

**ORIGINAL**

Decision No. 71087

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA<sup>1</sup>

Investigation on the Commission's own motion into the rates, rules, regulations, operations, contracts, practices, services, facilities, equipment, securities, finances, and financial transactions of Vallecito Water Company, Suburban Water Systems, Calfin, Victoria Mutual Water Company, and San Gabriel Valley Water Company, corporations; and into certain transactions between said corporations and Camille A. Garnier, C. H. Dietz, Walker Hannon, R. H. Nicholson, Frederick R. Schumacher, William J. Hickey, Toll & Co., Security First National Bank, a corporation, (Whittier Branch), and Bank of America National Trust and Savings Association, a corporation.

Case No. 8086  
(Filed December 15, 1964)

Order to Show Cause  
Re Contempt  
(Filed February 24, 1966)

V. V. MacKenzie, for William W. Dunlop,  
affiant.  
Samuel D. Hale, Jr., specially appearing  
for Frederick R. Schumacher, respondent.

O P I N I O N

Frederick R. Schumacher was ordered to show cause why he should not be adjudged in contempt of the Public Utilities Commission and punished therefor according to law.<sup>1/</sup>

The order to show cause, issued February 24, 1966, recites the filing of an affidavit of William W. Dunlop, Secretary of this Commission, in which it is alleged that Frederick R. Schumacher, respondent, knowingly and wilfully failed and refused to appear and

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<sup>1/</sup> Calif. Const., Art. XII, Sec. 22; Public Util. Code, Secs. 312 and 2113.

testify before this Commission as commanded by a subpoena issued by this Commission.

A certified copy of the affidavit and of the order to show cause was personally served on respondent prior to the hearing, which was held after due notice at Los Angeles on March 28, 1966, before Commissioner Frederick B. Holoboff and Examiner Robert Barnett. Respondent was represented by counsel.

Respondent, at the hearing on March 28, 1966, orally objected to the jurisdiction of this Commission over respondent. Said objection was based on various grounds which will be discussed below. Ruling on the objection was deferred pending the filing of briefs in this case. Briefs having been filed, the case is now ready for decision.

Seven exhibits were introduced at the hearing on March 28, 1966. All but one were introduced by stipulation of counsel for the parties. The affidavit of William W. Dunlop in support of the order to show cause was offered as an exhibit by affiant and was received in evidence over the objection of respondent. Respondent did not testify.

#### Background

Calfin, a corporation, purchased over 18,000 shares of stock of Vallecito Water Company in 1963. On May 26, 1964, this Commission declared that said purchase was void because Calfin, an alter ego of Suburban Water Systems, a public utility water company, had not obtained authorization of the Commission to effectuate

said purchase as required by Section 852<sup>2/</sup> of the Public Utilities Code. (Decision No. 67261 in Application No. 45688.) In November, 1964, Calfin purported to transfer 18,003 of these shares, which had been held to be void in its hands, to William J. Hickey.

On December 15, 1964, the Public Utilities Commission, on its own motion, instituted an investigation (Case No. 8086) into the rates, rules, regulations, operations, contracts, practices, services, facilities, equipment, securities, finances, and financial transactions of Vallecito Water Company (Vallecito), a corporation, Suburban Water Systems, a corporation, Calfin, a corporation, Victoria Mutual Water Company, a corporation, and San Gabriel Valley Water Company, a corporation, all of which were designated respondents, and into certain transactions between said corporations with the following named persons and corporations, all of whom were also designated respondents, to wit, Camille A. Garnier, C. E. Dietz, Walker Hannon, R. H. Nicholson, Frederick R. Schumacher, William J. Hickey, Toll & Co., Security First National Bank, a corporation, and Bank of America, NT&SA, a corporation.

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<sup>2/</sup> "No public utility shall purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this State, without having been first authorized to do so by the commission. Every assignment, transfer, contract, or agreement for assignment or transfer of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility. Nothing herein contained shall prevent the holding of stock heretofore lawfully acquired."

One of the purposes of the investigation was to determine all the facts and circumstances surrounding the purported sale or transfer of shares of stock of Vallecito to any of the other respondents; to determine what steps should be taken by any or all of the respondents to avoid or rescind any such sale or transfer, and to issue an appropriate order or orders to effectuate such purpose; to determine what transactions had been entered into by any of the respondents, or any other person, purportedly in reliance upon any such sale or transfer, and the good faith of any of the respondents in entering into any such transaction; and to determine what steps should be taken by any of the respondents to avoid or rescind any such transaction, and to issue an appropriate order or orders to effectuate such purpose.

Public hearings in said investigation were held before Examiner Stewart C. Warner. In furtherance of said investigation the staff of the Commission caused a subpoena ad testificandum to be issued and served upon respondent Frederick R. Schumacher (Exhibit No. OSC-1). Said subpoena was returnable August 31, 1965, at 10:00 a.m., in the Commission Courtroom at Los Angeles.

On August 30, 1965, William J. Hickey, one of the respondents named in the Commission investigation, brought suit in the Superior Court in and for the City and County of San Francisco, against Vallecito and others (Case No. 558551). This suit touched upon some of the issues raised in the Commission investigation, Case No. 8086. On March 23, 1966, the Commission intervened in that suit, and on March 24, 1966, pursuant to stipulation, counsel for the Commission assured the Court "that they would not, prior to the hearing on April 6, 1966, (in the San Francisco Superior Court Case) recommend the issuance of any orders or take any actions

relating to the conduct of Commission Proceeding No. 8086, or affecting the proportional ownership rights in the Vallecito Water Company of William J. Hickey."

The Alleged Contempt

On August 31, 1965, at 10:00 a.m., at Los Angeles, Examiner Warner began the third day of hearings in Case No. 8086. At that time and place respondent Frederick R. Schumacher appeared in person and with his counsel, Samuel D. Hale, Jr. Mr. Hale stated, ". . . we are making a special appearance at this time to contest the jurisdiction of the Commission over Frederick Schumacher." (Page 268, Exhibit No. OSC-2.) After setting forth his reasons for this assertion, he stated, "I have advised Mr. Schumacher not to testify in this hearing and he will not do so." (Page 274, Exhibit No. OSC-2.) Later in the proceeding, the following colloquy took place:

Mr. Saroyan (counsel for the staff of the Commission):

"I would like to call Mr. Schumacher, but I think --."

Examiner Warner: "Mr. Schumacher refuses to respond."

Mr. Saroyan: "Let the record show that I want him for questioning."

Examiner Warner: "All right. Yes. All right."

(Pages 353-354, Exhibit No. OSC-2.)

For this failure of Frederick R. Schumacher to respond to its subpoena, the Commission issued its Order to Show Cause re Contempt.

Discussion

For clarity, the investigation instituted December 15, 1964, Case No. 8086, will be referred to as "the main case".

Respondent contends that the subpoena requiring him to testify on August 31, 1965, in the main case is without effect because this Commission lacks jurisdiction over the subject matter of the investigation. It is claimed that the Commission cannot investigate the transfer of stock of a public utility to private individuals who are not public utilities. This argument is erroneous on two grounds: (1) the order instituting investigation encompasses much more than an inquiry into the transfer of public utility stock, it includes an investigation into the rates, services, and practices of a number of public utility water companies under Commission jurisdiction; (2) the argument assumes that the transfer of public utility stock was to private individuals who are not public utilities. Even if such a transfer is beyond the jurisdiction of this Commission the Commission has the power to determine the true nature of the transfer and the status of the parties. It is within the power of an administrative agency to determine in the first instance whether a given controversy falls within its statutory grant of jurisdiction. (United States v. Superior Court, 19 Cal. 2d 189, 195 (1941); Ligda v. P. G & E., 61 Cal. P.U.C. 1,2 (1963).)

The Commission's jurisdiction to institute the main case and to join Schumacher as a respondent is clear. Public Utilities Code Section 1702 provides, in part, that "Complaint may be made by the Commission of its own motion . . . setting

forth any act or thing done or omitted to be done by any public utility, . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the Commission." The Commission has frequently named an agent<sup>3/</sup> or an alter ego<sup>4/</sup> of a company subject to its jurisdiction as a respondent in a Commission investigation. Not only may the Commission investigate the rates and rules of a public utility but the Commission may investigate the stock and security transactions of a public utility as a necessary implementation of its plenary power over such transactions. (P.U.C. Sections 816-830, 851-853.) Transfers of stock in violation of the provisions of the Public Utilities Code are void (P.U.C. Sections 825 and 852); therefore, when the Commission suspects that such a transfer has taken place it becomes its duty to investigate. When rescission of a transfer of stock may be required to prevent the public from being misled because void transactions are recorded on the books of a public utility and invalid shares of stock remain in the hands of unauthorized transferees, all those involved in the stock transfer may be necessary parties to the rescission and should be named respondents in an investigation of the stock transfer.

But even if Schumacher was erroneously named as a respondent in the main case he was nevertheless subject to call as a witness. California Constitution Article XII, Section 22 and

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<sup>3/</sup> Re Miraflores Water Co., Inc., et al., 60 Cal. P.U.C. 462 (1963).

<sup>4/</sup> Re Truck Maintenance, Inc., et al., 59 Cal. P.U.C. 103 (1961).

Public Utilities Code Sections 311, 312, and 1705, provide that the Commission may issue process to enforce the attendance of witnesses. A respondent in an investigation is not exempt from our process and being erroneously named as a respondent does not create an exemption.

Respondent next contends that the investigation in the main case is unlawful in that it constitutes a denial of due process of law. His argument is that "the instant investigation is, in part, founded upon orders rendered in prior proceedings, and founded upon testimony admitted therein. Respondent herein was not a party to said prior proceedings and did not have an opportunity to cross-examine or be heard in connection with said testimony. In the absence of such opportunity, it is a denial of due process of law for his rights to be precluded by the admission of such orders and testimony." Respondent does not clearly set forth the "rights to be precluded" that he is referring to. If he means that he has a right not to be made a respondent in the investigation we have determined that question adversely to him. If he means that he has a right to have himself dismissed as a respondent before he can be compelled to testify in the investigation, he has cited no authority in support of such proposition, nor has he set forth any compelling reasons why we should adopt such a rule. If he means that the Commission, in the main case, can make no orders affecting him because they would be based on prior proceedings to which he was not a party, the answer is that no such orders have been made. His objection is premature.



Respondent further contends that this contempt proceeding "was neither initiated nor thereafter conducted in accordance with controlling law." His first argument on this point is based on Code of Civil Procedure, Section 1991, which provides, in part:

"(Disobedience of witness: Punishment: Procedure where attendance out of court required.) Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court issuing the subpoena.

"When the subpoena, in any such case, requires the attendance of the witness before an officer or commissioner out of court, it is the duty of such officer or commissioner to report any such disobedience or refusal to be sworn or to answer a question or to subscribe an affidavit or deposition when required, to the court issuing the subpoena. The witness must not be punished for any refusal to be sworn or to answer a question or to subscribe an affidavit or deposition, unless, after a hearing upon notice, the court orders him to be sworn, or to so answer or subscribe and then only for disobedience to such order."

Respondent asserts that the failure to give him an opportunity to testify and thereby purge himself of contempt prior to this hearing is a fatal defect. Respondent construes the phrase "out of court", by analogy, to mean a hearing conducted by an examiner of the Commission, with no Commissioner in attendance. He cites no authority for this interpretation. Whatever logic respondent's analogy may have had, the enactment of Code of Civil Procedure Section 1991.1<sup>5/</sup> and its construction in

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<sup>5/</sup> "(Refusal to attend or to answer or to be sworn as witness at deposition: Consequences.) Disobedience to a subpoena requiring attendance of a witness before an officer out of court in a deposition taken pursuant to Article 3, Chapter 3, Title 3, Part 4 (commencing at Section 2016), or refusal to be sworn as a witness at such deposition, may be punished as contempt, as provided in Section 2034, without the necessity of a prior order of court directing compliance by the witness."  
(Enacted 1959 )

conjunction with Section 1991 and Public Utilities Code Section 1794<sup>6/</sup> renders the logic ineffective. When a witness in a deposition proceeding in a Superior Court civil action refuses to answer a question, Section 1991.1 eliminates the necessity for a prior order of court directing compliance by the witness before the witness can be held in contempt. Public Utilities Code Section 1794 provides that the Commission may cause the deposition of witnesses to be taken "in the manner prescribed by law for like depositions in civil actions in the Superior Courts . . . ." Proper construction of these sections results in the conclusion that if a witness refuses to testify at a deposition taken in conjunction with a Commission proceeding the witness may be held in contempt without the necessity of the Commission or a Commissioner directing compliance by the witness. If such direction need not be given to a recalcitrant witness who refuses to testify at a deposition proceeding held before a reporter, a fortiori, it need not be given to a recalcitrant witness who refuses to testify at a Commission hearing held before an examiner.

In any case, the Public Utilities Code provides that contempts are punishable in the same manner and to the same extent as contempt is punished by courts of record.<sup>7/</sup> Courts of

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<sup>6/</sup> "The commission or any commissioner or any party may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this State and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, and accounts."

<sup>7/</sup> Sections 312 and 2113.

record may punish as a contempt, "Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness." (Code of Civil Procedure Section 1209(9).) The procedure that must be followed to so punish is set forth in Code of Civil Procedure Sections 1211, 1212, 1217, and 1218. None of these sections require the Court to direct compliance by the witness prior to holding the witness in contempt. Respondent's assertion that he must be given an opportunity to purge himself prior to a finding of contempt is without merit. (See Paddon v. Superior Court, 65 Cal. App. 34 (1923).)

Respondent's next argument questions the validity of the affidavit that initiated the contempt proceedings. He contends that it was not executed by a person having knowledge of the facts in accordance with Code of Civil Procedure Section 1211<sup>8/</sup> and that it is so patently lacking in allegations sufficient to constitute the contempt that it should have been dismissed. It is respondent's contention that an affidavit filed pursuant to Section 1211 must allege facts within the affiant's knowledge and cannot be made on information and belief, as done herein. The only case that respondent cites in support of this proposition, Ex Parte Davis, 31 Cal. 2d 451 (1948), is not in point. Davis dealt with the sufficiency of the affidavit forming the basis for the contempt action to charge the alleged contemptuous act, not whether the

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"When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers."

allegations were on information and belief. Affidavits based upon information and belief are proper. (Freeman v. Superior Court, 44 Cal. 2d 533, 537 (1955); Golden Gate Consol H. M. Co. v. Superior Court, 65 Cal. 187 (1887); In re Simoniello, 6 Cal. App. 2d 425 (1935).)

Respondent further claims that the affidavit is insufficient because it does not set forth all the allegations sufficient to constitute a contempt. The missing allegation that respondent feels is jurisdictionally required concerns the materiality of the evidence sought to be elicited "by testimony of the alleged contemptuous witness." To state the proposition in respondent's words is to refute it. Respondent never was a witness - he refused to come forward and be sworn. This proceeding is not concerned with the relevance or materiality of questions to be asked; it is concerned with the subpoena power of this Commission.

Respondent also asserts that before a person can be adjudged in contempt he must be able to comply with the order he is accused of violating; and that he did not have the ability to comply. We agree with the statement of law in this assertion but not with the statement of fact; nothing in this record indicates that respondent did not have the ability to comply with the subpoena. He was at the hearing on the return date of the subpoena and his attorney offered to permit him to testify if the case against him would be dismissed. The claim of lack of ability to comply with the subpoena under these circumstances strains credibility.

Respondent has raised certain other defenses which he feels should absolve him from being in contempt of this Commission.

These defenses can only be characterized as extraordinary. Perhaps the most egregious defense is that respondent has acted in good faith because at all times he offered to exchange his testimony for a dismissal of the main case as to him. How or why this should be a defense or an excuse for failing to answer a subpoena is not explained. If anything, it shows how flagrant was respondent's contempt of this Commission's process.

Another defense appears to be that respondent considers himself a third party beneficiary to an agreement made in a Superior Court action<sup>9/</sup> between the Commission staff and William J. Hickey wherein the staff agreed not to proceed with the main case for a period of time. Respondent was not a party to that stipulation; no evidence was introduced in this proceeding to show that he was to be a beneficiary of that stipulation; and, of course, that stipulation did not refer to this contempt.

The last of respondent's extraordinary assertions is that prior to the institution of the contempt proceedings, but subsequent to his failure to respond to the subpoena, respondent had given testimony by deposition in the aforesaid Superior Court action which testimony, he claims, parallels the issues in the main case, thus obviating the need for his appearance in answer to the subpoena. No reason is given why a deposition under such circumstances excuses obedience to a subpoena issued by this Commission. As a matter of fact, respondent's willingness to testify in another tribunal shows, if anything, the full extent of his contempt herein.

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Hickey v. Vallecito Water Company, et al., S.F.No. 558551

The affidavit of William W. Dunlop has not been considered in determining the truth of the matters asserted therein. The findings of fact concerning the contempt are based solely on the evidence submitted by stipulation of counsel for the parties.

Findings of Fact

1. On December 15, 1964, the Commission issued, on its own motion, its Order Instituting Investigation, Case No. 8086, which was an investigation into the rates, rules, regulations, operations, contracts, practices, services, facilities, equipment, securities, finances, and financial transactions of Vallecito Water Company and other corporations, all named respondents, and into certain transactions between said corporations and various named persons, including Frederick R. Schumacher, also designated respondents.

The purposes of the investigation included the following:

(a) To determine all the facts and circumstances surrounding the purported sale or transfer of shares of stock of respondent Vallecito to any of the other respondents.

(b) To determine what steps should be taken by any or all of the respondents to avoid or rescind any such sale or transfer, and to issue an appropriate order or orders to effectuate such purpose.

(c) To determine what transactions had been entered into by any of the respondents, or any other person, purportedly in reliance upon any such sale or transfer, and the good faith of any of the respondents in entering into any such transaction.

(d) To determine what steps should be taken by any of the respondents to avoid or rescind any such transaction, and to issue an appropriate order or orders to effectuate such purpose.

2. Pursuant to said Order Instituting Investigation, hearings were held before Examiner Stewart C. Warner.

3. On August 23, 1965, the staff of the Commission caused the Assistant Secretary of the Commission to issue a subpoena of the Public Utilities Commission commanding Frederick R. Schumacher to appear and testify before the Commission, in Case No. 8086, on August 31, 1965, at 10:00 a.m., in the Commission Courtroom, State Office Building, 107 South Broadway, Los Angeles, California.

4. At 10:00 a.m., on August 31, 1965, Case No. 8086 was duly called for hearing by Examiner Warner. Frederick R. Schumacher appeared at the Courtroom, but, when called as a witness by the attorney for the staff of the Public Utilities Commission, did refuse to testify.

5. On February 24, 1966, the affidavit of William W. Dunlop, Secretary of the Commission, in support of the order to show cause herein, was filed with the Public Utilities Commission of the State of California, in which it was alleged in substance, that respondent Frederick R. Schumacher, after being personally served with a subpoena duly issued under the seal of the Commission on the 23rd day of August, 1965, and signed by Noel Coleman, then the Assistant Secretary of the Commission, commanding said respondent to appear and attend before the Commission at a session thereof to be held at 10:00 a.m., on the 31st day of August, 1965, in the Commission Courtroom at Los Angeles, and having the ability to comply therewith, and while said subpoena remained in force and effect, knowingly and

wilfully failed and refused to appear and testify as commanded by said subpoena and that his said failure and refusal were in contempt of this Commission.

6. On February 24, 1966, subsequent to said filing of said affidavit, the Commission duly issued its order directing respondent to appear before Commissioner Frederick B. Holoboff or Examiner Robert Barnett at 10:00 a.m. on the 28th day of March, 1966, in the Commission Courtroom, State Office Building, 107 South Broadway, Los Angeles, California, there to show cause why said respondent should not be punished for the alleged contempt set forth in said affidavit. A certified copy of said order to show cause, to which was attached a certified copy of said affidavit, was personally served on respondent on March 1, 1966. On March 28, 1966, respondent appeared with counsel in response to said order to show cause.

7. Frederick R. Schumacher had notice of the hearing of August 31, 1965, had knowledge of the contents of the subpoena requiring him to testify, and had the ability to comply therewith. While said subpoena remained in force and effect, Frederick R. Schumacher, knowingly and willfully failed and refused to testify at the Commission hearing as commanded by said subpoena. Said failure and refusal were in violation of law and in contempt of the Commission.

8. The order of the Superior Court of the State of California in and for the City and County of San Francisco in Case No. 558551, Hickey v. Vallecito Water Company, et al, entitled Order Granting Continuance, dated March 24, 1966, is not applicable to this Order to Show Cause Re Contempt.

9. Respondent's motion to dismiss should be denied.



Conclusion of Law

For said contempt the Commission concludes that Frederick R. Schumacher should be punished according to law.

Now, therefore, based upon the foregoing Opinion, Findings of Fact, and Conclusion of Law,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Frederick R. Schumacher is guilty of contempt of the Public Utilities Commission of the State of California in disobeying its subpoena issued August 23, 1965, in Case No. 8086, by failing and refusing to testify, pursuant to said subpoena in Case No. 8086, on behalf of the staff of the Public Utilities Commission.

2. For said contempt of the Public Utilities Commission of the State of California, as hereinabove described, the following punishment is hereby imposed: Frederick R. Schumacher shall pay a fine of \$500, said fine to be paid to the Secretary of the Public Utilities Commission of the State of California, Fifth Floor, State Building, San Francisco, California, within five days after the effective date of this decision.

3. In default of the payment of the fine imposed as ordered in paragraph 2 of this order, Frederick R. Schumacher shall be committed to the County Jail of the County of Los Angeles, State of California, until such fine be paid or satisfied in the proportion of one day's imprisonment for each \$100 of said fine that shall be unpaid.

4. The Secretary of the Public Utilities Commission of the State of California, if said fine or any part thereof shall not be paid by Frederick R. Schumacher within the time specified above, shall prepare and issue an appropriate order of arrest and commitment in the name of the Public Utilities Commission of the

State of California, directed to the Sheriff of the County of Los Angeles, to which shall be attached and made a part thereof a certified copy of this decision.

5. Respondent's motion to dismiss is denied.

This decision shall become effective twenty days after personal service of a certified copy hereof upon Frederick R. Schumacher. The Secretary is directed to make personal service of a certified copy of this decision upon Frederick R. Schumacher.

Dated at San Francisco, California, this 2nd day of AUGUST, 1966.

*[Signature]* President  
*George L. Grover*  
*Frederick B. Holcomb*  
*[Signature]*  
 Commissioners

Commissioner William M. Bennett  
present but not voting.