

ORIGINALDecision No. 65860

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.)
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Case No. 7586

J. Thomason Phelps, with James F. Haley,
for the Commission staff.
Roe and Reilas, by Chris S. Reilas, for
Dyke Water Company.
Joseph B. Geisler, City Attorney, and
John H. Dawson, Assistant City Attorney,
for the City of Anaheim, protestant.
Milford W. Dahl, for Orange County Water
District; Woodrow W. Butterfield, in
propria persona and George P. Karcher,
for certain customers, interested
parties.

O P I N I O N

The Commission, by an interim decision issued April 24, 1962 (Decision No. 65266), vacated a previous order submitting this investigation for decision and continued the case for further hearing. The interim decision also continued in effect, as modified, a previous order restraining Dyke Water Company and others having notice or knowledge of the order from disposing, until further order of the Commission, of any of the company's property necessary or useful for its duties to the public and from disposing of the proceeds of a stipulated condemnation judgment in the sum of \$1,891,245, obtained by the City of Anaheim on April 2, 1963 in the Orange County Superior Court. That sum represented the agreed value, including severance damages, of the portion of Dyke's

properties (about one third of the utility's total system) used to supply public utility water service in the Anaheim area of Orange County (City of Anaheim v. Dyke Water Co., et al., No. 111,149).

A further hearing was held at Los Angeles before Commissioner Grover and Examiner Gregory, on June 27, 1963, when the proceeding was submitted for decision subject to the filing of two exhibits (Exhibits 42 and 43) and of statements by counsel in the nature of comment on the two exhibits. The exhibits and statements have been filed.¹

The central issue is whether acquisition by the city of the utility's Anaheim properties, in the circumstances disclosed by this record, will be consistent with the public interest.

The city, the utility and the district have severally moved to dismiss the investigation for lack of jurisdiction. They assert, in substance, that the choice by the city of the Orange County Superior Court as the forum for the acquisition has served to oust the Commission of any jurisdiction over the transaction it might otherwise have had under Sections 851 or 1401 et seq. of the Public Utilities Code. Those sections, respectively, relate to transfers or other dispositions of utility property generally and to the fixing of just compensation for acquisition of utility property by political subdivisions.

¹ Exhibit 42 is a memorandum by members of the Commission staff, based on examination of certain company records, concerning the amounts of various present and prospective obligations of Dyke Water Company. Exhibit 43 is a supplement to escrow instructions to the Title Insurance and Trust Company concerning disbursement of the proceeds of the condemnation judgment. Comments on these exhibits were filed by counsel for the Commission staff and for Orange County Water District. The matter was submitted upon receipt of the last of these filings, July 24, 1963. Although authorized to do so, neither the company nor the city filed a final statement. ✓

The motions to dismiss will be denied. While it appears that jurisdiction to entertain eminent domain proceedings for the taking by a political subdivision of utility property has been held to lie with the superior courts of this state and that the above cited provisions of the Public Utilities Code relating to just compensation are not exclusive (Citizens Utilities Co. of Cal. v. Superior Court, 59 Adv. Cal. 833, decided June 13, 1963), nowhere in this record does it appear -- nor have we been referred to any authority which suggests -- that this Commission does not have plenary jurisdiction to determine: (a) whether a utility's disposition of utility property is in the public interest, including the interest of consumers or others concerned with the obligations of the utility as such, and (b) the conditions under which a public utility may be relieved of its obligation to serve. We particularly note that the condemnation judgment specifically incorporates certain provisions of the "Stipulation of Facts and as to Value," entered into between the city and the utility (Exhibit 31), which provide for the execution by the utility of deeds and other evidences of transfer of title. This provision, especially when considered with the fact that the amount to be paid for the properties was stipulated and the fact that the company failed to assert available defenses to the city's suit (see Code Civ.Proc. Sections 1240, 1241), distinguishes this superior court proceeding from a true eminent domain action. However, we do not mean to imply that we do not have jurisdiction over the transfer of public utility property in any condemnation proceeding. We find that we have jurisdiction over this transfer and the authority to impose reasonable conditions thereon.

We pointed out in our interim decision that the escrow instructions for consummation of the eminent domain proceeding (Exhibit 40) made no provision for a long-standing obligation of the utility to refund to customers certain excess charges resulting

from cancellation of a company-wide interim rate increase authorized in an earlier consolidated proceeding (Decision No. 59828, Application No. 39303, Case No. 5841). Nor did those instructions reveal the basis on which a portion of the proceeds of the condemnation judgment had been allocated among certain main extension refund contract holders, or the total amounts due or to become due on such contracts. The obligation to refund customers' deposits for establishment of credit, ordinarily considered a prerequisite to relief from utility obligations on a partial or total transfer of the system, also was not covered by the instructions. As a result, the Commission concluded:

"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."

The parties have endeavored to work out possible arrangements whereby the company's public utility obligations might be satisfied and its Anaheim system, after acquisition by the city, might be fully metered and thus stand, eventually, on an equal footing with the city's present system in its participation in the underground basin water conservation project which, the record clearly shows, is of vital importance to that area and of special concern to the Orange County Water District, which has a substantial claim against the company for delinquent taxes for pumping from the basin.

These arrangements, spelled out in the city's Exhibit 41-B (rates for water service outside city limits)² and the supplemental escrow instructions (Exhibit 43), may be summarized as follows:

1. The city, by Resolution No. 63R-247, has provided water rates for service outside city limits which do not discriminate between its present and prospective customers within and outside the city other than to offset reasonable burdens sustained by residents and taxpayers within the city by contribution to a municipal water system.

2. The utility, by its supplemental escrow instructions, has directed that the escrow holder, Title Insurance & Trust Company, prior to making any other payments contemplated by the original instructions, shall pay out of funds to be deposited with the trustee the following:

- a. Advances to Dyke Water Company by various subdividers and individuals, to be shown on a schedule to be attached to the instructions (Schedule B) \$ 100,000.00
- b. Orange County Water District pumping taxes 211,083.00
- c. United States of America, corporation income taxes 1957, 1958, 1959 278,702.90
- d. Interim Rate Refunds 60,000.00
- e. Scheduled individuals, items and amounts as shown on Exhibit A (Exhibit A was not submitted)

The staff's memorandum (Exhibit 42) concerning certain present and potential obligations of Dyke Water Company, based on an examination of specific records and data furnished by the utility ✓

² The City Attorney of Anaheim has furnished a certified copy of Resolution No. 63R-267, adopted April 9, 1963 by the City Council of Anaheim, which, in all respects, is identical with the draft resolution submitted as Exhibit 41-B.

(complete review of the company's books was not provided), contains computations and estimates indicative of such obligations as shown by the following summary. The bases and assumptions used in developing the various amounts are described in the memorandum.

<u>Item</u>	<u>Anaheim</u>	<u>Total Company</u>
Estimated remaining liability under advances for construction, considering contract expirations and present worth terminations ..	\$435,450.84	\$ -
Unpaid Orange County Water District assessments and interest	-	211,083.00
Federal income tax assessments and interest, 1957, 1958 and 1959	-	278,702.90
Estimated additional Federal income tax liability, 1960, 1961 and 1962	-	200,000.00
Estimated Federal capital gains tax on Anaheim sale	300,000.00	-
Interim rate refunds, flat and metered service customers	77,441.00	266,342.00
Contributions ordered refunded by Decision No. 59828	-	39,946.77
Total	812,891.84	996,074.67
Grand Total *	\$1,731,525.51	

* Sum of all amounts listed except \$77,441, a part of the total of \$266,342 of total company interim rate refunds.

Counsel for the Commission staff, in his comments on the escrow instructions, suggests that: (a) the company should be required to make provision for payment of 1960, 1961 and 1962 Federal income taxes; (b) no provision should be made for payment of an asserted claim of Farmers & Merchants Bank of Long Beach, since details of the transaction are not in the record; (c) the exact amount of the Orange County Water District's claim for delinquent and current assessments should be ascertained and provision

made for payment as of the date of actual transfer of the Anaheim properties to the city; (d) payment of \$21,321.33 to four savings and loan associations should not be required as a condition of the transfer authorization, since the record does not reveal the details of such purported obligations; (e) the sum of \$100,000 proposed to be set aside for payment of construction advance refunds on the Anaheim system is inadequate in view of the company's estimated remaining liability, considering contract expirations and present worth termination, of \$435,450.84 for such refund obligations; (f) the proposal to set aside \$60,000 for refund, to Anaheim customers only, of the difference between temporarily authorized system-wide rate increases and rates in effect prior to the interim increase (Decision No. 59828, supra) is inadequate, since the record shows that the refunds amount to an estimated \$266,342 system-wide and \$77,441 for customers in the Anaheim area; (g) respondent should be required, as a condition to Commission authority to sell to Anaheim, to make provision for the return of certain contributions in aid of construction, as ordered by Decision No. 59828, totaling \$39,946.77 (Exhibit 42). (One of the offenses charged in a pending contempt proceeding against the utility concerns respondent's failure to return such contributions.)

Orange County Water District, in its statement filed July 24, 1963 and directed to Exhibits 42 and 43, urges that there should be no further delays in authorizing completion of the acquisition of the utility's Anaheim system by the city. Provision should be made, the District asserts, for creation of a trust fund, or otherwise, for payment of disputed items, but the transfer,

nevertheless, should be authorized subject to payment of liquidated items, including amounts due to the District for replenishment assessments.

The District asserts that while Exhibits 42 and 43 set forth a total of \$211,083 for delinquent and estimated current replenishment assessments, that amount was based on six months' penalty on the now-delinquent assessment and upon an estimate of \$76,000 for the period of January 1, 1963 to June 30, 1963. The District further states that since it will be impossible to conclude the transaction and allow the payment prior to the month of August, there will be an additional sum of \$2,548.74 due as interest on the delinquent payment. Furthermore, the District maintains, payment of the current replenishment assessment from January 1, 1963 to June 30, 1963, though not of record herein but calculated to be \$102,000, or an additional \$26,000, should be provided for in the Commission's order to the extent that respondent should be required to ascertain and make provision for payment of the exact amount due and unpaid to the District at the time of transfer of the Anaheim properties.

We have considered the evidence in this proceeding and the statements of counsel directed to certain exhibits, as indicated above. It is clear, and we find, that the acquisition of the utility's Anaheim system by the City of Anaheim and its incorporation into the municipal system, on a metered basis, will provide an integrated service to customers within and outside the city's boundaries and, at the same time, promote water conservation policies and practices shown to be beneficial to that area.

In our interim decision setting aside submission and ordering further hearing, we stated that we would 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." The proposed transfer admittedly will reduce company revenues, and we continue to be of the view, and find, that unless reasonable provision is made for the three stated obligations, the contemplated transfer would not be in the public interest. It appears, however, that the city has made appropriate arrangements with respect to customers' deposits to establish credit in the portion of the system to be transferred, so that no provision for return of such deposits need be made herein.

In addition to the three items mentioned in our interim decision, there are two tax obligations which it is conceded are due and must be paid. These are (1) the assessment for additional federal income taxes for 1957, 1958, and 1959, in the total amount of \$278,702.90, and (2) assessments owing to Orange County Water District (the so-called pump tax) in the amount of \$211,083. (The latter amount may be greater by the time of actual transfer.) The income tax claim constitutes a lien on the company's property. The District may obtain an injunction against pumping of water if its assessments are not paid. We find that the ability of the company to provide utility service would be jeopardized if payment of these two governmental obligations is not made. Certain other claimed obligations have been urged upon us, such as estimates of further federal tax liability that may become a lien in the future. We are persuaded, however, that this transfer should not be conditioned on provision for such future liability. Orderly

procedure suggests that we limit our consideration to the obligations specifically recited in our interim order, plus those additional tax liabilities which all parties recognize. Moreover, there might be no end to the future obligations that could be included in this order, if we were to attempt to guarantee payment of every possible company debt, existing now or in the future. We do not have jurisdiction, nor are we attempting, to reduce all company obligations to money judgments or to establish priorities for their payment (Hempy v. Public Utilities Commission 56 Cal. 2d 214, 363 Pac.2d 476); rather our objective is to condition the transfer on reasonable provision for discharge of existing public utility obligations, particularly those that might otherwise remain unsatisfied -- all to the end that the transfer, considered as a whole, will not be adverse to the public interest.

In weighing all aspects of the public interest, we have considered the effect of the proposed transfer upon ratepayers of the company who would henceforth be served by the city but who do not reside within the city. One such ratepayer contended at the hearing that the city might, through excessive water charges, attempt to force such ratepayers to agree to annexation to the city. We do not assert jurisdiction over rates charged by a city for service, either within or without its boundaries; it is for the local governing body to determine precise rates and whether the system should be subsidized or profitable. We do note, however, that all water users who would be affected by the proposed transfer are presently required to be served by the company without discrimination; the transfer would not be in the public interest if discriminatory treatment by the city were to result. It is for this reason that the Commission has at times imposed, as a condition of its approval, a provision that a city purchasing a utility system shall

not unfairly discriminate against customers who live outside the city and have no voice in city government. In this case, however, the evidence is that other city funds, in addition to the charges paid by water customers, are used to support Anaheim's municipal water system; customers living outside the city may therefore fairly be expected to pay for their water at higher rates. Moreover, the city has adopted a resolution binding it to treat nonresidents on an equitable basis with respect to water rates. Under the circumstances, no further requirement in this respect is called for.

Still to be considered are: (a) the specific amounts to be set aside for each of the four obligations which will be covered by the order herein, and (b) the method which should be employed to accomplish payment.

In connection with the specific amounts that should reasonably be provided, we find:

1. The amount of delinquent federal income taxes for 1957, 1958 and 1959 is \$278,702.90. The proposed transfer should be authorized only on condition that arrangements be made for payment of this entire amount.
2. The amount of the assessments owing to Orange County Water District, including penalties and interest, was estimated to be \$211,083 at the time of the last day of hearing, but the exact amount due should be calculated as of the date of the actual transfer. The sum of \$240,000 should be set aside to assure payment of the amount owing to the District at the time of actual transfer.

3. The public interest requires that approval of the proposed transfer be conditioned on the company's making provision for refund to all ratepayers, throughout the company's system, of the amounts collected under interim rate authority and ordered refunded in Decision No. 59828. The sum of \$266,342 should be set aside for such purpose. At the same time, the order herein should not interfere with the company's right to pursue its contention (presently being asserted in Application No. 39303 and Case No. 5841) that, as a matter of law, no such refunds are due.

4. Reasonable provision should be made to guard against nonpayment of refunds due or to become due on construction advances relating to that portion of the system being transferred to the city, but it is not necessary to impound the full amount of such advances. A reasonable amount to be set aside at this time for the purpose of such refunds and as a condition to the approval of the proposed transfer is \$200,000.

With respect to the method that should be employed to accomplish payment of the foregoing sums, we find:

1. A reasonable method for provision of such payment would be a deposit of cash (either from the proceeds of the transfer or some other source) with Title Insurance & Trust Company, the present escrow agent as shown by this record. Such deposit should be subject to escrow instructions which should include provisions for ascertainment and payment of the exact amounts due, owing, delinquent, or unpaid in connection with undisputed or liquidated items in the four classes of obligations indicated above, as of the date of actual transfer of the properties, together with provision for payment, to the extent of the deposit, of any disputed items when the amounts thereof, if any, are finally ascertained.

2. Dyke Water Company, prior to this decision becoming effective and as a condition precedent thereto, should furnish the

Commission with a fully conformed copy of such escrow instructions, together with the certificate or other acknowledgment, in writing, of a responsible officer of Title Insurance & Trust Company to the effect that the required sums have been deposited and are being held subject to such escrow instructions. Upon receipt of the copy of such instructions and the certificate or acknowledgment the Commission, by appropriate supplemental order herein, will allow its transfer authorization to become effective. Attached to this order as Appendix "A" hereof are proposed escrow instructions which may be used as a model for the purpose of satisfying the conditions of this order. These instructions have been patterned after Exhibit 43, with certain modifications.

The City of Anaheim in particular has vigorously contested the jurisdiction of the Commission, but it is clear that the proposed transfer would be delayed by a court test of the jurisdictional issue and that advantages may accrue to all the parties if the conditions of this order can be satisfied and the matter dismissed. Accordingly, nothing in this decision should be construed as requiring any party to concede jurisdiction, nor should satisfaction of any of the conditions contained herein be regarded as waiving the jurisdictional contentions that have been raised.

O R D E R

IT IS ORDERED that:

1. Dyke Water Company, a corporation, after the effective date of this order and subject to the conditions set forth in the foregoing opinion concerning the amounts of certain obligations and the method of payment thereof, may sell and transfer to the City of Anaheim, a municipal corporation, the properties of said utility

described in Exhibit 29 in this proceeding consisting, generally, of the properties of said utility used or useful in providing public utility water service in and in the vicinity of the City of Anaheim, California.

2. This decision will be effective when (1) Dyke Water Company shall have complied with all conditions set forth in the preceding opinion, respecting: (a) provision of certain amounts for the specified four classes of obligations; (b) the method of payment thereof; (c) the furnishing to this Commission of a copy of escrow instructions to Title Insurance and Trust Company, together with the certificate or other written acknowledgment of a responsible official of Title Insurance and Trust Company that the required sums have been deposited and are being held subject to such instructions, and (2) the Commission, upon such showing, shall have issued its supplemental order herein fixing the effective date of this decision.

3. The temporary restraining order issued pursuant to Decision No. 65266 herein is continued in effect until the effective date of this decision.

4. The motions to dismiss are denied.

Dated at San Francisco, California, this 6th day of August, 1963.

President

Ernest B. Leage

George G. Hoover

Fredrick B. Holoboff
Commissioners

APPENDIX "A" ✓

SUPPLEMENT TO ESCROW INSTRUCTIONS

Escrow No. 345591-ET
Santa Ana, California

Title Insurance and
Trust Company

Gentlemen:

You have heretofore been furnished with escrow instructions and supplements and amendments thereto in the above-numbered escrow, wherein and whereby the seller therein, Dyke Water Company, has given you certain instructions with respect to the disbursal for said seller of the funds due the account of seller therein; and you have also received knowledge or notice of a certain restraining order issued by the Public Utilities Commission of the State of California, being Decision No. 65266, wherein said seller and others, including yourselves, are named as being restrained and enjoined from taking any action in the consummation of the within numbered escrow.

Accordingly, you are hereby instructed that unless and until the hereinafter described conditions are met and the hereinafter described funds and instruments are deposited with you, you are to take no further action in the closing of the within escrow, but at such time as you shall have received the funds and instruments and the conditions hereinafter described are met, you are immediately to proceed to close said escrow:

Condition 1. There shall be deposited with you sufficient moneys in order that you may, prior to making any other payments contemplated by your escrow instructions, pay the following:

(a) To Title Insurance and Trust Company as trustee, for the uses and purposes hereinafter described, being herein referred to as "Advances Trust", the sum of \$200,000.00.

(b) To Orange County Water District, pay the demand of said District, including penalties and interest to date of payment, in the approximate total amount of \$240,000.00 (this instruction for payment supersedes the instruction for payment to said District heretofore given to you).

(c) To United States of America, corporation income taxes aggregating the approximate sum of \$278,702.90 (this instruction for payment supersedes the instruction for payment to said United States of America heretofore given to you).

(d) To Title Insurance and Trust Company, as trustee, for the uses and purposes hereinafter described being herein referred to as "Interim Rate Trust", the sum of \$266,342.00.

Condition 2. You shall have provided said Commission with your written receipt acknowledging the deposit with you of the moneys referred to in Condition 1 hereof.

Condition 3. There shall be deposited with you a certified copy of an order of said Public Utilities Commission of the State of California dissolving or terminating the aforesaid restraining order and approving this supplement to escrow instructions. ✓

The Advances Trust, to which reference has hereinabove been made, consists of the receipt by Title Insurance and Trust Company as trustee of the sum of \$200,000.00 from the deposit of moneys referred to above for the purpose of paying certain advances made

to seller by various subdividers and other individuals, which you are to disburse subject to the instructions of said Commission from time to time as to amounts, payees, and priorities.

The Interim Rate Trust, to which reference has hereinabove been made, consists of the receipt by Title Insurance and Trust Company as trustee of the sum of \$266,342.00 from the deposit of money referred to above for the purpose of providing a fund to be employed as to certain potential refunds to customers of seller, to be disbursed as said Commission shall hereafter direct. ✓

You are hereby specifically and irrevocably instructed that the foregoing supplement to escrow instructions is not to be in any way modified, amended, cancelled, revoked or superseded, nor are you to undertake to carry out any instructions which modify, amend, cancel, revoke or supersede the foregoing supplement without in each case receiving the prior written consent of said Public Utilities Commission of the State of California.

DYKE WATER COMPANY

By _____

I dissent.

This proceeding should be reopened immediately and a full revelation of all pertinent facts adduced on the record. Late-filed staff Exhibit 42 comments as follows: "The staff was not afforded general access to the books and records of the Company but was furnished specific records and data...." Section 582 of the Public Utilities Code states: "Whenever required by the commission, every public utility shall deliver to the commission, copies of any or all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers and records in its possession or in any way relating to its property or affecting its business, and also a complete inventory of all its property in such form as the commission may direct."

Notwithstanding an apparent agreement by the Dyke Water Company (Transcript, Pages 171 et seq.) to furnish all their books including supporting data, the staff has advised the Commission this was not done. To exercise informed judgment, the Commission certainly must have complete knowledge of the financial condition of the Company.

I recognize the importance of the transfer involved herein and the interests of the City of Anaheim, the Orange County Water District, the Dyke Water Company, and the customers of the company. This transfer should be (and can be with cooperation) approved promptly and effectually - protecting the rights of all parties.

The Commission is confronted with a partial dismemberment of the Dyke Water Company, a public utility, by virtue of which two-thirds of the system will continue in existence after the proposed sale. As related in Exhibit 42, neither the staff nor the Commission has been fully informed concerning the obligations, encumbrances, or financial operations of the Dyke Water Company. How, then, can we set up a list of preferences determining which creditors shall be paid, in what amount and under what circumstances? The majority decision does that, in conditioning the transfer of the so-called Anaheim portion of the Dyke Water Company, on the company agreeing to pay approximately \$1,000,000 of a stipulated sales price of \$1,891,245 to certain specified creditors. Yet, there are other obligations of the company of which we have incomplete knowledge and which may encumber the rest of the system and be a burden on the remaining customers.

Nor do we know that this decision will be acceptable to the parties. If unacceptable, it will unduly prolong these proceedings and require the Commission to formulate another list of preferences to present to the parties. If acceptable, the assets of a public utility will be diminished with our consent for purposes and in a manner not completely revealed to the governmental agency charged with the responsibility of its regulation.

Therefore, I would reopen the proceeding forthwith; all of the books, records, and supporting data of the Dyke Water Company should be examined by the staff and based upon such examination, the staff should present its findings and recommendations at further hearings.

In the alternative, I would be agreeable to an immediate transfer of the Dyke Water Company Anaheim property to the City of Anaheim provided a method of escrow of the sale proceeds is devised which would protect the present and remaining customers of the utility until the result of the staff examination of the books is submitted on the record.



Peter E. Mitchell, Commissioner

BENNETT, William M., Commissioner, dissenting opinion:

I cannot agree with the majority opinion herein. To me it represents an intrusion upon the right of a municipality to acquire its own water distribution facilities. The majority opinion is based upon the premise that in some way this Commission is competent and is empowered by law to determine money obligations of the Dyke Water Company, and thereafter to assert a priority as to their payment.

The majority opinion also assumes, without any basis therefor in this record, that the Dyke Water Company will not honor its lawful obligations and that it is consummating this transaction for the curious purpose of handicapping itself as to its remaining public utility obligations. This is nothing but speculation. It has not been developed in this record and it is merely an assumption which I suspect has been colored and formed by the relationship between this Commission and this public utility. If, in fact, this or any public utility employed a sale and transfer for the purpose of frustrating its obligations to the public then, of course, Commission action would be warranted. But the record shows no such case here.

In Hempy v. Public Utilities Commission 56 Cal. 2d 214, 363 Pac. 2d 476, the Commission, again motivated by the public interest, was nonetheless struck down when it attempted to assume the functions which properly belong to a court.

As stated in Hempy at page 217:

"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 /55 P. 2d 867_7; Sanderson v. McIntosh, 65 Cal. 36 (2 P. 728)."

The majority goes so far as to direct that payment be made for delinquent federal income taxes for specified years, ignoring the reality of the entire collection machinery of the federal government. This voluntary assistance is clearly most helpful to the Internal Revenue Service, particularly in view of the statement of the utility's accountant that the liability was based upon a disputed depreciation allowance.

The majority directs that funds be provided for payment to the Orange County Water District, apparently assuming this entity is incapable of pursuing its remedies in courts of competent jurisdiction.

And as to subdividers who are simply creditors of the utility, and whose claims arise by virtue of contracts, the majority attempts to assure payment to them when all the while the doors of the Superior Court are open to them. In short, the Commission is giving to creditors remedies and relief which it is not our business to do and it is imposing conditions for the benefit of creditors -- all of which should be left to their initiative.

I would point out that the principle of protection of creditors which apparently stems from some authority inherent in the broad but undefined phrase "public interest" breaks down when it is

realized that despite the stated liability to subdividers of \$435,450.84 we are only making provision for the payment of \$200,000. Just why this arbitrary sum is adopted and upon what facts or expertise it is based, remains undisclosed. It does apparently illustrate, however, almost unlimited authority on the part of the majority to compel this utility to set aside any sum which this Commission arbitrarily deems required by the public interest.

I am struck by the fact that the majority fails to extend its protection to the Farmers and Merchants Bank of Long Beach, apparently excusing its failure to do so because of a lack of details in the record. Let me point out that there is a startling lack of detail in this record concerning the creditors' claims which the majority has sought to protect. Exhibit 42, which purports to set forth the tax obligations, the subdividers' liability, and the Orange County Water District assessments, is based not upon general access to the books and records of the company but upon other furnished data. It seems to me that the majority opinion is slighting the Farmers and Merchants Bank of Long Beach in failing to make provision for whatever claims it may have against this utility.

As to the refunds which are due ratepayers, let me state that this Commission has available to it the power to punish for contempt any public utility, as here, which fails to comply with its lawful orders. In all the history of the proceedings involving the Dyke Water Company this Commission has failed to utilize its full lawful powers to compel refunds. It has failed to use its full lawful powers to compel the production of all of the books and records of this utility.

And now for the first time, when the City of Anaheim seeks to acquire the Dyke Water Company, the Commission suddenly becomes actively concerned about the refund obligation and utilizes its nonpayment as a basis for blocking the sale. This strikes me as arbitrary when viewed in light of the fact, as previously stated, that nothing has been done up to now to compel these refunds which were ordered in 1960.

With respect to the failure to make refunds and to the defiance of this Commission's right to full access to the books and records of this utility, our responsibility is clear. It has not been exercised. I would point out as well that as to the refunds, the ratepayers themselves individually have available to them courts of appropriate jurisdiction for such refunds as they individually claim are due them.

Let me also point out that other transfers requested under the authority of Section 851 of the Public Utilities Act are generally and almost routinely approved even though there are claims against the sale proceeds. Whether the public utility transferors are a public utility water corporation, a highway common carrier, an electrical corporation, a telephone corporation, or any of those public utilities enumerated in Section 216(a) of the Public Utilities Act -- all of those sales and transfers have been attended by creditors' claims and we have not therein given the benefits of our protection to those creditors. The records of this Commission will illustrate that such transfers have been made recently and in the past -- all without an intrusion on the part of this Commission into the debtor-creditor relationship.

In summary then, and in accord with my previous dissenting opinion in this matter, I would permit the transfer as requested and would leave to creditors such remedies and the pursuit thereof as the law gives them. I would enforce the refund obligation of the Dyke Water Company to ratepayers by initiating proceedings to hold it in contempt for failure so to do, absent a lawful defense. I would hold it in contempt of this Commission for failure to produce books and records, absent a lawful defense. As to the tax claims of the United States of America, the claimed assessments of the Orange County Water District, and the claims of subdividers for advances -- all of these claims and defenses thereto belong in the Superior Court.


WILLIAM M. BENNETT, Commissioner