

ORIGINALDecision No. 49585

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FRANK ROGINA,

Complainant,

vs.

Case No. 5476

MENDOCINO STATE HOSPITAL and
R. S. ROOD,

Defendants.

TALMAGE IMPROVEMENT CLUB, INC.,
a corporation,

Intervener.

Gordon McKenzie, for Frank Rogina.
Edmund G. Brown, Attorney General, State of
 California, by Adolphus Moskovitz, Deputy
 Attorney General, for Mendocino State
 Hospital and R. S. Rood, Superintendent,
 Mendocino State Hospital.
Charles Kasch, for Talmage Improvement Club, Inc.

O P I N I O NNature of Proceeding

Frank Rogina, whose water service in and near the unincorporated Town of Talmage, Mendocino County, was certificated in 1949 (Dec. 42766, April 19, 1949, Appl. 29618), alleges by complaint filed July 11, 1953, that Mendocino State Hospital and its superintendent, Rood, are selling water unlawfully to the general public within his certificated service area. Complainant seeks a cease and desist order and an order of condemnation of defendants' facilities. The latter request was abandoned at the hearing.

Defendants deny the material allegations of the complaint and assert lack of Commission jurisdiction over them upon the

grounds that (1) the State has not consented to be sued and (2) the State is selling only surplus water. Defendants ask that the complaint be dismissed.

Talmage Improvement Club, Inc., a nonprofit corporation, alleges that it receives surplus water from the hospital under contract with the State and distributes the water on a nonprofit basis to its members only. It also seeks dismissal of the complaint on jurisdictional grounds. The Commission, by order dated September 22, 1953, granted the club's petition for leave to intervene and enlarged the scope of the proceeding to determine whether intervenor has been or is operating as a public utility water corporation within the meaning of the Public Utilities Code.

Public Hearing

The case was submitted on briefs following a public hearing at Ukiah on October 7, 1953, before Examiner Gregory.

The Evidence

Rogina serves some 186 customers in an area approximately three miles north and south and a mile and one-quarter east and west, located generally between the Russian River and the Mendocino State Hospital entrance and north and south of the Talmage Road which connects U. S. Highway 101 and the hospital.

Water is pumped from a well located in an old bed of the Russian River, to a reservoir of 200,000 gallons storage capacity situated at a higher elevation some 1,200 feet east of the well in the north central portion of the area. Most of Rogina's customers are located immediately north and south of the Talmage Road. The distance from the reservoir to the southernmost customer is about 8,000 feet. Rogina's distribution mains range in size from 8 to 4 inches. All customers served by Talmage Improvement Club, Inc.,

are located within the exterior boundaries of Rogina's certificated service area.

Rogina's rates for domestic and commercial metered service, established in 1949, commence at \$2 per meter per month for a 5/8 x 3/4-inch meter, which allows up to 500 cubic feet of water, or 3,740 gallons. Rogina also maintains a schedule of meter rates for irrigation service, which is rendered subject to prior demands of the domestic and commercial consumers. In 1953, Rogina supplied irrigation water to only 8 of the 35 acres of land so served in previous years.

The Mendocino State Hospital, an agency of the State of California, Department of Mental Hygiene, since 1938 has supplied water under a 10-year contract, renewed in 1948 and approved by the Department of Finance, to the Talmage Improvement Club, Inc., incorporated August 9, 1937, under the nonprofit corporation laws of California for the stated purpose "solely of delivering water to its members at cost."⁽¹⁾ The contract, which is terminable by mutual consent of the parties or upon 30 days' written notice by the State to the club of intention to reduce or discontinue the supply, provides in substance for the sale by the State to the club of not to exceed 40,000 gallons per day of "surplus" water at 5 cents per 1,000 gallons, delivered at and measured by a master meter located inside the west gate of the hospital.

(1) Historically, as appears from the pleading filed by Talmage Improvement Club, Inc., the corporation was formed for the purpose of securing a substitute water supply for its members who, with their predecessors, formerly obtained water from Mill Creek, a tributary of the Russian River (fed in part by springs located on State property) and from wells. Diversion of Mill Creek water for hospital use (other than human consumption) led to the arrangements concluded between the State and the club for supplying the latter with water.

The Talmage Improvement Club, Inc., distributes the water received from the State through lines constructed, at various times since 1937, by means of assessments levied on a square-footage basis upon the property owners within its service area. The club charges its members at the rate of 6 cents per 1,000 gallons plus 50 cents per month for water delivered through approximately 47 individual meters. Some property owners have more than one meter.

Although the club's bylaws provide that all persons who furnish proof of ownership of land in fee simple within the exterior boundaries of its service area may become members, by signing the bylaws and agreeing to the terms thereof, the officials of the club were unable to produce for the record any set of bylaws bearing the signature of any member. No membership certificates have been issued, as provided for in the Articles of Incorporation. No meeting of members has been held for at least five or six years, although there have occasionally been meetings of the board of directors. Prospective members secure water service by proving ownership of their premises, by purchasing a meter if one is not already installed on the property, by requesting the club's meter reader to turn on the water and by paying the monthly quantity bill plus the 50-cent service charge. No other formalities are involved in securing service. If premises are rented and the lessee fails to pay the water bill, the club attempts to collect from the owner. The club has not had a new customer for the past year or more.

All domestic water used at the hospital or sold outside the hospital grounds is pumped from a well located on the hospital grounds. The well pumps into a 100,000-gallon elevated storage tank and is also used, during dry spells, to replenish the waters of Mill Creek behind the hospital's diversion works. From October, 1952, through September, 1953, an estimated total of 191,197,500 gallons of

water was pumped from this well. Of that amount, only 9,069,461 gallons, or less than five per cent of the total pumped, was sold by the State for domestic use outside the hospital grounds to the Talmage Improvement Club and to five individual users, among them the River Union School, all of whom are located within or adjacent to the southeastern portion of Regina's service area south of Mill Creek. These five customers receive water from the hospital through its so-called Dairy Line, or main. There is no connection between the mains of the Talmage Improvement Club and the pipelines which serve these five consumers. The level of the water in the hospital well has remained constant at 26 feet below the surface of the ground for the past 24 years, despite a steady increase in the amount of water pumped.⁽²⁾

Conclusions

The arguments, with supporting authorities, advanced by the three parties to this case have been reviewed. It is clear that the hospital, as an instrumentality of the State of California, is not a private corporation or association capable of being subjected to the regulatory authority of this Commission in the circumstances disclosed by this record. (City of Pasadena v. Railroad Comm., 183 Cal. 526.) Nor is the hospital amenable to our authority under the Act for Regulation of Water Companies (Stats. 1913, Ch. 80; Public Utilities Code, Secs. 2701-2712), since, the record shows and we so find, it is engaged in the sale of surplus water only and thus is exempt from control under the specific provisions of the Public Utilities Code, Sec. 2704(a).

Regina, therefore, has no legal cause for complaint, despite the uncontrollable nature of the competition to which

(2) The hospital is now digging an additional well to be used for standby purposes.

his operations are subjected by the activities of the State hospital.

The Talmage Improvement Club, Inc., whose status has been made an issue in this case, cannot be held to be a public utility, under familiar rules, unless an unequivocal intention to dedicate its properties and service to the general public can be found to exist. We do not find such an intention on this record. The fact, however, that it has clothed itself in the garments of a nonprofit or mutual water company (Public Utilities Code, Sec. 2705) would not, of itself, preclude its regulation as a public utility if it otherwise were discovered to be acting as one.

Despite the rather informal manner in which the club conducts its business and bearing also in mind that it was organized to provide a substitute water supply, interruptible at best, for persons in the locality whose former sources of supply had been taken over by the State, we are not persuaded that such a clear case of dedication to public use has been made out as would compel a finding which would fasten upon the Talmage Improvement Club the status and burdens of a public utility.

The complaint will be dismissed.

O R D E R

Public hearing having been had herein, evidence and argument having been received and considered, the matter having been submitted for decision, the Commission now being fully advised and basing its order upon the findings and conclusions contained in the foregoing opinion,

IT IS ORDERED that the complaint of Frank Regina herein be and it is hereby dismissed.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 18th day of January, 1954.

R. F. [Signature]
President

[Signature]
[Signature]
[Signature]

Commissioners

Commissioner Justus F. Craemer, being necessarily absent, did not participate in the disposition of this proceeding.