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ORIGINAL

Decision No. 54444

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

City of Oroville, a municipal corporation, and County of Butte, a political subdivision, Complainants, vs. California Water Service Company, Defendant.	Case No. 5628
Lois Deconter, et al, Complainants, vs. California Water Service Company, Defendant.	Case No. 5650

(A List of Appearances and Witnesses is included herein as Appendix A)

O P I N I O N

The above-entitled proceedings, Case No. 5628 and Case No. 5650, were consolidated for hearing and heard upon a common record, hence this opinion and order will dispose of both of said proceedings.

Four days of public hearing were held before Commissioner Matthew J. Dooley and Examiner F. Everett Emerson. The matters were submitted upon the filing of briefs by all interested parties.

The two complaints filed herein asked this Commission to require defendant, California Water Service Company, to add fluorides to its domestic water supply in and adjacent to the City of Oroville, County of Butte. Defendant is a public utility water company subject to the jurisdiction of this Commission. (Secs. 216, 241 and 2701,

Public Utilities Code).

The evidence showed that on February 1, 1954, the City Council of Oroville adopted a resolution requesting the defendant to add fluorides to its water supply in accordance with the pertinent provisions of the Health and Safety Code of this State. This resolution was adopted after public hearings and said council thereafter determined that the public health, welfare and safety required fluoridation of the water served by defendant in the City of Oroville. On February 15, 1954, the Board of Supervisors of the County of Butte adopted a similar resolution. Despite the request of the City and the County the defendant refused to add fluorides to its water supply. Shortly thereafter the City and the County jointly filed their complaint in Case No. 5628. Subsequently, a similar complaint in Case No. 5650 was filed jointly by certain individuals, clubs, and organizations, within the service area of the defendant, also seeking fluoridation of defendant's water supply.

At the time of hearing certain interested parties within and without the service area of defendant were granted permission to intervene in the proceeding. These intervenors may be grouped into two classes: those who attack the merits and claims of fluoridation, opposing the method as being one of unsafe compulsory medication, and those who oppose fluoridation on the ground that it deprives them of their constitutional right of freedom of religion by forcing medicinal treatment on people who have religious scruples against the use of medicines.

Defendant contends that, as the water supplier, it is within its discretion whether it will or will not undertake to fluoridate the water and that it would only do so provided certain conditions were complied with. The primary condition was that there should be an election of the water users determining whether or not

they desire fluoridation. The question of requiring such an election was the real dispute between the complainants and the defendant water company which caused the filing of the complaint herein. Defendant's service area lies not only within the City of Oroville, but also covers an area adjacent thereto in the County of Butte. Hence, there is no established political subdivision with boundaries coterminous with defendant's service area that could be used for calling and supervising such an election.

The record is replete with expert medical, dental, chemical, and other scientific testimony on both sides of the question as to the advisability of the fluoridation of a domestic water supply. This evidence dealt with the effect upon the general health of all persons using fluoridated water and with the effectiveness of fluoridation in the prevention of dental caries in children.

A review of the record reveals that the preponderance of the evidence supports and we hereby find that the injection of fluorides, in the quantity testified to by several experts, in defendant's water supply will promote the health of the customers of defendant and will not cause injury to the consumers of such water. (Secs. 451 [1] and 768, [2] Public Utilities Code).

1/ Sec. 451. * * * Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

2/ Sec. 768. The Commission may, after a hearing, by general or special orders, rules, or otherwise, require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signalling, establish uniform or other standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand.

We have examined the copious authorities cited in the briefs and oral argument and are of the opinion that those rights guaranteed by the First Amendment to the Federal Constitution, and implied in the Fourteenth Amendment, would not be unlawfully infringed by requiring the defendant utility to fluoridate its water supply. We recognize that it is a fundamental constitutional principle that a person is entitled to adhere to any religious belief which he may choose. However, there is another principle which is equally true and fundamental--that no person may, by exercising his religious belief, infringe the sovereign power of the state to provide for the health, safety, or general welfare of its citizens. When these two principles collide, the power of the state must prevail. The Supreme Court of the United States has laid down the basic rule that the right to think and believe is unlimited but that the right to act in pursuance of such thought or belief is, necessarily, limited. The inadmissible position of these protestants is that the customers of this defendant utility must be denied the benefit derived from the fluoridation of the water supply of said utility because certain customers assert that fluoridation infringes their constitutional right to religious freedom.

At the close of the hearings in these cases a motion was made by the attorneys for the intervenors Dorothy Henderson, Minnie Clarke, Percy C. McChesney and Charles L. Reilly, and later a formal petition was filed requesting a proposed report be issued by the presiding officer pursuant to Rule 69 of the Rules of Practice and Procedure of this Commission. After careful consideration of the record and the issues presented, the Commission is of the opinion that the filing of such report would not serve any useful purpose. The issues herein are clear and the paramount question is one of law. The law and the facts herein have been thoroughly argued and briefed and in the judgment of the Commission each party has been accorded every opportunity to be heard in support of his position. Therefore, said

petition for a proposed report of the presiding officer is denied.

The action which we are taking herein is not to be understood as holding that a water public utility which does not fluoridate its water supply, necessarily, is violating the law. All we hold is that, based upon the facts revealed by the record herein, it is appropriate for us to direct the defendant utility to fluoridate its water supply.

It is recognized that if defendant is required to fluoridate the water supply it may require additional capital investment and expenses. However, we do not deem this to be the proper proceeding for the determination of such additional cost and if after fluoridation commences defendant finds it needs rate relief it may make appropriate application to the Commission.

O R D E R

California Water Service Company is hereby ordered and directed to fluoridate said water supply and to notify this Commission in writing, within sixty days after the effective date of this order of the action taken and progress made and every thirty days thereafter until said water supply has been fluoridated.

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

Dated at Los Angeles, California, this 29th day of JANUARY, 1957.

President

Commissioners

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APPENDIX A

Appearances

Complainants: City of Oroville, by Robert V. Blade; County of Butte by Charles H. Andrews; Lois DeConter, et al., by Thomas J. Corkin.

Defendant: California Water Service Company, by Robert Minge Brown of McCutchen, Thomas, Matthew, Griffiths & Greene.

Intervenors: Oroville and Butte County Committee Against Fluoridation, by Jack B. Tenney; National Health Federation and No. California Committee of The Pure Water Association of America, by C. P. Von Herzen and Wm. E. Gearhart; Oroville & Butte County Committee Opposed To Fluoridation of Water, by Clifford B. Johnson; City of Oroville & Butte County Committee Opposed To Fluoridation of Drinking Water, by Fannie E. Trussell; Pacific Gas and Electric Company, by F. T. Searls and John Carroll Morrissey; Dorothy Henderson, et al., by Allan E. Charles of Lillick, Geary, Olson, Adams & Charles.

Witnesses

For Complainants: Dr. John E. Benediktson, Dr. Henry M. Leicester, Dr. John Roy Doty, Dr. H. Trendley Dean, Dr. Francis A. Arnold, Jr., Dr. Ellis D. Sox, Lloyd F. Richards, Robert Wickenden.

For Defendant: Fred L. Dodge, John Rossum.

For Intervenors: Fannie E. Trussell, Miss Minnie Clarke, Perry C. McChesney, Charles L. Reilly, Dr. Frederick B. Exner.

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CONCURRING OPINION

These cases have been long under submission, and my views have been made known to the Commission. I would not delay the issuance of the Order, finally agreed upon by the majority only this morning, by asking for sufficient time properly to prepare and document this separate opinion. I am simply setting down, as the Commission has granted me the privilege of doing, the conclusions I have reached on the record and without the benefit of research or consultation with any member of the Commission staff. For any error of fact, law, logic or expression in what follows, the writer--with no excuse save necessary haste-is alone responsible.

I concur, subject to one condition, in the Order entered by the majority of the Commission. I cannot subscribe to the decision, however, because its sole basis is a finding of fact which I think the Commission is not qualified to make, and which I further believe, even if properly made, will not support the Order.

That finding is that the injection of fluorides into their water supply will promote the health of and not cause injury to defendant's customers.

Without raising any question as to the validity of this conclusion, I seriously question the competency of this Commission to arrive at it with that degree of certainty which we should demand of ourselves in arriving at findings on which significant orders are to be based. We are neither physicians nor scientists; nor are we staffed with experts in medicine or science who can give us unbiased and competent advice in this area. Each of us is

ontitled to his personal opinion; and my own personal opinion is as favorable to flucridation as is that of the other Commissioners. But personal opinions, in areas where we are not competent to make authoritative findings, are dangerous grounds on which to make decisions which may vitally affect the public welfare.

I am fully aware of the fact that courts must frequently arrive at decisions, based on the evidence before them, in cases involving medical or other problems with respect to which the judges have no personal competence. The courts, however, are competent in the law, which presumably provides the answers to all judicial problems; and they discharge their duties when they properly interpret and apply the law. This Commission, while bound to act always within the law, is by the law itself charged with legislative as well as judicial authority. It has the duty of formulating policies, in its designated area of responsibility, to promote the public interest. Commensurate with the wide power given us, should be our zeal to avoid extending the limits of our regulatory authority on the basis of findings we are not, or may not be, qualified to make. This is particularly true where, as in the present instance, the People of the State of California are amply protected by another public agency--the State Department of Public Health--which has the competence to make and the responsibility for making such findings as the majority of the Commission has taken upon itself to make.

The finding which underlies this Order is further, in my opinion, dangerously broad. The defendant provides water in many other districts in addition to the Oroville district. If the Commission is convinced that "the injection of fluorides, in the quantity testified to by several experts, in defendant's water

supply will promote the health of the customers of defendant"--and note that the finding is not limited to the Oroville customers--must not the order be interpreted to require the defendant to fluoridate the water in all its districts? And can we, in the discharge of our duties to the public, limit the benefits of fluoridation to the customers of the defendant? The decision says in words that "The action we are taking herein is not to be understood as holding that a water public utility which does not fluoridate its water supply, necessarily, is violating the law." But how can the Commission escape its responsibility to issue a general order requiring all water utilities to fluoridate, if it has confidence in the broad finding of fact on which this order is based? Is it the intention of the majority to impose fluoridation on water consumers in areas where they do not want it?

My second ground for being unable to subscribe to this finding is that I believe it will not support the Order. The legislative history of Sections 451 and 768 of the Public Utilities Code, relied on as authority for an order based on this finding, gives no indication that the Legislature had in mind their use for accomplishment of any such purposes as they are applied to in the majority decision. I am convinced that the "health" of the customers of a water utility, as the Legislature ordered the utility to promote it and authorized the Commission to promote and safeguard it, is such health as will be promoted by the provision of clean, pure water in adequate quantities. I do not believe that the Legislature intended by these provisions to order water utilities to enter into the unlicensed practice of medicine; nor to authorize the Commission to order them so to do. The expansion of a utility's duties, and of the power of the Commission, under the

interpretation of these code sections apparently adopted by the majority of the Commission, is somewhat frightening. A commission that can find as a fact that fluorides contribute to health would surely have no difficulty in finding that vitamins do likewise--and in ordering them added to the water supply. Body deodorants and "tranquilizers" may surely be found to promote the "comfort," if not the health, of water consumers--and there is no forecasting what the potentialities might be for some of the new "wonder" drugs. The code sections are not, of course, limited to water utilities. Bus companies, under the philosophy of this finding, might quite properly be ordered to provide massaging seats, sun lamps, and psychiatric treatment en route. The field for innovation is almost boundless. For, under the interpretation of the code sections adopted by the majority in basing its Order on this finding, it is not the sole duty of a water utility to do what it holds itself out to the public to do--that is, to provide a satisfactory grade of water in adequate quantities--but it is its further duty to generally promote "the safety, health, comfort, and convenience of its patrons." I cannot believe that these code sections were intended by the Legislature, or can properly be interpreted by this Commission, to cast such a burden and responsibility on a water utility. I cannot believe, therefore, that the finding in this decision will support the Order requiring fluoridation. That something may be good for people does not in itself justify this Commission in ordering a public utility to supply it.

This is a concurring opinion--at least, on a condition--not a dissent. I am as unwilling as my fellow Commissioners to hold that the customers of a utility cannot have the kind of service they reasonably desire unless the company voluntarily agrees

to provide it. Like they, I have sought for some proper ground on which we might order the defendant to give the people of Oroville what they want. The findings on which I would base the Order are fully supported by the record but have been rejected by the other Commissioners. Those findings may be as faulty as the finding on which the majority decision rests. But if they will support the Order they will do so without the reckless "stretching" of the statutes involved in the majority decision. If they will not, then I think the Commission has no present authority to order fluoridation and cannot make such an order until the Legislature gives it that authority.

Naturally-occurring water, which by common understanding is the water which utilities are expected to provide, is virtually never the pure H_2O of the chemical laboratory. It contains a variety of mineral and biological substances. If these are sufficiently harmful, they must be removed or reduced in quantity to make the water potable. Filtering, flocculation, aeriation and chlorination are accepted and widespread practices, and may unquestionably be ordered, where necessary, by this Commission. Water so treated is different in quality from untreated water; but it is still water in the common meaning of the word and in the intent of the statutes. When this Commission orders chlorination, for example, it does not do so in order that consumers may get a daily ration of chlorine gas; but in order that they may get a better quality water. We are not prescribing chlorine, but setting a standard for the water to be served. This, we are clearly authorized and qualified to do.

In some areas, the natural water contains fluorides which, the medical evidence indicates, are beneficial to health, particularly in the prevention of dental caries in children. This

ingredient does not change its identity as "water." It simply differs in kind and quality from water which does not contain such fluorides. If fluorides be added to water which does not contain them naturally, it likewise continues to be water--differing in kind and quality from what it was before the addition was made.

While I do not feel qualified, as a layman, to make a finding that the taking of fluorides into the human body is beneficial to health, and do not believe that the legislative intent in enacting Sections 451 and 768 of the Public Utilities Code was to require water utilities to provide medication for their customers, I have no difficulty in finding, from the record, that fluoridated water differs, in kind and quality, from unfluoridated water. I do so find.

I further find, from the record, that the majority of the customers of the defendant in the Oroville district desire to be served with the kind and quality of water that will result from fluoridation. In the absence of a public election, which no existing political subdivision is authorized to call or supervise, the Commission has no alternative but to conclude that the elected representatives of the people of the city and the county speak for the majority of their constituents. On the basis of these findings, and on a condition yet to be mentioned, I concur in the Order of the majority.

It may appear that I have drawn a very fine distinction. One who refuses to order fluoridation on the ground that fluorides are medically beneficial, may seem to be catching at straws when he orders it on the grounds that it provides a different kind and quality of water and that the consumers want that different kind

and quality. In effect, however, it appears to me that the majority decision orders the defendant and, by logical implication, all other water utilities, to provide medication. This concurring opinion only establishes the standard of water to be served in the Oroville district.

The distinction between the two positions may be narrow, but to me it seems deep enough to justify this separate opinion. Incidentally, while it is not to be expected that any order requiring fluoridation will be palatable to the protestants who appeared in these proceedings, an order based on the findings I have made might reasonably be expected to be less objectionable to them than the opinion and order of the majority. Those who believe that the presence of fluorides in drinking water is harmful can scarcely take issue with the finding that fluoridated water differs in kind and quality from unfluoridated water. Those who have religious scruples against the use of medicines may find the establishment of standards for a water supply more acceptable, as a principle, than compulsory medication. Neither group is likely to be as affronted by the principle of a majority rule, on which the decision in this concurring opinion is predicated, as by the exercise of the power of government to override their convictions and their scruples.

As to the Commission's authority to establish standards, there can be little question. A public utility is not discharging its full responsibility to its customers when it renders only that minimum of service which is indispensable for meeting minimum needs. Public convenience and necessity require that a utility render service of the kind and quality which its customers desire and are willing to pay for. Even the purest water in abundant quantities does not satisfy the requirements of public convenience and necessity in areas where the consumers want and are willing to pay for fluoridated water. It is clear from the record that unfluoridated water does not satisfy the legitimate and reasonable demands of the people of Oroville as to the quality of public utility service they require of the defendant. It is altogether appropriate for this Commission, on this record, to order the defendant to satisfy those demands.

The condition I would attach to my concurrence in the Order herein is that there be a finding by the property authority--that is, by the Department of Public Health of the State of California--that fluoridation of the Oroville water supply would not be medically harmful; and a determination by that Department of the amount of fluorides to be injected into said water supply. Such finding and determination can be implied from the issuance of a permit to the defendant by said Department. I would, therefore, order the defendant to apply for such permit, and to inaugurate the ordered fluoridation only after it has been issued. With this qualification, and on the findings above set forth, I concur in the Order herein.

Dated at Los Angeles, California, this 29th day of January, 1957.

Ray E. Untereiner
Commissioner