

ORIGINAL

Decision No. 65266

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the matter of a proposed sale and transfer by DYKE WATER COMPANY, a corporation, of a portion of its property to the City of Anaheim.

Case No. 7586

- J. Thomason Phelps, with James F. Haley, for the Commission staff.
- Roe and Rellas, by Chris S. Rellas, for Dyke Water Company.
- Joseph B. Geisler, City Attorney, and John H. Dawson, Assistant City Attorney, for City of Anaheim, protestant.
- Milford W. Dahl, for Orange County Water District, interested party.

INTERIM OPINION

The Commission, on March 29, 1963, instituted this investigation to determine whether an action in eminent domain, filed March 6, 1963 by the City of Anaheim with the consent of Dyke Water Company, a public utility corporation, in the Superior Court in Orange County, for the purpose of acquiring, for a stipulated sum, certain operating properties of the utility used to serve water customers within and outside the city limits, was in circumvention of the Commission's regulatory jurisdiction over transfers or other dispositions of utility property (Public Utilities Code, Secs. 851 et seq.), or would be adverse to the public interest. Included in the investigation order is a temporary restraining order, directed to the utility, its officers and agents, enjoining the sale or encumbering, until further order of the Commission, of the whole or any part of the utility's operating properties.

The proceeding was submitted at the conclusion of a public hearing held, after due notice, on April 3 and 4, 1963 at Los Angeles before Commissioner Grover and Examiner Gregory. The city, joined by the utility, moved to dismiss the investigation for lack of jurisdiction by this Commission to proceed in any manner other than pursuant to the provisions of Public Utilities Code Secs. 1401 et seq. Those provisions relate to the fixing, by this Commission, of just compensation for the acquisition by a political subdivision, in eminent domain proceedings or otherwise, of lands, property and rights of a public utility. The city urges that although it had filed and there is still pending with the Commission a petition under Sections 1401 et seq. (Application No. 44526, as amended), the fact that the parties have stipulated, in the Superior Court condemnation case, to a price for the same properties obviates any need for further proceedings before the Commission, other than for the city to request dismissal of its petition, which, it states, it proposes shortly to do.

The record reveals that on March 28, 1963, at 3:45 p.m., Dyke Water Company filed its answer to the eminent domain complaint in the Orange County Superior Court (City of Anaheim vs. Dyke Water Co., et al., No. 111,149); that on March 29, 1963 the City of Anaheim and Dyke Water Company filed a "Stipulation of Facts And As To Value" in said proceeding, reciting the value of the properties described in the complaint, including (but not separately stated) severance damages, in the total sum of \$1,891,245.00 and further stipulating that said sum would be paid, in the event the Court should adjudge that plaintiff had the right to condemn said property, to the Title Insurance and Trust Company, at its Santa Ana Office, "as Trustee for the benefit of defendant, Dyke Water Company, to be paid in accordance with instructions on file with said Trustee." It is

further stipulated that the city, upon such payment having been made to the title company, "shall be entitled to immediate possession of defendant's water system as herein condemned."

Other provisions of the stipulation relate to: the furnishing, by the utility to the city, of title insurance policies, deeds, bills of sale, an indemnity agreement against liability by the city for outstanding water main extension obligations of the utility; transfer of accounts, customer deposits and prorated advance payments by customers for water; payment by the utility of all accrued bills for electric energy due the city; severance by the city of the utility's remaining system; and payment by the utility of all accrued Orange County Water District Replenishment Taxes up to and including the date of transfer of the condemned properties based on meter readings as of the date of said transfer.

The record further reveals that on April 1, 1963, at 10:04 a.m., a certified copy of the Commission's Order Instituting Investigation and Temporary Restraining Order was personally served upon Arlyne Landsdale, Secretary of Dyke Water Company, at Los Angeles.

On April 2, 1963 the condemnation case was heard on the short-cause calendar of the Orange County Superior Court. The court rendered its judgment, which was filed and entered at 10:00 a.m. of the same day in Judgment Book No. 88, Page 505, of the records of that court. The judgment adopted the facts set forth in the stipulation and ordered condemnation in accordance with the provisions thereof.

Although the Commission's attorney, then in Los Angeles, was prepared to seek intervention in the condemnation case on April 2, 1963, he was advised, before leaving for Santa Ana, that judgment had already been rendered that morning.

The record further establishes that Dyke Water Company is presently and for some time past has been under financial pressure from a number of creditors and that it proposes to use the proceeds of the condemnation judgment, as far as possible, to pay certain obligations, including liens.

The Commission's concern, in this proceeding as in other cases where a utility is being acquired, in whole or in part, by a political subdivision not otherwise subject to its regulatory jurisdiction, is with the resultant effect of the acquisition on consumers of the utility who either may be excluded from the area to be served by the political subdivision or may, for one reason or another, be subjected to discriminatory treatment unrelated to the lawful requirements of the acquiring authority.

It is also a matter of concern to this Commission, especially in the case of a partial disposition of a utility's operating properties (as is the case here), that the utility's application of funds received from such disposition be made in such a manner as to appropriately discharge its obligations to its customers (those remaining and also those which will be transferred), extension contract holders, and other bona fide creditors of the utility and, of course, in a manner consistent with its obligation to continue to render adequate service with its remaining properties.

The record shows that the City of Anaheim, by resolution of its City Council (Exhibit 41-B), has declared that it will provide water service in the areas served by the acquired facilities with no inequality in rates, as between customers within and without the city limits, other than as may result from the necessity of offsetting any reasonable burden sustained by residents and taxpayers within the city by contribution to the operation of a municipal water system. This declaration of policy is similar to that which the Commission has required in connection with several

recent applications for authority to transfer public utility property.

In addition, the city and the utility have stipulated that the disposition of proceeds of the condemnation judgment will be made in accordance with instructions to the Title Insurance and Trust Company to be filed with that company pursuant to the "Stipulation of Facts" adopted in the judgment (Exhibit 40), and that no substantial change in such instructions will be made without prior notification to this Commission.

Examination of the escrow instructions reveals that the monetary claims, including liens, to be paid from the \$1,891,245 condemnation judgment, plus accrued interest through February, March and April, 1963 for some items, are estimated at \$1,886,238.28, with provision for ascertainment of actual amounts to be paid. The items include: federal taxes and liens; bank loans; Orange County Water District pumping taxes; escrow fees and costs; refunds of certain advances due under main extension contracts, including a number reduced to judgment in formal complaint proceedings before the Commission; ⁽¹⁾ attorneys' fees.

The instructions do not indicate, nor does the record otherwise reveal, what disposition will be made by the utility of a substantial and long-standing obligation to refund to consumers certain excess charges resulting from cancellation of a company-wide interim rate increase authorized in an earlier consolidated proceeding (Application No. 39303, Case No. 5841). Moreover, the exact amounts of these refunds are not presently ascertainable from data of which the Commission may take official notice.

(1) The utility will retain the obligation to refund advances under other outstanding contracts on its Anaheim system (Exhibit 40).

Aside from the interim rate refund question, which is left unanswered by the escrow instructions and by the record as a whole, neither the instructions nor the record reveal the basis on which a portion of the proceeds of the condemnation judgment will be distributed to certain main extension refund contract holders, or the total amount due or to become due on such contracts. Nor do the instructions provide for the return of customers' deposits.

In addition to the foregoing, the record does not disclose the precise nature of the major item to be satisfied from the proceeds of the condemnation judgment, namely, the sum of \$1,318,620.81, stated to be owing to the Farmers & Merchants Bank of Long Beach. On April 2, 1963, Dyke Water Company executed a Partial Assignment of Judgment for the above-mentioned sum in favor of the bank (Exhibit 38). The assignment recites that it is being made "for the purpose of providing payment of sums now past due and owing to the aforementioned assignee", and that if payment is not made on or before April 4, 1963, "the additional sum of \$226.21 for each day from and after April 5, 1963 is hereby also assigned to said assignee."

Neither the escrow instructions nor the record, as they now stand, are sufficient to persuade the Commission that a proper disposition of the proceeds of the condemnation judgment is contemplated by the utility in light of its existing and prospective public utility obligations. As a result, we are of the opinion that the order of submission of the investigation on April 4, 1963 should be vacated and the proceeding continued to a date to be set for the purpose of developing a more complete record. Meanwhile, the temporary restraining order, issued herein on March 29, 1963, will be continued in effect, as modified in the following order, until further order of the Commission.

At the reopened hearings the Commission will be interested primarily in evidence of the company's plans to discharge its obligations relating to: (1) refund of excessive rates collected pending court review of Decision No. 59828; (2) payments due on construction advances in accordance with the terms of the company's extension contracts; and (3) refund of customers' deposits to establish credit.

While it is unnecessary at this time to determine the issue of the validity of the purported judgment of condemnation rendered by the Superior Court of Orange County, we desire to point out that a most serious jurisdictional issue is thereby presented.

(Northwestern Pacific Railroad Co. v. Superior Court, 34 Cal.

2d 454, 458; Miller v. Railroad Comm., 9 Cal. 2d 190, 195;

Loustalot v. Superior Court, 30 Cal. 2d 905, 911-912.)

INTERIM ORDER

IT IS ORDERED that:

1. The order submitting this proceeding on April 4, 1963 is vacated and said proceeding is continued for further hearing, after due notice, at a time and place hereafter to be fixed.

2. Dyke Water Company, a corporation, its officers, directors, agents, attorneys, servants and employees and all persons having notice or knowledge of this order are, and each of them is, hereby restrained, enjoined and prohibited, until the further order of this Commission, from selling, leasing, assigning, transferring, mortgaging, or otherwise disposing of or encumbering the whole or any part of Dyke Water Company's plant, system, or other property, real or personal, necessary or useful in the performance of Dyke Water Company's duties to the public. Said Dyke Water Company and said

persons aforesaid are, and each of them is, hereby specifically restrained, enjoined and prohibited, until the further order of this Commission, from paying, or causing or consenting to be paid, directly, in trust, by way of assignment, or otherwise, the whole or any part of the sum of \$1,391,245.00, heretofore stipulated by said Dyke Water Company, by its attorneys and the City of Anaheim, by its attorneys, to be the value of certain properties, including severance damages, included in a proceeding in the Superior Court of the State of California in and for the County of Orange, entitled "City of Anaheim, a Municipal Corporation, Plaintiff, vs. Dyke Water Company, a corporation, and Does 1 to 50, both inclusive, Defendants", No. 111,149, wherein a purported judgment for condemnation was rendered April 2, 1963 and filed and entered the same day in Book 88 of judgments at Page 505; or from disposing, by deed, contract of purchase, bill of sale or other evidence of title or interest, the whole or any part of the property condemned in said judgment, including property owned in fee by Dyke Water Company, property where said company owns less than the fee, and property classified as chattels or chattels real; or from assigning or causing to be assigned, or from relinquishing, causing to be relinquished, or consenting to the relinquishment of, possession or control of or over any of the aforesaid proceeds of said judgment of condemnation, or of or over said property or any estate or interest therein.

3. The secretary is directed: to cause a certified copy of this Interim Opinion and Order to be served personally upon Dyke Water Company, a corporation, upon Richard P. Roe, Esquire and Chris S. Rellas, Esquire, attorneys for said Dyke Water Company and upon Joseph B. Geisler, Esquire, City Attorney of the City of

Anaheim; to cause a certified copy of this Interim Opinion and Order to be recorded in the office of the County Recorder of the County of Orange; to cause certified copies of this Interim Opinion and Order to be served, by registered mail, upon the Farmers & Merchants Bank of Long Beach, California, Title Insurance and Trust Company, at its Santa Ana, California office and upon Milford W. Dahl, Esquire, Attorney for Orange County Water District; to cause a copy of this Interim Opinion and Order to be served upon J. Thomason Phelps, Esquire, Attorney for the Commission staff in this proceeding.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 24th day of APRIL, 1963.

George E. Grover
President
[Signature]
Wesley W. Page
Fredrick B. Holbrook
Commissioners

BENNETT, William M., Commissioner, dissenting:

I differ with my colleagues as to their decision upon the proposed sale and transfer of the properties of the Dyke Water Company to the City of Anaheim. I am aware of nothing before me which discloses that such a transfer is adverse to the public interest. To the contrary, the City of Anaheim, as a municipality, has elected on behalf of its municipal water users to acquire this system. It seems to me that the decision reached by that municipality can hardly be subjected to criticism that it was not in the public interest. I would approve the sale and transfer to the City of Anaheim without the delay of a restraining order.


Apparently, the crux of the majority decision concerns itself with conditions sought to be imposed upon the Dyke Water Company's disposition of the funds derived from the sale. I, too, am concerned in the disposition of these funds to the extent of desiring immediate satisfaction of all refunds due to ratepayers. However, I do not think that it is the function of this Commission to set itself up as some type of tribunal to establish the validity and priority of claims against the Dyke Water Company. The courts in this state have been empowered and are competent to perform not only this function, but, if necessary, to set aside any unlawful preferences to creditors made by the seller or imposed by this Commission.

The majority opinion seems to assume that the Dyke Water Company, in some manner, is bent upon disabling itself by spitefully and perversely refusing to meet its financial obligations. While there is nothing in the present record which suggests such conclusions, even should they be true, that is primarily the

concern of creditors, and the creditors' remedies presently available in our courts should be duly followed.

"The Public Utilities Commission is nowhere expressly given the power to adjudicate the rights between a public utility subject to its regulatory powers and its general creditors or those asserting contract rights against it. By the condition which the Commission attempted to impose upon its approval of the transfer here, it sought to give priority to certain classes of claims in the disbursement of the purchase price to be paid over all other creditors of the transferring corporations. It is settled that the general jurisdiction to determine the respective rights of creditors where, as here, an assignment for the benefit of creditors has been made, reposes in the superior court. (Farmers etc. Nat. Bank v. Peterson, 5 Cal. 2d 601; Sanderson v. McIntosh, 65 Cal. 36.) In the absence of a legislative grant to the respondent of power to adjudicate the relative rights of the creditors of a public utility, we can find no theory under which it has acquired jurisdiction to do so." (Hempy v. Public Utilities Commission, 56 Cal. 2d 214, 363 Pac. 2d 476.)

Dated at San Francisco, California, this 24th day of April, 1963.


WILLIAM M. BENNETT
Commissioner