

Decision No. 67048

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of the)
 County of Butte of the State of)
 California for an order under Section)
 11592 of the Water Code determining)
 and deciding the character and)
 location of new facilities to be)
 provided by the Department of Water)
 Resources of the State of California)
 in substitution for certain county)
 roads to be taken and destroyed by)
 inclusion within the area of the)
 reservoir of the Oroville Dam on)
 the Feather River.)

Application No. 45701

Brobeck, Phleger & Harrison, by Marion B. Plant
and Gordon E. Davis, for the County of Butte, *16*
 applicant.
Iver E. Skjeie and James Mastoris, for the
Department of Water Resources, respondent.

ORDER DENYING MOTION TO DISMISS

On August 22, 1963 the County of Butte filed the petition herein requesting the Commission to issue its order determining and deciding the character and location of the new roads to be provided by the Department of Water Resources in substitution for the Oroville-Quincy Road, Lumpkin Road and the Nelson Bar Road, which roads will be taken and destroyed by inclusion within the area of the reservoir of the Oroville Dam on the Feather River. The petitioner County of Butte also requested that the order make suitable adjustment for the increased cost of operating and maintaining such roads.

On September 30, 1963, the Department of Water Resources filed its special appearance and return to the petition herein by way of motion to dismiss.

Oral argument on the motion to dismiss was heard by Examiner Cline in San Francisco, California, on November 13, 1963. The motion to dismiss was taken under submission upon the filing of the Supplemental Memorandum of the County of Butte on December 3, 1963, and the filing of Points and Authorities by the Department of Water Resources on December 6, 1963.

The motion to dismiss was based on the ground that the Public Utilities Commission has no jurisdiction of the matters referred to in the petition herein for the following reasons:

1. Water Code Sections 11590 to 11592 apply to public utility lines or plants only. They do not apply to nor include county roads.

2. The Federal Power Act in Section 814 provides the exclusive method for the acquisition by the Department of Water Resources as a federal power licensee under the Federal Power Act. Sections 259 and 11590 to 11592 of the Water Code are prohibited limitations on rights given a Federal Power Commission licensee.

3. County roads are property of the State held by counties as trustees only. As a result, the State has no obligation for the taking or destruction thereof at all.

4. Water Code Section 259 does not apply to the subject proceeding for the reason that Oroville Dam and Reservoir are a part of the State water facilities. Those facilities are being

acquired and constructed and will be operated and maintained pursuant to other provisions of the Water Code, those governing the Central Valley Project, Water Code Sections 11100 to 11925.

5. Condemnation proceedings having been instituted by respondent to acquire all of the portions of the roads referred to in the subject petition, the Public Utilities Commission cannot act under Water Code Sections 11590 to 11592 for were it to do so, rights of respondent to acquire property through exercise of the right of eminent domain would be interfered with and abridged contrary to the provisions of Water Code Section 11577.

6. Water Code Sections 259 and 11590 to 11592 are unconstitutional to the extent they attempt to confer jurisdiction on the Public Utilities Commission to determine questions involving entities not engaged in the function of a public utility, since determination of such questions is neither cognate nor germane to utility regulation.

We shall discuss each of the grounds on which respondent's motion to dismiss is based in the numerical order listed above and will make our conclusions with respect to each of said grounds.

Ground No. 1

Section 11590 of the Water Code provides as follows:

"The department has no power to take or destroy the whole or any part of the line or plant of any common carrier railroad, other public utility, or state agency, or the appurtenances thereof, either in the construction of any dam, canal, or other works, or by including the same within the area of any reservoir, unless and until the department has provided and substituted for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness with

suitable adjustment for any increase or decrease in the cost of operating and maintenance thereof, or unless and until the taking or destruction has been permitted by agreement executed between the department and the common carrier, public utility, or state agency."

Section 11591 of the Water Code provides:

"The expense of the department in complying with the requirements of this article is part of the cost of constructing the project."

Section 11592 of the Water Code provides:

"In the event the department and any common carrier railroad, other public utility, or state agency fail to agree as to the character or location of new facilities to be provided as required in this article, the character and location of the new facilities and any other controversy concerning the requirements imposed by this chapter shall be submitted to and determined and decided by the Public Utilities Commission of the State."

The issue is whether County roads are the plant of a State agency.

The County of Butte is admittedly a State agency.

Webster's Third New International Dictionary defines plant as:

"3a: the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or a mechanical or other industrial business.

* * *

"c: the total facilities available for production or service in a particular country or place (a nation which both in present plant and in natural resources is probably the richest in the world--New Republic) (not just the town's sewers but its streets, its schools--its whole plant--had to be enlarged for the new arrivals--C. W. Thayer)"

Under these definitions we conclude that County roads are part of the plant of the County of Butte and that Sections 11590 to 11592 are applicable to such County roads.

Ground No. 2

In Decision No. 66386 issued November 26, 1963, in Application No. 44283, this Commission has previously concluded that Sections 11590 to 11592 of the Water Code are not prohibited limitations on rights given to the Department of Water Resources acting on behalf of the State of California as a Federal Power Commission licensee. In that decision the Commission stated:

"No conflict exists between Water Code Sections 11590 to 11592 and the Federal Power Act.

"The Department of Water Resources and the Department of Finance are agencies of the State of California and are creatures of the Legislature and are subject to the statutory limitations imposed by the Legislature respecting procedure to be followed in the construction of the dam pursuant to the license issued by the Federal Power Commission under the Federal Power Act, provided such statutory provisions are not unconstitutional. The agent can have no greater power than its principal gives it."

The Commission concludes that Sections 259 and 11590 to 11592 of the Water Code are not prohibited limitations on rights given to the Department of Water Resources acting on behalf of the State of California as a Federal Power Commission licensee.

Ground No. 3

Both parties to this proceeding agree that County roads are property of the State held by the counties as trustees for the public.

We conclude, however, as contended by the petitioner, that the power of the State to control the use of County property lies with the State Legislature and not the Department of Water Resources. County property may be diverted to the use of the State

through the Department of Water Resources only in the manner and upon the terms which the Legislature has prescribed, i.e. in accordance with the provisions of Sections 11590 to 11592 of the Water Code.

Ground No. 4

In view of our conclusion respecting Ground No. 1 above it is unnecessary for us to determine whether Section 259 of the Water Code also applies to the subject proceeding. The respondent admits that Sections 11100 to 11925 of the Water Code are applicable to the project of the Department of Water Resources which is the subject of this proceeding to the extent that statutory and constitutional construction permit.

Ground No. 5

Section 11577 of the Water Code reads as follows:

"Nothing in this chapter shall in any way interfere with or abridge the right of the department or of any state agency to acquire any property through the exercise of the right of eminent domain."

We conclude that Section 11577 governs the acquisition of private property, not public property, and has no application to the county roads involved in this proceeding. The State Legislature has the power to appropriate County property to the use of the Department of Water Resources without compensation, but it has not chosen to do so. Section 11577 is not a limitation upon Sections 11590 to 11592 of the Water Code.

Sections 259, 11131 and 11590 to 11592 govern the use of public land, rights of way and facilities by the Department of Water Resources.

Ground No. 6

The Department of Water Resources has asserted that the relocation of County roads pursuant to Water Code Sections 259 and 11590 to 11592 is not cognate and germane to the regulation of public utilities.

Petitioner in its reply to the motion to dismiss has pointed out, however, that to be cognate and germane to the regulation of public utilities a matter need not deal directly with the regulation of utilities. The relocation of County roads has a material effect upon the operation and maintenance of much utility plant and more specifically upon the location of utility transmission and distribution facilities pursuant to County franchises and certificates of this Commission pertaining to the exercise thereof. The relocation of County roads also has a material effect upon the service of ~~water~~ common carriers. It is to the interest of utilities and motor carriers and the public which they serve that roads be relocated in such a way as to produce the least dislocation of utility and common carrier services.

A private company operating a toll road is a public utility. The road is dedicated to the public use and the business of providing such a road is affected with the public interest. See Miami Bridge Co. v. Miami Beach Ry. Co., 152 Fla. 458, 12 So. 2d 438 (1943); Winchester & L. Turnpike Road Co. v. Croxton, 98 Ky. 739, 34 S.W. 518 (1896).

In California the Legislature has not specifically included toll roads among the classifications of public utilities subject to the Commission's jurisdiction under the Public Utilities Code. However, a toll road is a public utility and a public road is dedicated to the public use equally with a toll road and may be subjected to the Commission's jurisdiction by the Legislature.

We conclude that the relocation of County roads is cognate and germane to the regulation of public utilities, and under the California Constitution the State Legislature may legally confer jurisdiction upon this Commission over County roads pursuant to Sections 11590 to 11592 of the Water Code. Los Angeles Metropolitan Transit Authority v. Public Utilities Commission (1963)

59 A.C. 891.

Therefore, good cause appearing,

IT IS ORDERED that respondent's motion to dismiss is denied.

This order shall be effective twenty days after the date hereof.

Dated at San Francisco, California, this 7th day of April, 1964.

Hallam L. Demas
President

[Signature]

[Signature]

Fredrick B. Halbluff

Commissioners

I concur in the order.
George T. Grover