

**ORIGINAL**

Decision No. 67098

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the operations and practices of public utilities and air transportation companies, to determine the propriety of requiring the invitation publicly, of written sealed bids for construction, for purchase of equipment, materials, and supplies, and for obtaining of services.

Case No. 7372

Appearances are listed in Appendix A

O P I N I O N

The Commission, deeming it appropriate to inquire into and determine whether it would be in the public interest to require public utilities to call for written sealed bids for construction, for the purchase of equipment, materials and supplies, and for the obtaining of services, issued an investigatory order on its own motion on June 4, 1962 into the operations of public utilities and air transportation companies. The purpose of the investigation is to inquire into and determine the propriety of issuing a general order requiring public utilities and air transportation companies to invite publicly, written sealed bids for construction, for the purchase of equipment, materials and supplies, and for the obtaining of services.

The order directed that public hearings be held at San Francisco and Los Angeles, and that each respondent having \$2,000,000 or more annual gross revenue from California intrastate operation prepare and present at such hearings a written report setting forth its practices and procedures relating to the afore-mentioned subject matter of the investigation, such reports to contain information specified in Appendix A attached to the investigatory order:

Hearings were held before Commissioner McKeage or Examiner Gregory at San Francisco on October 3 and December 5 and 6, 1962, at Los Angeles on October 10 and December 19 and 20, 1962 and again at San Francisco on October 2, 1963. The October, 1962 hearings were restricted to receiving in evidence the written reports filed by some 68 public utilities, including gas, electric, telephone, telegraph, water, transportation and warehouse utilities and airlines. At the December, 1962 hearings respondents and other interested parties presented statements of position and some respondents supplemented their previously presented reports. A number of professional societies presented testimony or made statements for the record regarding procurement of services.<sup>1</sup> The hearing held October 2, 1963 was primarily concerned with the receipt in evidence of a "Summary of The Record and Other Related Data on Competitive Bidding", dated July 26, 1963, prepared by the Commission staff (Exhibit 64) and distributed on July 31, 1963 to the appearances of record, and to the receipt of written and oral comments on the staff's summary. An opportunity was extended, at this hearing, to all parties desiring to do so to file briefs ten days prior to oral argument, which was held before the Commissioners and Examiner, after due notice, on December 4, 1963 whereupon the case was submitted for decision.

---

<sup>1</sup> California Society of Professional Engineers; American Society of Civil Engineers, San Francisco Section; Consulting Engineers Association of California; State Bar of California; California Society of Certified Public Accountants.

Some of the parties moved to dismiss this investigation<sup>2</sup> and others presented oral or written argument opposing the adoption of a competitive bidding procedure. Their several contentions may be summarized as follows:

- a. The Commission either does not have jurisdiction to issue a competitive bidding order or the constitutionality of such an order is so questionable as to militate against a court ruling in its favor.
- b. The record discloses the complexity of purchasing practices and is devoid of any hint that such practices of California utilities are wasteful or improper.
- c. Adoption of a competitive bidding procedure would unduly burden the operations of respondents and would be impractical in operation.
- d. There is no showing of need for competitive bidding rules and procedures, as envisioned by this proceeding; moreover, the Commission has sufficient authority, through its rate-making power, to protect the ratepayer from the effects of any unjust or unreasonable contracts made by utilities.
- e. Compulsory competitive bidding would increase costs and impair service.

---

<sup>2</sup> Formal motions to dismiss this proceeding were presented on behalf of:

Southern Pacific Company and associated respondents  
Union Pacific Railroad Company  
California Water & Telephone Company  
Citizens Utilities Company of California  
West Coast Telephone Company of California  
Duarte Water Company

The contention made by the parties to this proceeding that this Commission has no lawful authority to prescribe a competitive bidding rule as envisioned by the order instituting the investigation herein is, in essence, an argument against regulation in general. These arguments made by the parties are standard arguments heretofore made by the public utility industry when comprehensive regulation was first invoked. We entertain no doubt as to the lawful authority of the Commission to prescribe a reasonable competitive bidding rule concerning the subjects involved in this proceeding.

All parties placed great emphasis upon the decision of the Supreme Court of this State in the case of Pacific Telephone and Telegraph Co. v. Public Utilities Commission, 34 Cal. (2d) 322, citing said decision as authority for their contention that this Commission is without lawful authority in the premises. We do not interpret said decision as do the parties herein. The holding of the court in that case must be interpreted in light of the subject matter there involved. Much of the language of that decision is dicta. Later decisions of the Supreme Court of California are clearly at variance with the broad, general dicta contained in the Telephone case. As an example, the decision in the case of Southern Pacific Co. v. Public Utilities Commission, 41 Cal. (2d) 354, 367, is cited. The definitive holding in that case sets at rest any implications arising from the dicta in the Telephone case. In the Southern Pacific case, this Commission exercised an extreme regulatory power by ordering Southern Pacific Company to furnish a particular type of passenger service and specifying the particular equipment which must be used. The action of the Commission was upheld both by the Supreme Court of California and by the Supreme Court of the United States. It is of interest to note that the author of the decision in the Southern Pacific case was one of the two dissenting justices in the Telephone case.

Pointing out that any regulation is an interference with management, the decision in the Southern Pacific case had the following to say:

"In exercising the powers thus granted it may not be disputed that the commission to some extent invades the functions of management. But they are not necessarily unlawfully invaded. They are subjected to the exercise of the police power of the state in the regulation of the public utility. It is undoubtedly true that for the most part all lawful regulations of a public utility in the exercise of the police power are to some degree an invasion of the managerial functions of the utility. In the absence of such regulations the utility would be free to exercise all powers of management otherwise within the law. Without question the order of substitution of one equipment for another by a transportation company is within the field of management; but it does not follow that as such it is necessarily outside of the field of an appropriate regulatory order.

"Probably the most conspicuous example of an asserted but rejected claim of 'invasion of management' on the part of this commission was when it issued an order requiring the construction of a union passenger station and terminal in the city of Los Angeles. After an extensive investigation covering a period of years the commission issued an order described by this court in the Atchison, etc., Ry. Co. v. Railroad Com., 209 Cal. 460, 464 [283 P. 775], as an order directing the Atchison, Topeka and Santa Fe Railway Company, the Los Angeles & Salt Lake Railroad Company, and the petitioner herein, the Southern Pacific Company, 'to make and construct a union passenger station within that portion of the city of Los Angeles [describing it] together with such tracks, connections and all other terminal facilities and additions, extensions, improvements and changes in the existing railroad facilities of [the railroads] as may be reasonably necessary and incidental to the use of said union passenger station, at a cost, as estimated or suggested in said order, of approximately \$10,000,000 and in substantial compliance with the plans outlined by said Commission.'

"A brief history of that proceeding is set forth in the opinion of this court, the judgment in which was affirmed by the Supreme Court of the United States in Atchison, T. & S. F. Ry. Co. v. Railroad Com. of Calif. (1931), 283 U.S. 380 [51 S.Ct. 553, 75 L.Ed. 1128]. There as here it was contended that the construction of a union station with the manifold details and specifications prescribed was 'a matter of business policy and management and not a proper subject for control under the police power of the state.' That case involved the validity of an order of the commission requiring the abandonment of widely separated railway stations, terminals, tracks, and facilities, and the substitution of a centrally located union passenger terminal. The final decisions in that case are conclusive on the question of the power of the commission to order the substitution in the present matter.

"From the foregoing it is concluded that in making the order contained in item 1 the commission has acted within constitutional bounds and has regularly pursued its authority."

Obviously, the very nature of regulation requires a most definite interference with the management of a public utility, that is, the prerogatives of management as they existed prior to the coming of regulation. Dictating to a public utility the price at which it must sell its service or commodity (which is a conventional regulatory power) is one of the most stringent interferences with the prerogatives of management.

In the Southern Pacific case, the railroad strongly urged upon the court the philosophy contained in the Telephone case, but the court, in its decision, did not even mention the latter case.

In the case of Pacific Electric Railway Co. v. Public Utilities Comm., S.F. No. 19427, a writ of review was denied by the Supreme Court of this State in a situation where the Commission had modified a contract existing between two public utilities. The petitioner stoutly contended in that case before the court that the action of the Commission was clearly unlawful on constitutional grounds and, also, upon the ground that it interfered with the prerogatives of management, and cited the Telephone case. The Supreme Court denied review without opinion.

Again, in the case of Metropolitan Coach Lines v. Public Utilities Comm., S.F. No. 19750, the Commission was upheld by the Supreme Court over the protest that the action of the Commission invaded the prerogatives of management. In that proceeding the rule in the Telephone case was strenuously urged upon the court, but review was denied. In S.F. No. 19750, the Commission had ordered the utility to provide for terminal benefits to its employees who might be discharged because of contemplated reduction of service.

Notwithstanding the fact that there was nothing specific in the Public Utilities Code granting such authority to the Commission, the action of the Commission was, nevertheless, upheld.

It is the policy of the law to imply broad, remedial regulatory authority as an incident to the exercise of delegated powers, even though the statute may be entirely silent on the subject. The Supreme Court of the United States in American Trucking Assns. v. United States, 344 U.S. 298, 312, upheld a comprehensive truck leasing regulation issued by the Interstate Commerce Commission, although the statute was entirely silent on the subject. That same court, in Interstate Commerce Commission v. Railway Labor Executives Assn., 315, U.S. 373, 376-381, and in the case of United States v. Lowden, 308, U.S. 225, 233-239, held that the Interstate Commerce Commission was empowered to provide for terminal benefits to employees of railroads in consolidation and abandonment proceedings, even though the statute made no reference to this particular subject. Later on, the Interstate Commerce Act was amended in this regard, but it contained no such provision at the time these two decisions were rendered. The fact that the subject sought to be regulated may not be specifically enumerated or denominated in the regulatory statute is not conclusive at all against the power of the regulatory body to regulate the particular subject.

There is a fundamental rule of law that any claimed exemption from the reach of a comprehensive regulatory statute, such as the Public Utilities Act of the State of California, must be strictly construed. (Piedmont & Northern Railway Co. v. Interstate Commerce Commission, 286 U.S. 299, 311-312; Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 622, 691; United States v. Public Utilities Comm., 345 U.S. 295, 310.)

It is a matter of record that this Commission promulgated a competitive bidding rule as applied to the securities of public utilities under date of January 15, 1946, in Decision No. 38614 in Case No. 4761. (46 C.R.C. 281.) This particular rule has been in operation continuously since that date. If there be public interest justification for prescribing a competitive bidding rule regarding securities of public utilities, the same justification would apply to a competitive bidding rule as envisioned in the instant proceeding. It must be borne in mind that the cost of materials and services purchased by public utilities go into the rate base of public utilities and their operating expenses. As all are aware, the rate base and the operating expenses of a public utility are most important items involved in the prescription of such utility's rates.

Laying aside the judicial authority on this particular issue, it is pointed out that Sections 22 and 23 of Article XII of the State Constitution grant broad, plenary authority to the Commission to regulate public utilities. Section 701 of the Public Utilities Code provides as follows:

"The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Section 702 of the same Code provides:

"Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

Also, Sections 728 and 761 of that Code contain implementing authority in connection with the subject here involved.



In light of the foregoing authorities, we must conclude that this Commission does have lawful authority to promulgate a competitive bidding rule as envisioned by the order instituting the investigation herein.

We shall now turn to the question as to whether or not the public interest requires that a competitive bidding rule be prescribed in the premises.

The record in this case contains voluminous reports of the purchasing and procurement practices of California utilities and of air transportation companies. It shows that, where and when it is considered by the utility to be appropriate, competitive bidding is regularly used as an element in multiple purchasing practices. One large electric utility, for example, reported that it used competitive bids or standard prices in more than 57 percent of its purchases of materials and equipment for its projects during 1961.

The record reveals, without refutation, that denial of the option to use negotiated contracts or other contracting procedure on certain types of construction projects would be disadvantageous to California utilities and hence to those who utilize their services.

The record with respect to procurement of equipment, supplies, materials and services leads, by much the same reasoning as in the case of construction projects, to the ultimate conclusion that a utility and its customers would not necessarily benefit by adoption of mandatory competitive bidding procedures.

We find that:

1. The purchasing and construction practices generally followed by the California utilities and by air transportation companies, as disclosed on this record, do not presently warrant a general requirement for competitive bidding.

2. For the purpose of testing the reasonableness of any such costs in the future, the Commission may examine into the reasonableness of prices paid or to be paid for construction, supplies, equipment and services in conjunction with rate proceedings, financings or on the Commission's own motion.

Respondents are hereby placed on notice that they have a continuing responsibility to: (1) achieve the most reasonable cost for construction and for the procurement of materials, equipment and services, and to demonstrate the reasonableness thereof to the Commission in any appropriate proceeding; (2) have definitive rules which will clearly disclose conflicting interests by officers and employees.

The several motions to dismiss this investigation should be granted on the ground that the public interest does not presently require the prescription of a competitive bidding rule in the premises. As to the jurisdictional grounds, said motions should be denied.

O R D E R

IT IS ORDERED that:

1. The motions to dismiss the investigation herein, filed by or on behalf of Southern Pacific Company and its associated respondents; Union Pacific Railroad Company, California Water & Telephone Company, Citizens Utilities Company of California, West Coast Telephone Company of California and Duarte Water Company, are and each of said motions is granted on the ground specified in the foregoing opinion; as to the jurisdictional grounds, each of said motions to dismiss is denied.

2. Each public utility and air transportation company subject to the jurisdiction of this Commission, having \$2,000,000 or more annual gross revenue from California intrastate operation, shall report to the Commission any substantial change which it makes in its procurement practices and policies regarding construction work, equipment, materials, supplies, or services. Such report shall be in writing; signed by a responsible officer of the public utility or air transportation company, and shall be filed with the Commission not later than sixty days after said change has been made.

3. The investigation herein is discontinued.

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

Dated at San Francisco, California, this 14<sup>th</sup> day of April, 1964.

*Hollander*  
President  
*[Signature]*  
*[Signature]*

\_\_\_\_\_

\_\_\_\_\_  
Commissioners


*I concur in the findings and order.*

*Frederick B. Holboeff*

CONCURRING OPINION OF COMMISSIONER GROVER

I concur in the order.

Although I agree that we have authority to require competitive bidding (see Southwest Water Co., Decision 66086, Application 43589, September 24, 1963), I do not concur in the Commission's discussion herein of Pacific Telephone v. P.U.C., 34 Cal.2d 822, and Southern Pacific Co. v. P.U.C., 41 Cal.2d 354. In addition, I would have preferred a more detailed summary of the purchasing practices disclosed by the voluminous record developed in this proceeding. A full Commission review of the problems and techniques involved could contribute substantially to public understanding of this area of utility operations.

  
\_\_\_\_\_  
Commissioner

APPENDIX A.  
Page 1 of 3List of AppearancesRespondents (unless otherwise indicated):

Chickering & Gregory, by Sherman Chickering, C. Hayden Ames and Richard B. Morris, with Stanley Jewell, for San Diego Gas & Electric Co.

Richard G. Campbell, for Sierra Pacific Power Co.

Randolph Karr, for Southern Pacific Co., Northwestern Pacific Railroad Co., Pacific Electric Railroad Co., San Diego & Arizona Eastern Railway Co., Southern Pacific Pipe Lines, Inc., Union Terminal Warehouse, Inter-California Railway Co., Cia. del Ferrocarril de Tijuana y Tecate, S. A., Nacozari Railway Co., Holton Inter-Urban Railway Co., Petaluma and Santa Rosa Railroad Company, Visalia Electric Railroad Co., and, with John MacDonald Smith, for Pacific Motor Transport Co. and Pacific Motor Trucking Co.

Harry P. Letton, Jr., and John Ormasa, with Robert M. Olson, Jr., for Southern California Gas Co.

McCutchen, Doyle, Brown & Enersen, by A. Crawford Greene, Jr., for San Jose Water Works, and, with C. G. Ferguson, for California Water Service Co.

F. T. Searls, John C. Morrissey and Leland R. Selna, for Pacific Gas and Electric Co.

Thomas J. Barnett and Frederick G. Pfrommer, for The Atchison, Topeka and Santa Fe Railway Co. and Santa Fe Transportation Co.

Pillsbury, Madison & Sutro, by Arthur T. George, Francis N. Marshall and G. H. Eckhardt, Jr., for The Pacific Telephone and Telegraph Co.

Oscar C. Sattinger, J. R. Elliott and R. D. Twomey, Jr., for Pacific Lighting Gas Supply Co.

Milford Springer and Robert M. Olson, Jr., for Southern Counties Gas Co. of California.

Brobeck, Phleger & Harrison, by Robert N. Lowry, for Pacific Power and Light Co. and United Air Lines, Inc.

Donald J. Carman and Richard Edsall, by Richard Edsall, for California Electric Power Co.

Noel Dyer and Dudley Zinke, for Railway Express Agency, Inc., and, with Emerson Bolz, for The Western Union Telegraph Co.

C. A. Myhre, for Pacific Airlines, Inc.

Orrick, Dahlquist, Herrington & Sutcliffe, by James F. Crafts, Jr., for Western California Telephone Co. and California-Pacific Utilities Co.

A. D. Poe, for California Cartage Company, Inc., California Motor Express, Ltd., California Motor Transport Co. of the West, J. Christianson Co., Delta Lines, Inc., Doudell Trucking Co., Fortier Transportation Co., Interlines Motor Express, Merchants Express of California, Miles Motor Transport System, Miles and Sons Trucking Service, Paxton Trucking Co., Shippers Express Co., Signal Trucking Service, Ltd., Southern California Freight Forwarders, Southern California Freight Lines, Sterling Transit Company, Inc., United Parcel Service, Inc., Valley Express Co., Valley Motor Lines, Western Truck Lines, Ltd., and Willig Freight Lines, respondents, and with J. C. Kaspar and J. K. Quintrall, for California Trucking Association, interested party.

Respondents (unless otherwise indicated)- Cont'd.

William Hickey and Silver & Cole, by William Cole, for Consolidated Freightways of Delaware.  
Robert A. Thompson, for Western Pacific Railroad, Sacramento Northern Railroad, Tidewater Southern Railroad and Alameda Belt Line.  
Gerald H. Trautman, for The Greyhound Corporation.  
Marshall W. Vorkink, for Union Pacific Railroad Co.  
Jack L. Dawson and Vaughan, Paul & Lyons, by John G. Lyons, for Merchants Refrigerating Co. of California, National Ice and Cold Storage Co. of California, Union Ice & Storage Company, respondents, and for California Warehousemen's Association and Pacific States Cold Storage Warehousemen's Association, interested parties.  
Rollin E. Woodbury, Harry W. Sturges, Jr. and John R. Bury, for Southern California Edison Co.  
Waldo K. Greiner, for San Diego Transit System.  
Best, Best & Krieger, by Glen E. Stephens, for California Interstate Telephone Co.  
Richard G. Snyder, for Southwest Gas Corporation.  
Robert D. Crandall, for Pacific Southwest Air Lines.  
John E. Skelton, for San Gabriel Valley Water Co.  
W. C. Jennings, for Western Air Lines.  
John Robert Jones, Albert M. Hart and Ralph Snyder, Jr., for General Telephone Co. of California.  
Bacigalupi, Elkus & Salinger, by Charles de Y. Elkus, Jr., for California Water & Telephone Co., West Coast Telephone Co. of California and Citizens Utilities Co. of California.

Interested Parties (unless otherwise indicated):

V. A. Eordelon, for Los Angeles Chamber of Commerce, protestant.  
Dan T. Costello, for Oakland Chamber of Commerce.  
W. M. Cheatham, for Dohrmann Hotel Supply Co.  
Oliver Deatsch and Jack D. Todd, for California Society of Professional Engineers.  
William W. Evers and Eugene A. Read, for California Manufacturers Association.  
Eugene A. Feise, for Calaveras Cement Co., A Division of the Flintkote Co.  
Neal C. Hasbrook, for California Independent Telephone Association.  
Harold H. Heidrick, for Wilsey, Ham & Blair, Engineers & Planners.  
William L. Knecht & Ralph O. Hubbard, for California Farm Bureau Federation.  
Jack Y. Long, for American Society of Civil Engineers, San Francisco Section.  
H. A. Lott, for General Electric Co.  
Hazen L. Matthews, for The State Bar of California.  
Charles C. Miller, for San Francisco Chamber of Commerce.  
R. A. Morin and M. A. Walker, for Fibreboard Products Corporation.  
Thomas M. O'Connor, City Attorney, Orville I. Wright, Deputy City Attorney and Robert R. Laughhead, Chief Valuation and Rate Engineer, for City and County of San Francisco.  
E. K. Slusser, for Permanente Cement Co.

Interested Parties (unless otherwise indicated)- Cont'd.

R. E. Dempster, for Cabot Corporation and Traffic Managers Conference of California.  
Russell & Schureman, by Carl H. Fritze, for Transcontinental Bus System, Inc., and American Bus Lines, Inc.  
Richard H. Zahm, Jr., and Dale Finley, Traffic Manager, by H. M. Long, for Mobil Oil Co.  
Patrick J. Maloney, for California Water Association.  
John O. Jewett, for Consulting Engineers Association of California.  
Robert W. Ruggles, for California Society of Certified Public Accountants.  
G. L. Burke, for R. T. Hunt, Richfield Oil Corporation.

Commission Staff:

William Bricca, John Pearson, C. V. Shawler and Greville Way.