

ORIGINALDecision No. 52191

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of PACIFIC ELECTRIC RAILWAY COMPANY, a corporation, and METROPOLITAN COACH LINES, a corporation, for approval of terms of extension of trackage agreement.

Application No. 37107

ORDER DENYING REHEARING

Pacific Electric Railway Company (hereinafter referred to as Pacific) and Metropolitan Coach Lines (hereinafter referred to as Metropolitan), the applicants herein, have filed separate petitions for rehearing respecting Decision No. 51980, rendered in the above-entitled proceeding on the 19th day of September, 1955. Said petitions were not filed within time to stay the operative effect of said decision and the same is now in full force and effect.

Both petitioners are public utilities subject to the jurisdiction of this Commission.

In essence, each petition raises specifically or by implication the same objections to the decision herein. These alleged objections are:

- (a) The Commission violated the constitutional rights of Pacific by refusing to approve the proposed lease contract submitted by the parties for the Commission's consideration.
- (b) The Commission violated the constitutional rights of Pacific by, in effect, abrogating a sale and purchase contract between the parties herein which the Commission, therefore, had approved.
- (c) The Commission based its decision, herein, upon incompetent evidence while ignoring

evidence which fully supported the reasonableness of the proposed lease contract.

Subsidiary objections and contentions are raised but the foregoing specifications of error include these lesser objections and contentions.

These alleged objections have been carefully considered and found to be without merit as we, hereafter, shall point out.

The ultimate question here presented is whether or not the action of this Commission in refusing to approve the lease contract infringes petitioners' rights under the Federal Constitution.

(Pacific Telephone and Telegraph Company v. Eshleman, 166 Cal. 640, 654-658, 689.)

There can be no possible question that the contract of sale and purchase between these parties whereby Pacific sold and transferred to Metropolitan certain of its operative properties, which contract was approved by the Commission upon certain terms and conditions, and the herein proposed lease contract were and are subject to regulation by the Commission. Such regulatory authority is historical and necessary and has been embodied in the Public Utilities Act of this State since its enactment in 1911. No such contract, lawfully, may be entered into without prior approval of this Commission. Any attempt to do so without Commission authority results in an absolutely void act. (Section 851, Public Utilities Code; Slater v. Shell Oil Co., 39 C.A. (2d) 535, 547, hearing by Supreme Court denied; Webster Mfg. Co. v. Byrnes, 207 Cal. 630; Crum v. Mt. Shasta Power Corp., 220 Cal. 295.)

It is a fundamental rule of regulatory law that the authority to approve or disapprove a contract carries with it the authority to approve upon terms and conditions which means that the contract may be modified by the regulatory authority as a condition to approval

thereof.

Petitioners are in error in their contention that a contract, once approved by the Commission, may not thereafter be modified or abrogated. The decision herein did not undertake to abrogate or modify the sale and purchase contract as it was approved by the Commission. Said decision impliedly modified the prior decision of the Commission which had approved, upon terms and conditions, said sale and purchase contract. It must be kept in mind that the purchase and sale contract was not approved by the Commission as it was presented by the parties but upon the terms and conditions prescribed by the Commission in the decision dealing with that contract. A regulatory body has continuing jurisdiction over all such contracts as are here involved and may modify them from time to time or even terminate them. Rate contracts and the sale and purchase contract and lease contract, herein concerned, are prime examples of those types of contracts which are subject to the continuing jurisdiction of a regulatory body. If a contract, once approved by a regulatory body, could not thereafter be modified or terminated when the public interest required, regulation in that respect would be relatively ineffective.

The foregoing propositions are no longer open to debate having been foreclosed by the decisions of the Supreme Court of the United States and the Supreme Court of this State. (Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 437-439, 78 L. ed. 413, 428-429; Sutter Butte Canal Co. v. Railroad Commission, 279 U.S. 125, 137, 73 L. ed. 637, 641; East New York Savings Bank v. Hahn, 326 U.S. 230, 231-234, 90 L. ed. 34, 35-37; Hudson County Water Co. v. McCarter, 209 U.S. 349, 357, 52 L. ed. 828, 832; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372, 375, 63 L. ed. 309; Producers' Transportation Co. v. Railroad Commission, 251 U.S. 228, 232, 64 L. ed.

239; Law v. Railroad Commission, 184 Cal. 737, 739-740; Sutter Butte Canal Co. v. Railroad Commission, 202 Cal. 179, 184, 188-190; Traber v. Railroad Commission, 183 Cal. 304, 312-313.)

The foregoing cited cases make it abundantly clear that contracts of the nature herein concerned are not beyond the reach of the police power and may be modified or even terminated when the public interest so requires. One of the most important - if not the most important - contracts into which a public utility may enter is one whereby it sells its product or service to the public. No such contract may be entered into by a public utility, whether by special contract or tariff prescription, without first receiving the authorization of the regulatory body so to do. To specify the price and terms and conditions of the sale of the product or service of a public utility, as a regulatory body does, is a most stringent interference with management, yet it is elementary in regulatory law. Therefore, it is no legal objection to the action of a regulatory body to say that such action interferes with managerial discretion or impairs the exercise of powers of management for the simple reason that all regulation represents interference to some extent with managerial control. (Southern Pacific Company v. Public Utilities Commission, 41 Cal. (2d) 354, 367.) This Commission has authority to supervise and regulate every public utility in this State and may do all things, whether specifically designated in the Public Utilities Act or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (Section 701, Public Utilities Code.)

In addition to the regulatory authority conferred by Section 851 of the Public Utilities Code, Sections 207 and 216 of said Code endow the Commission with jurisdiction over the furnishing by Pacific to Metropolitan of the service, equipment and facilities herein con-

cerned. (See Western Canal Co. v. Railroad Commission, 216 Cal. 639, wherein the court pointed out that these sections had enlarged the definition of a public utility.)

In light of the foregoing authorities, we hold that the Commission had lawful authority to treat with these contracts as it has done.

The next question which arises is whether or not there was evidence which justified the Commission in exercising its lawful powers in the way in which it did exercise them.

It is true that Metropolitan is not objecting to the lease contract here involved. As a matter of fact, it urges this Commission to approve it as it was presented by the parties. The position of Metropolitan is not conclusive as to what this Commission should do with regard to the contract. A regulatory body has the duty of protecting the rate-payers of a public utility from the prejudicial impact of any improvident contract which such utility seeks to enter into. Believing that the lease contract as presented would be contrary to the public interest, it was the duty of this Commission to refuse approval thereof.

In resolving a matter such as this, a regulatory body is not only authorized but is required by law to use its informed judgment and to exercise its discretion based upon the evidence presented. (Chicago, Burlington & Quincy Railroad Company v. Babcock, 204 U.S. 585, 598, 51 L. ed. 636, 640.)

On the question of reasonableness of the proposed lease contract and the Commission's determination thereof, the finding and conclusion of the Commission are conclusive, if based upon evidence. (Pacific Telephone and Telegraph Company v. Eshleman, 166 Cal. 640, 689; Live Oak Water Users Association v. Railroad Commission, 192 Cal. 132, 144.) Necessarily, this must be so because one of the

fundamental reasons for creating these expert regulatory bodies was for the purpose of having them exercise their expert knowledge and judgment.

While it is true that witnesses appearing for the applicants did testify in support of the provisions of this lease contract as it was presented to the Commission, such testimony is not binding upon the Commission. The Commission is free to exercise its own judgment and call upon its own experience in arriving at a determination of a matter like the one here presented. Expert testimony in such circumstances is little more than argument. (Market Street Railway Company v. Railroad Commission, 324 U.S. 548, 560, 89 L. ed. 1171, 1181; Dayton Power & Light Company v. Public Utilities Commission, 292 U.S. 290, 298-299, 302-303, 307-308, 78 L. ed. 1267, 1274-1275, 1276-1278.) The record contains evidence to the contrary upon which the Commission was entitled to rely.

In resolving the question here presented, we cannot lose sight of the fact that Pacific was possessed of a passenger operation which, under its management, was a continuously losing proposition resulting in substantial deficits year after year. That Pacific was most anxious to dispose of this passenger operation is evident. Metropolitan was willing to purchase said operation but, in granting authority to carry out the sale and purchase thereof, the Commission imposed certain important terms and conditions upon its grant of authority as reflected by the proceedings in Applications Nos. 34249 and 34402 and Decision No. 48923, issued in said proceedings, whereby the Commission authorized the transfer. To the extent that said decision modified or was inconsistent with said sale and purchase contract, the latter has been superseded by the former. Certain of these terms and conditions addressed themselves to the future and by said decision placed a continuing responsibility and obligation upon

Pacific to cooperate with regard to the rail transportation segment of the passenger operation involved. Pacific was not completely released from its public responsibility in this regard. This fact is most important. The public interest will not permit this Commission to disregard this important feature of the transaction. In other words, the transfer was authorized upon the condition that there be a continuing responsibility of Pacific with particular regard to the continued maintenance of rail transportation facilities which Metropolitan was obligated to operate. The decision, herein, continues the imposition of that responsibility upon Pacific. The decision of the Commission which authorized this transfer was accepted by both Pacific and Metropolitan and has now become final and is binding upon them. We cannot agree with the one-sided interpretation which petitioners place upon the decision of this Commission which authorized the transfer of these operative properties of Pacific.

The case of Pacific Telephone and Telegraph Co. v. Public Utilities Commission, 34 Cal. (2d) 822, relied upon by petitioners, has no application to the instant proceeding. That case involved a contract for the purchase of services and materials by the telephone company from a corporate parent over which this Commission had no jurisdiction whatsoever. The court held that the Public Utilities Act did not confer upon the Commission regulatory authority over the contract, there concerned, in light of the particular facts of that case, except to disallow excessive or unreasonable charges to operating expense for the purpose of rate-fixing. The court did not hold that such a contract, lawfully, could not be regulated. The holding was that the Legislature had not authorized the Commission to regulate it. Here, in contrast, we have contracts which, by the specific provisions of Section 851 of the Public Utilities Code and

other sections of said Code, are subject to regulation by this Commission.

In the final analysis, the action of this Commission, as represented by Decision No. 51980 rendered herein, must be judged by the following rule announced by the Supreme Court of the United States in the case of San Diego Land & Town Company v. Jasper, 189 U.S. 439, 47 L. ed. 892, wherein that Court speaking through Mr. Justice Holmes stated at page 442, U.S. Report:

"It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached."

Believing that the action of the Commission, as reflected by the assailed decision, is consistent with and required by the public interest and the record herein, we can find no basis for granting either of the petitions for rehearing; therefore,

IT IS ORDERED that each of said petitions for rehearing be and the same is hereby denied.

Dated, San Francisco, California, this 7th day of November, 1955.

John E. Mitchell
President
Justus J. Gammie
Paul W. Tereme
Thomas J. [unclear]
R. [unclear]
Commissioners