper rate base, of the property taken and the property not taken, and remaining in respondents' possession, after severance.

The court said:

> "The question is, does the constitutional requirement of just compensation demand that the factor of severance damages by way of damages to business be resolved on the basis of actual earning potentiality when such actual earnings amount to more than a reasonable return on the investment?"

The Supreme Court then proceeds to answer this question and we have quoted that answer on page 7 of our dissent in Decision No. 35985. The court concludes "that it cannot be said as a matter of law that the commission has failed to award just compensation by fixing the item of severance damages in dispute on the basis of a reasonable return." The court says further (supra):

> "The petitioner is in no position to here insist that for this particular property it be compensated at an exhorbitant figure merely because in another and independent proceeding, and with other considerations in view, it has been given the benefit of such a high return for the use of the property sought to be condemned. This is true especially in the present proceeding for the reason that the record herein is sufficient to support the conclusion of the commission that with the Tulare unit removed from the operation of its established rates, the company will still receive a reasonable return on the balance of its properties."

This, precisely, is the situation in the present case. The record shows conclusively that after severance of the property sought by the district, the remainder of the company's electric system will continue, under existing rates, to earn a fair rate, or better than a fair rate, of return. The court concludes:

> "Our conclusions are fortified by the fact that so far as we have been able to discover the theory of the petitioner has not been approved by any court, and the commission cases, both here and elsewhere, do not support it. (Wisconsin Power & Light Co. v. Public Service Com. supra; Kennebec Water Dist. v. City of Waterville, supra; Appleton Water Works Co. v. Railroad Com., 154 Wis. 121 (142 N.W. 476, Ann. Cas. 1915B, 1160, 47 L.R.A. (N.S.) 770); National Water Works Co. v. Kansas City, 62 Fed. 853 (27) L.R.A. 827); Re Montgomery Hydro-Electric Co., (Ill.) Pub. U. Com. P.U.R. 1917C, 224; City of Charleston v. Public Service Com., 95 W. Va. 91 (120 S.E. 398); Re Application of City of Los Angeles, 32 C.R.C. 579, wherein this court denied a petition for a writ of review on May 13, 1929, in Southern California Edison Co. v. Railroad Com., No. S.F. 13461; Re Application of City of Los Angeles, 37 C.R.C. 117, wherein this court denied a petition for a writ of review on July 14, 1932, No. L.A. 13619). In the two proceedings before this court last referred to, the petitioner therein, which is the petitioner herein, made the point in each matter that the commission had failed regularly to pursue its authority by refusing to fix compensation by the capitalization of loss in estimated net earnings. The denial of the petition for a writ of review in each case must be deemed a determination of the point against the petitioner's contention. (Napa Valley Elec. Co. v. Railroad Com., supra. Southern California Edison Co. v. Railroad Com., 6 Cal. (2d) 737, 59 Pac. (2d) 808, 814 to 816. (Emphasis supplied.)"

That rule was ignored in the majority decision No. 35985 and excess earnings of respondents over and above a fair rate of return on the undepreciated rate base were capitalized and added as just compensation to the market value of the property taken and to the severance damage accruing to the property not taken. This, we think, was error and should be repaired. We have discussed this matter at some length in our dissents in decision No. 35985, to which reference is hereby made.

Franck R. Havenner

Franck R. Havenner

Richard Sachse

Richard Sachse
Commissioners