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ORIGINAL

Decision No. 59443

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of CORONA CITY WATER COMPANY, a California corporation, for an order authorizing the sale and transfer of certain assets.	Application No. 38626
Investigation on the Commission's own motion into the status of TEMESCAL WATER COMPANY and into the operations, rates, and practices of TEMESCAL WATER COMPANY and CORONA CITY WATER COMPANY.	Case No. 6098

Clayson, Stark & Rothrock, attorneys at law, by Donald D. Stark and George G. Grover, for applicant and respondents.
Edward G. Fraser, Jr., and Karl Roos, attorneys at law, for the Commission staff.

INTERIM OPINION

By Application No. 38626, filed on November 30, 1956, Corona City Water Company, a California corporation, hereinafter referred to as Corona, seeks authority to sell two wells, only one of which is usable, and three well sites, all heretofore acquired from Coronita Mutual Water Company, to Temescal Water Company, a mutual water company, hereinafter referred to as Temescal, for the sum of $4,100. Public hearings on the application were held on May 8 and October 23, 1957, evidence was presented, and the matter was submitted. Thereafter, on May 13, 1958, the Commission made its Order Reopening for Further Hearing and Consolidation Thereof with Order Instituting Investigation. The Order Instituting Investigation referred to is the Investigation on the Commission's own motion into the status of Temescal Water Company and into the

operations, rates and practices of Temescal Water Company and Corona City Water Company, Case No. 6098, filed by this Commission on May 13, 1958.

Thereafter, public hearings on the two consolidated matters were held in Los Angeles before Commissioner Theodore H. Jenner and Examiner Kent C. Rogers on April 16 and May 13, 1959, and the matters were ordered submitted thirty days after the filing of briefs. These briefs were filed on August 4, 1959. Subsequently an Examiner's Proposed Report on the matter was issued September 14, 1959. The staff filed exceptions thereto on October 5, 1959. On October 20, 1959, the applicant and respondents filed their reply to said exceptions.

By Application No. 38626, Corona seeks authority to transfer the heretofore described property to Temescal for the sum of $4,100. By Decision No. 52396, dated December 22, 1955, in Application No. 37390, the Commission had required that Corona retain said property "until and unless the Commission shall otherwise order".

History of Corona and Temescal

Temescal was organized under the laws of the State of California on March 22, 1887, for the purpose of furnishing and distributing water to its shareholders at cost. It obtains its water from wells, canyon streams, and Metropolitan Water District, and through ownership of stock in other water companies.

As of December 31, 1957, Temescal had 11,759 shares of stock outstanding, of which 2,100 were held by Corona.

Temescal has supplied its stockholders with water for approximately 70 years, gradually acquiring land, water rights,

reservoirs, wells, pumping plants, canals, pipelines, and stock in other water companies.

The history of the Temescal system dates back to 1880 when the South Riverside Land and Water Company began the development of a large area for citrus culture which included the present city limits of Corona City. Early subdivision of the land was known as the townsite of South Riverside, since renamed Corona. The water supply required for this development was obtained from the Temescal River Basin and a water system was constructed to furnish the territory with irrigation and domestic water.

Temescal was formed in 1887 to acquire the water system referred to above, including all sources of supply and territory, to separate the land transactions of the South Riverside Land and Water Company from the water supply operations.

The Iowa - California Land Company was formed in the meantime, and acquired the right to subdivide the town lots and the right to install and operate a distribution pipe system in the town for domestic purposes. The water supply for this domestic utility was obtained from Temescal through the purchase of 500 shares of Temescal stock.

In 1897 Temescal organized Corona which acquired the property, rights and all interests of the Iowa - California Land Company in the domestic water system. To meet the growth and development of the City of Corona and the increased demand for water, the utility made additions, extensions and improvements to the distribution system, but in lieu of developing its own water supply, it obtained additional water from Temescal.

In addition to the water supply from the Temescal River Basin, Temescal later developed wells in the City of Corona and

connected these directly to Corona's distribution system. At the present time Temescal has four wells in the city (not including the Coronita well referred to in Application No. 38626).

All of the common stock of Corona, 750 shares, is held for the stockholders of Temescal under a trust agreement dated December 6, 1923. As of July 31, 1958, the trustees were: Joy G. Jameson, Jr., R. L. Hampton and Lucile Burns. Mr. C. M. Brewer is the general manager of each company.

The directors of each company consisted of the following on July 31, 1958:

R. L. Hampton
A. C. Barns
E. F. Birdsall
R. L. Cook
R. C. Verity
T. J. Todd
Joy G. Jameson, Jr.

As of July 31, 1958, the respective officers were as follows:

Officers	Corona	Temescal
R. L. Hampton		President
Joy G. Jameson, Jr.	President	Vice President
R. C. Verity	Vice President	
Lucile Burns	Sec.-Treasurer	Sec.-Treasurer
C. M. Brewer	Asst. Sec.-Treas.	Asst. Sec.-Treas.

Temescal Stock Held by Corona

Disregarding the Coronita well, all of Corona's water is secured from Temescal through stock issued by Temescal to Corona. As of April 15, 1959, Corona had 2100 shares of Temescal stock issued between 1897 and 1956 which was purchased by Corona for prices ranging from $125 to $185 and at a total cost to Corona of $316,500.

There are two types of stock issued by Temescal. The first is canyon line stock which sells for $50 per share and entitles

the holder thereof only to water from the Metropolitan Water District. Common stock is of one class only. The stock is not appurtenant to the land but limits the water entitlement and may be affixed to any location in Temescal's service area. The presently authorized price of stock is $185 per share. Temescal has various lines bringing water into the service area (see Exhibit No. 11), including the high line and the low line. The high line is to the south at a higher elevation (Line No. 3). Historically, due to higher pumping costs, a $60 per share premium was charged for changing low line to high line shares. All stock recently acquired by Corona is high line shares. At present no high line or low line stock is available. It becomes available as subdivisions are formed and agricultural areas changed to residential.

Disregarding the canyon line shares, all Temescal stock is entitled to the same amount of water, basically, one-tenth of a miner's inch of water per day per share, but the amount is varied by Temescal's directors. To obtain expense money, the directors determine and collect an annual assessment for each share of stock. The assessment was $18 per share in 1956 and 1957, and $21 per share in 1958. Except for Corona, the majority of Temescal customers are agricultural, and water allowances per share are based on irrigation requirements. However, Temescal furnishes water to a number of commercial and domestic customers. When no irrigation is needed, no water allowances are made. This means that when adequate water is available due to the fact that no agricultural users require water, Corona must buy so-called "extra water" at $1.10 per miner's inch day as the directors of Temescal make no water allowance per share of stock. Each agricultural user must use his water entitlement in the month in which it is granted by Temescal (except for a

5% carry over into the next month), but Corona is permitted to compute its water usage on an annual basis and pay only for extra water above the entire year's cumulative stock allowance.

The System

Temescal secures its water from various sources in the vicinity of Lake Elsinore and by importing water from the San Bernardino basin which it obtains by means of stock ownership in various other water companies. It also has wells in the vicinity of Glen Ivy southeast of Corona, and wells in the City of Corona. Lines run from the various sources into the vicinity of Corona. As most of the consumers of Temescal are irrigation or commercial, none of the water is treated except that which is used by Temescal to supply the City of Corona and other domestic consumers. Line No. 3, the so-called high line, extends from Glen Ivy into Corona. The water carried in the line is treated and there are numerous water consumers outside the City of Corona and outside the service area of Corona City Water Company who receive water direct from this line. Outside the City of Corona the line is owned by Temescal, and inside the city it is owned by Corona (see Exhibits Nos. 10 and 11). Said line is operated by Temescal.

Domestic and Commercial Water Consumers (nonstockholders of Temescal) Securing Water from the Temescal Transmission Lines and Stockholders of Temescal Securing Water from the Corona Lines

There are several water consumers, both domestic and commercial, outside Corona's certificated area along the No. 3 or high line between Glen Ivy and the Corona City Limits who are served by said line. There are also certain consumers on the irrigation line who receive nonpotable water for fire protection and commercial uses. None of these consumers are stockholders of

Temescal. Temescal argues that these consumers are customers of Corona as Corona meters the service, bills and collects for the water. However, it is clear these consumers are located outside any area which Corona has a certificate to serve; they are served directly from Temescal's lines, the only facilities of Corona involved being a meter at the premises, and in the case of the commercial users, receive nonpotable water and in some instances "interruptible service" for which Corona has no filed tariff and therefore is not authorized to provide. The funds collected by Corona for these services eventually find their way to Temescal or Temescal's stockholders either by way of water purchases by Corona for these consumers or through the trust declaration heretofore referred to. This arrangement and practice between Temescal and Corona, we find to be a scheme and device employed by these parties to shield Temescal from regulation by this Commission and a device to violate the applicable regulatory statute.

In its service area Corona supplies water to several of Temescal's stockholders. Corona does not bill these consumers and the water received by them is considered by both Temescal and Corona as water supplied under stock entitlement. At about the time this investigation was instituted, Corona and Temescal began offsetting the amount of water these consumers received against the water charged to Corona by Temescal. Again, Corona has no provision in its tariff for this type of service and Corona is not compensated by Temescal for the use of its facilities in serving these consumers.

It is apparent that the operations of Temescal and Corona, considered as a whole, form an integrated system and that Corona is dominated and controlled in its entirety by Temescal whose interests lie mainly with its agricultural stockholders.

It is equally apparent that it would be an illegal extension of its service for Corona to acquire customers outside its service area or to furnish services not provided for in its tariffs without prior authority from this Commission. All of the foregoing of this Interim Opinion we hereby find to be the fact based upon the record herein.

In light of the record in this case, this Commission cannot recognize the hereinabove-described water consumers as customers of Corona, for to do so would be to accept an illegal activity of Temescal's subordinate affiliate, Corona, as lawful.

This Commission finds that these consumers are in fact customers of Temescal and that the activities of Corona in connection therewith constitute the activities of an agent in behalf of its principal.

Among the issues raised herein are whether or not Temescal is a mutual water company, whether or not Temescal is a public utility water company, and whether or not Corona is the alter ego of Temescal and vice versa.

Temescal was formed as a mutual water company. The Articles of Incorporation of the company (Exhibit No. 6) provide that

> "the primary purpose for which this company is formed is to acquire, own and hold water and water rights, to construct and maintain water-works and storage and distribution facilities, for the purpose of furnishing and distributing water to its shareholders only, at cost."

However, it is clear that even though organized as a mutual, a water company can become a utility by its subsequent activities. Western Canal vs. Railroad Commission, 216 Cal. 639, 646-647.

The evidence herein shows, and we find, that Temescal delivers water to persons other than its stockholders or members contrary to the provisions of Section 2705 of the Public Utilities Code and, therefore, Temescal's operations fall squarely within the provisions of Sections 2702 and 2703 of that Code, which latter sections are the counterpart of Section 2705. This finding is sufficient to subject Temescal to the jurisdiction of this Commission.

Furthermore, Temescal has presented no evidence that its water deliveries are "at cost", which is another requirement of Section 2705. It has neglected to make a cost of service study to apportion costs in serving its stockholders and has refused the staff of the Commission access to its books for the purpose of making such a study. We can only conclude, therefore, that this evidence, if presented, would be adverse to Temescal (C.C.P., Sec. 1963, sub. 5). Temescal presented figures purporting to show that, for some period of time, it operated at a loss. This does not prove that it delivers water at cost. Many public utilities fail to earn their expenses for long periods of time. Finally, as Public Utilities Code Section 2705 is an exemption statute, it provides an affirmative defense to regulation as a public utility and the burden is upon Temescal to prove that each and every requirement in said section is fully satisfied before the exemption will apply (C.C.P., Sections 1869, 1981). The evidence of record shows and we find that Temescal has failed to prove that its deliveries of water are at cost and that it delivers water only to those named in Section 2705. It is elementary that the burden rests upon the party claiming exemption from regulation, where but for the exemption such party would be subject thereto, to prove his entitlement to such exemption. (Piedmont & Northern

Ry. Co. vs. I.C.C., 286, U.S. 299, 311-312, 76 L. ed. 1115, 1123; Interstate Natural Gas Co. vs. F.P.C., 331 U.S. 682, 691, 91 L. ed. 1742, 1748; U.S. vs. Public Utilities Commission of California, 345 U.S. 295, 310, 97 L. ed. 1020, 1034.) See also our recent decision in Yucaipa Domestic Water Co. vs. Yucaipa Water Co. No. 1, Decision No. 59222, Cases Nos. 6247-6248. Thus, we find that Temescal is not exempted from regulation as a public utility by the provisions of Public Utilities Code Section 2705.

Additionally, the evidence shows and we find that Temescal supplies water to Corona (in fact is the sole supplier) which brings Temescal squarely within the provisions of Section 216(c) of the Public Utilities Code which defines a public utility as a person or corporation performing any service or delivering any commodity to any person, private corporation, municipality or other political subdivision of the State, which, in turn, either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof. The water delivered by Temescal to Corona is redelivered by Corona to its customers and we hereby so find. The language of Section 216(c) is clear and unambiguous and was added to the Public Utilities Act in 1913 to overcome contentions then being made which sought to avoid regulation.

The issue of alter ego is presented and the staff of the Commission points out that there is an identity of directors and partial identity of officers of Temescal and Corona. Moreover, the same person is general manager of both companies. They share the same offices and as previously pointed out some facilities of each are used interchangeably by both for their mutual convenience. Corona is a stockholder of Temescal and all of Corona's outstanding

stock is held by a board of trustees for the benefit of Temescal's shareholders.

The staff further points out that an adherence to the fiction of a separate existence of Temescal and Corona would promote an injustice in that it would sanction and recognize a legal fiction obviously created by Temescal expressly to evade and frustrate regulation of its operations by this Commission. It is elementary that this Commission, in the exercise of its constitutional and statutory duties, cannot permit Temescal to accomplish by means of a scheme or device or legal fiction, that which it cannot accomplish directly, i.e., engage in the business of a public utility water company free from regulation by this Commission. On this issue we find the facts to be as follows.

It is undisputed that the domination and control of Corona by Temescal has prevented Corona from developing its own sources of water. Corona is utterly dependent upon Temescal for its water. Corona has been prevented from owning or operating wells which are connected directly to its distribution facilities. At the time of submission, Corona had over $300,000.00 on its books representing stock purchases in Temescal. This would normally represent an investment in capital assets for water producing facilities. However, under the present situation, this Commission has no way of determining whether this sum represents capital assets at all, or whether the money has been spent by Temescal to meet operating expenses. As the agricultural consumption of Temescal's water decreases and the domestic consumption increases in the future it can easily be foreseen that ultimately Corona will acquire by purchase a majority of Temescal's transmission facilities and water stock. Corona will still have no water production facilities

and Temescal's assets will be mainly water production facilities. A presently existing example of the effect of this ultimate result is the Coronita well. If Temescal should acquire this well for $4,100.00 (as requested by Corona), Corona would then be required to pay $138,000.00 for stock in Temescal to obtain an equivalent amount of water which could be produced by the well. In addition, the annual cost to Corona in assessments and extra water charges would be approximately four times the cost of operating the well (Exhibit No. 9, Ch. 6). Under the circumstances, the injustice is apparent.

For many years, Temescal has dominated and controlled Corona. As against Temescal, Corona has no will of its own. The directors are the same and for all intents and purposes the officers are the same with immaterial exceptions. There is a unity of operation and control and, in fact and in law, the operations of these two companies constitute one integrated activity. Any separation of operations is artificial and colorable and is employed in an attempt to evade regulation. Corona is the alter ego of Temescal and vice versa. To recognize the separate existences of these two companies would defeat and frustrate lawful regulation of the activities of both these companies. The failure to regulate Temescal results in a substantial frustration of lawful regulation of Corona. The case of Minifie v. Rowley, 187 Cal. 481, cited and relied upon by Temescal, declares no rule contrary to the principle which we follow herein. The rule applicable to alter ego has been expanded by the Supreme Court of this State since Minifie v. Rowley was decided. However, it must be kept in mind that these court decisions dealt with adversary proceedings between private parties and not regulatory proceedings. Any scheme or device calculated to unlawfully evade or frustrate regulation constitutes constructive fraud

upon the public. This subject has recently received the consideration of the Commission in a proceeding where all elements of the subject were explored fully. There the Commission found that the proof of actual fraud is not necessary to invoke the rule of alter ego. All that need be shown is that the device will defeat or frustrate regulation. In such circumstances corporate fiction will be disregarded and regulation will be administered. (Direct Delivery Case, 54 Cal. P.U.C. 258, 263.)

Temescal has, on two separate occasions, resorted to proceedings in eminent domain to acquire operating property (Exhibit No. 12). As the right of eminent domain may only be exercised to convert a private use to a public use (see Northern Light & Power Co. vs. Stacher, 13 C.A. 404 (1910), General Petroleum Corp. vs. Hobson, 23 F. 2d 349 (1928) and Eckel vs. Springfield, 87 C.A. 617 (1928)), Temescal has by the exercise of that right, made an unequivocal act of dedication to public use and is estopped to deny that it is a public utility. Producers Transp. Co. vs. Railroad Commission, 176 Cal. 499 (1917.)

Temescal argues, however, in its written brief, at pages 33 and 34, that "The statutes of California give the right of eminent domain to development of water for irrigation purposes (Code Civ. Proc., Sec. 1238.5), and in fact the law expressly gives this power to mutual water companies. (Code Civ. Proc., Sec. 1238, par. 4.) The granting of the power of eminent domain to mutuals and at the same time the exemption of mutuals pursuant to Section 2705 can only mean that the Legislature contemplated that the exercise of eminent domain by a mutual does not of itself result in Commission jurisdiction."

The quoted paragraph misconstrues the effect of C.C.P. 1238, et seq., and in fact ignores the first sentence of said section which states "...the right of eminent domain may be exercised in behalf of the following public uses." Temescal also ignores C.C.P. 1237 which defines eminent domain as "the right of the people or government to take private property for public use." It also ignores Civil Code Section 1001 which states "any person may...acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of title seven, part three, of the Code of Civil Procedure...." Temescal also ignores the vital distinction between the mere existence of an incorporeal right or power and the voluntary exercise of that right. The fact that Temescal may exercise the right of eminent domain does not exempt the exercise of the right from constituting a dedication to the public use. Temescal was not compelled to exercise the right of eminent domain but it did so and such exercise converted it into a public utility, if it was not already of that status.

We need not tarry long on the issue involving the request by Corona to transfer these water wells to Temescal. We find from the evidence that these wells are necessary and useful to Corona, within the purview of the provisions of Section 851 of the Public Utilities Code, and that a transfer to Temescal would be contrary to the public interest. We find that Corona needs additional water supplies and will continue in the future to need additional water supplies. The claim made by the utility that there is a legal inhibition against it operating these wells is beside the point. This Commission cannot take this assertion by the utility as an adjudicated fact; otherwise, we would be abdicating our jurisdiction

and authority to the utility. The evidence shows that the objection upon which this assertion is based was made by a party who is connected with this utility and Temescal. It appears to be a "family" matter. At all events, this asserted legal inhibition would have to be litigated in a tribunal of competent jurisdiction and if the asserted inhibition should be upheld, this Commission has the authority to order the utility to condemn any right upon which such inhibition may be based. This asserted legal inhibition is immaterial to the issues in this proceeding. The request of Corona to transfer this property will be denied.

Conclusion

Based upon the foregoing findings of fact, the Commission concludes that Temescal is a public utility water corporation pursuant to the provisions of Sections 216, 241, 2701, 2702 and 2703 of the Public Utilities Code and that it has dedicated its properties to the public use.

In taking the action herein, the Commission is not unmindful that parties, without meaning to do so, may become subject to regulation because of the acts which they commit. This, sometimes, works a hardship upon the party thus finding himself confronted with regulatory requirements. It may well be that Temescal's owners were of the opinion that they were avoiding regulatory status but such would not be a defense against regulation, if the acts actually committed brought that company, as we have so held, within the ambit of the regulatory statute. The Commission must proceed upon the law and the facts, irrespective of the intent of the parties involved. It is not what a person intends that counts but, rather what he actually does. In regulating this water operation, the Commission will administer the law in light of the historical pattern and growth of the operation, consistent with the public interest.

INTERIM ORDER

Investigation on the Commission's own motion having been instituted, and the same having been consolidated for hearing with Application No. 38626, public hearings having been held thereon, and the matters having been submitted and now being ready for decision,

IT IS HEREBY ORDERED:

1. That Application No. 38626 is denied.

2. That Temescal Water Company is declared to be a public utility subject to the jurisdiction, supervision and control of this Commission.

3. That submission in Case No. 6098 be set aside and said case be reopened for further hearing for the purpose of determining various matters pertinent to the regulation of this utility, including, but not limited to the following:

a. Determination of the original cost, estimated if not known, of the water system properties used and useful in the public service, together with the depreciation reserve requirement applicable thereto.

b. The establishment of fair and reasonable rates and rules for this system.

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

Dated at San Francisco, California, this 29th day of December, 1959.

President

Commissioners

I concur in this interim opinion and order, except that I withhold my approval from that portion thereof in which the Commission expresses its opinion on the effect of Section 216c of the Public Utilities Code in determining public utility status.

Theodore H. Jenner
Commissioner