

ORIGINALDecision No. 73615

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of the CITY OF RIVERSIDE,)
 a Municipal Corporation, to have
 fixed the just compensation to be
 paid for the water system of the
 Southwest Water Company existing
 within and adjacent to the
 boundaries of said municipality.

Application No. 49307
 (Filed April 24, 1967)

Leland J. Thompson, for the City of Riverside,
 petitioner.
Howard M. Downs and Walker Hannon, for Southwest
 Water Company, respondent.
Cyril M. Saroyan, Counsel, and Gustave B. Weck,
 for the Commission staff.

INTERIM OPINION

On April 24, 1967, City of Riverside, hereinafter called petitioner, filed a petition under Division 1, Part 1, Chapter 8 of the Public Utilities Code, requesting that the Commission fix the just compensation to be paid by petitioner for the water system, including certain lands, property and rights described in said petition, of Southwest Water Company, hereinafter called respondent. The petition alleges that petitioner is authorized and empowered to submit to its voters a proposition to issue Revenue Bonds to obtain funds for the purpose of acquiring by eminent domain or otherwise said properties of respondent for the public use by petitioner in connection with the operation and maintenance of its existing water distribution system. As required by the code, the Commission thereupon issued its order directing respondent to appear and show cause, if any it had, why the Commission should not proceed to hear the petition and to fix such just compensation.

The record shows that all procedural requirements which are contemplated by Sections 1406 and 1408 of the Public Utilities Code were completed prior to the return date of the order to show cause. The hearing on such order, which was originally set at Los Angeles on June 15, 1967, was adjourned and held before Examiner Cline at Los Angeles on July 25, 1967.

At the hearing on the order to show cause the attorney for Southwest Water Company filed (1) a motion to disqualify and affidavit in opposition to order to show cause and (2) a memorandum in opposition to order to show cause.

In the motion to disqualify the Commission from hearing the matter as being biased against the respondent corporation and the affiant and unable to give a fair and impartial trial, the affiant in his affidavit set out a number of allegations to the effect that the testimony of Camille A. Garnier, president of Southwest Water Company, is essential in determining the value of the property in question; that in various court proceedings in which the Commission and Garnier and his agents are litigants it has made statements and arguments tending to impugn the motives and veracity of Garnier and of the affiant; and that it has threatened to impose severe sanctions against corporations with which Garnier is associated.

In many of these allegations the affiant has not been specific with respect to the time, place and other circumstances involved in these allegations. Many of them are not precise allegations of fact but mere conclusions of affiant, and it is very doubtful that they establish bias and prejudice on the part of the Commission. In any event it is unnecessary to resolve this doubt by making specific findings for reasons that will appear hereinafter.

Affiant also requested the Commission to take judicial notice of and to incorporate by reference all of the documents and papers filed by the Public Utilities Commission in various court proceedings and one proceeding before this Commission. Rule 73 of the Commission's Rules of Practice and Procedure provides:

"Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California."

Section 452(d) of the Evidence Code provides that California courts may take judicial notice of records in other and different actions, and Section 453 of the Evidence Code requires a trial court to take judicial notice of such records where a party furnishes the court with sufficient information to enable it to take judicial notice of the matter. As affiant has not specified precisely the documents and papers and the portions thereof on which he relies, but purports to quote portions of voluminous documents without indicating where those portions are to be found, we do not feel called upon to take official notice as requested by affiant. But even if we did it would not avail the respondent for reasons to follow hereinafter.

Moreover, since affiant has not specified the particular portions of the documents and papers filed by the Commission in various other proceedings that he considers competent, relevant and material in this proceeding, and as many of these documents and papers are not on file as public records with this Commission, the Commission will not incorporate by reference such documents and papers. Affiant has not complied with Rule 72 of the Commission's Rules of Practice and Procedure which requires specific identification of portions of documents to be incorporated by reference.

Even if we assume, though by no means conceding, for purposes of disposing of the motion to disqualify that all of the allegations in the affidavit are true, and accept at face value the matter purportedly quoted by affiant, and assume further, without conceding, that they establish bias and prejudice, they do not afford any basis for disqualifying the Commission in entertaining and disposing of the petition. Bias and prejudice are not grounds for disqualifying the Commission. Fish v. State Bar (1931) 214 Cal. 215, 225; Dyment vs. Board of Medical Examiners (1928) 93 Cal. App. 65; Winning v. Board of Dental Examiners (1931) 114 Cal. App. 658, 664; Hohreiter v. Garrison, 81 C.A. 2d 384, 392-3; Code of Civil Procedure Sec. 170.

Section 11512(c) of the Government Code, pertaining to disqualification of members of certain state agencies and the hearing officers of those agencies, is not applicable to this Commission. (Government Code Sections 11500, 11501.) It is interesting to note that when Government Code Section 11512(c) is applicable, it provides: "No agency member shall withdraw voluntarily or be subject to disqualification if his disqualification would prevent the existence of a quorum qualified to act in the particular case."

In his memorandum in opposition to order to show cause counsel for respondent demanded a trial by jury. In support of this demand the counsel for respondent states that Sections 1401 and following of the Public Utilities Code were enacted before the Constitution was amended by the adoption of Section 23a of Article XII of the California Constitution, and that a trial by jury in condemnation cases is guaranteed by Article 1 of Section 14 of the California Constitution. He also emphasizes the right of jury trial under the Seventh Amendment of the United States Constitution.

The time within which counsel for petitioner was to have filed a memorandum in support of the jurisdiction of the Commission and in opposition to the motion to disqualify was extended at his request to August 11, 1967. Similarly, counsel for respondent was granted an extension of time to August 21, 1967 to file a reply thereto.

Petitioner's memorandum in support of jurisdiction of the Public Utilities Commission and in opposition to the motion to disqualify was not received by the Commission until August 14, 1967, was therefore not timely received and is not a part of the record in this proceeding. The matter was taken under submission on August 11, 1967.

We conclude that the motion to disqualify should be denied. We further conclude that Section 23a of Article XII of the California Constitution confers jurisdiction upon this Commission in this proceeding to fix the just compensation to be paid for the taking of the property of Southwest Water Company, that neither the United States Constitution nor the California Constitution requires that such just compensation be fixed by a jury trial, and that the demand for a jury trial should be denied. Marin Water and Power Company v. Railroad Commission, 171 C. 706; Marin Municipal Water District v. Marin Water and Power Company, 178 C. 308; Chicago, B. & Q. R. R. Co. v. Chicago, 166 U.S. 226 at 244-45; and Bauman v. Ross, 167 U.S. 548 at 593.

We further conclude that no cause has been shown why this Commission should not proceed to hear the petition herein and to fix the just compensation to be paid for the lands, property and rights described therein.

INTERIM ORDER

IT IS ORDERED that respondent's demand for a jury trial and respondent's motion to disqualify the Commission are denied and that further hearings in this matter shall be held at such times and places as may hereafter be set.

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

Dated at San Francisco, California, this 16th day of JANUARY, 1968.

President

Avogato

William M. Bennett

Paul P. Morissette

Commissioners

*I will file a
sponsoring document
Peter L. Hetchel*

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.

COMMISSIONER PETER E. MITCHELL CONCURRING:

I wish to address certain observations on the MOTION TO DISQUALIFY AND AFFIDAVIT OF HOWARD M. DOWNS IN OPPOSITION TO ORDER TO SHOW CAUSE. Perhaps I am placing too much stress on a motion which is dilatory in nature and deficient in discernment but nonetheless, the imputations contained therein prompt my comments.

The motion filed by the affiant, Howard M. Downs, states, on behalf of Southwest Water Company and himself, that the California Public Utilities Commission is biased and therefore unable to hold a fair and impartial hearing in the petition of the City of Riverside to fix the just compensation for the water system of the Southwest Water Company. There does not exist nor has there ever been any prejudice or bias on the part of the California Public Utilities Commission or an individual Commissioner toward Howard M. Downs, Camille E. Garnier, or the Southwest Water Company. Mr. Downs' affidavit does not contain the slightest scintilla of evidence to support his position.

It is noted that the said motion to disqualify does not present an affidavit from an officer of the Southwest Water Company, including Camille E. Garnier, its President. The Commission has not been advised that the Southwest Water Company and/or Camille E. Garnier are also sponsoring this motion. Nor are there any specific references concerning bias and prejudice made by Howard M. Downs. The motion merely lists official acts of this Commission and judicial proceedings. Any attorney supposedly as experienced in the field of public utility regulation as Howard M. Downs recognizes that recourse for just grievances may be ob-

tained through a petition for rehearing to this Commission or by a Writ of Certiorari or Review to the California Supreme Court. The fact that Howard M. Downs has not previously raised the issue of discrimination is convincing evidence that there is no merit whatsoever to the motion that he now makes at this late date.

While I subscribe to the comments of my colleagues in the majority opinion, I wish to emphasize the impartiality of this Commission toward Howard M. Downs, Camille E. Garnier, and Southwest Water Company. Should this feeling of subjective bias, even though unsubstantiated in fact, continue in Howard M. Downs' mind, it must be resolved by Howard M. Downs and the Southwest Water Company. The Southwest Water Company will receive a fair hearing before this Commission, as will any public utility or related business subject to Commission regulation.


Peter E. Mitchell, President

San Francisco, California

January 18, 1968