

ORIGINAL

Decision No. 74141

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion
into the operations, rates, rules, tariffs,
contracts, practices, equipment, facilities
and service of GOLCONDA UTILITIES COMPANY,
a corporation.

Case No. 8166

Investigation on the Commission's own motion
into the operations of Robert J. Erwin,
Charlotte R. Erwin, Forrest J. Wood, and
Calvert Investment Company, respondents.

Case No. 8377

Robert J. Erwin and Charlotte R. Erwin, for them-
selves as respondents in Case No. 8377 and as
interested parties in Case No. 8166, and for
Hinkley Valley Water Company, interested party.
J. B. Calvert, for Calvert Investment Company,
respondent in Case No. 8377 and interested
party in Case No. 8166.
W. Paul Payne, for Golconda Utilities Company,
respondent in Case No. 8166 and interested party
in Case No. 8377.
Chester O. Newman, Raymond E. Keytens and H. J.
Lindenmeyer, for the Commission staff.

O P I N I O N

These consolidated matters are on rehearing. Decision
No. 72567 in the above entitled matters was entered on June 6, 1967.
It was to be effective twenty days thereafter. On June 16, 1967,
Golconda Utilities Company, the respondent in Case No. 8166 and an
interested party in Case No. 8377 (hereinafter referred to as
Golconda), filed a Petition for Rehearing. The filing of the
Petition had the effect of staying the order in Decision No. 72567.
On August 15, 1967 the Commission entered Decision No. 72899 which
granted a rehearing limited to the grounds alleged in the Petition.

The two grounds alleged in the Petition for Rehearing are: (1) The findings of fact contained in Decision No. 72567 are not supported by the evidence and (2) Decision No. 72567 is contrary to the Commission's previous Decision No. 67347. The rehearing, which was duly noticed, was held before Examiner Jarvis on October 17, 1967 at San Bernardino and the matter was submitted on that date.

The first point raised on rehearing is that there is not sufficient evidence to support the findings in Decision No. 72567. There is no merit in this contention. Finding of Fact No. 1 states that:

"1. During the period that respondents Robert J. Erwin and Charlotte R. Erwin (the Erwins) performed the service of delivering water to the public in GUC's present Ersul Tariff Area, such service was not to stockholders or members of a mutual water company nor was it surplus or accommodation service to neighbors, and the Erwins received payment for such service."

Evidence to support this finding may be found at pages 1 and 2 of Exhibit 2, pages 2 and 18 of Exhibit 4 in Application No. 45772,^{1/} and at pages 76 et seq. of the reporter's transcript.

Finding of Fact No. 2 states that:

"2. After having operated the Ersul System as a public utility, the Erwins did not obtain authorization of the Commission prior to the purported transfer of the system to GUC."

Evidence to support this finding may be found at pages 1 and 2 of Exhibit 2, pages 1, 2, and 4 of Exhibit 4 in Application No. 45772.

Finding of Fact No. 3 states that:

"3.a. During the period that respondent Calvert Investment Company (Calvert), a corporation, performed the service of delivering water to the public in GUC's present Calvert Area, such service was not to stockholders or members of a mutual water company nor was it surplus or accommodation service to neighbors, and Calvert received payment for such service."

^{1/} The record in Application No. 45772 was incorporated by reference in the record of the consolidated proceedings here under consideration. (R.T. pp. 20, 41.)

"b. After having operated the Calvert System as a public utility, Calvert, the corporation, went out of existence; even if the corporation had not been dissolved, its operation of the three-customer system would not have been economically feasible; and the application of the 'void' provisions of Section 851 of the Public Utilities Code in view of the provisions of Section 853 to the purported transfer to GUC is not necessary in the public interest."

Evidence to sustain this finding may be found at pages 2 and 3 of Exhibit 2, pages 3, 15, and 18 of Exhibit 4 in Application No. 45772 and pages 65 et seq. of the reporter's transcript.

Finding of Fact No. 4 states that:

"4. The operation of the three-customer Calvert System by GUC is not economically feasible, but the system could reasonably be operated by Robert J. Erwin and Forrest J. Wood (Erwin & Wood), a partnership, doing business nearby as Hinkley Valley Water Company.

Evidence to support this finding may be found at pages 3 and 15 of Exhibit 4 in Application No. 45772.

Finding of Fact No. 5 states that:

"5. During the period that respondent Forrest J. Wood (Wood) performed the service of delivering water to the public in GUC's present Hinkley area such service was not to stockholders or members of a mutual water company nor was it surplus or accommodation service to neighbors, and Wood received payment for such service."

Evidence to support this finding may be found at pages 3 and 4 of Exhibit 2 and page 18 of Exhibit 4 in Application No. 45772.

Finding of Fact No. 6 states that:

"6. After having operated the Hinkley System as a public utility, Wood did not obtain authorization of the Commission prior to the purported transfer of the system to GUC. There appears no reason of public interest to not hold the purported transfer to GUC to be void; hence, it is Wood's System."

Evidence to support the finding may be found at Page 3 of Exhibit 4, Application No. 45772.

Finding of Fact No. 7 states that:

"7. The Commission's investigation in Case No. 8166 has now covered all of GUC's present known utility operations."

This finding is supported by evidence contained by examination of the entire record.

As indicated, there is abundant evidence to support the findings of fact of what transpired. The critical question on rehearing is the impact of Decision No. 67347 upon those facts. Decision No. 67347 was entered in Application No. 45772. The face of that decision and the record in Application No. 45772 indicate that facts were there present disclosing the various transactions which were found to be void under the Public Utilities Code in the decision here on rehearing. Is the Commission precluded in this proceeding from again considering these transactions with reference to Sections 851 and 853 of the Public Utilities Code?

Sections 851 and 853 of the Public Utilities Code provide as follows:

851: "No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of

Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture.

"Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value; provided, however, that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers."

853: "The provisions of Sections 851 and 852 shall not apply to any person or corporation which transact no business subject to regulation under this part, except performing services or delivering commodities for or to public utilities or municipal or other public corporations primarily for resale or use in serving the public or any portion thereof but shall nevertheless apply to any public utility if the Commission finds, in a proceeding to which the public utility is or may become a party, that the application thereof is required by the public interest. The Commission may from time to time by order or rule and subject to such terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from the provisions of Sections 851 and 852 if it finds that the application thereof with respect to such public utility or class of public utility is not necessary in the public interest."

In the ordinary situation the purported transfer of public utility operating property and authority without prior authorization of the Commission is void under Section 851. However, the Commission has discretion under Section 853, where the public interest so requires, to exempt a transaction which would otherwise be void under Section 851. Where the Commission exempts a transaction under Section 853, it may impose appropriate terms and conditions as a prerequisite for such exemption.

The rights of individual litigants are important, but so are the rights of the general public, and the Commission, in taking action, must keep in mind the impact of such action on the general public as well as the litigants in a particular matter. (Sale v. Railroad Commission, 15 Cal. 2d 612, 617-18; Petition of the City of Los Angeles, 56 Cal. P.U.C. 133, 135-36.) Normally, it is not the Commission's function to determine title to or ownership of public utility property (Hanlon v. Eshelman, 169 Cal. 200). But it is the Commission's function to determine whether a transfer of public utility operating property is in the public interest, and unless the Commission authorizes (Sec. 851) or validates (Sec. 853) such a transfer or proposed transfer it is void and title to the property does not pass, regardless of the rights between the parties to the transaction. (Hanlon v. Eshelman, *supra*; Transport Clearings - Bay Area v. Simmons, 226 Cal. App. 2d 405, 421; Napa Valley Elec. Co. v. Calistoga Elec. Co., 38 Cal. App. 477.) In dealing with questions relating to the transfer of utility property, the Commission has the power to determine "all questions of fact essential to the proper exercise of . . . (its) jurisdiction." (Limoneria Co. v. Railroad Commission, 174 Cal. 232, 242; Palermo L. and W. Co. v. Railroad Commission, 173 Cal. 380, 385; People v. Western Air Lines, 42 Cal. 2d 621.) The Commission, because of its expertise, is often required by law to determine certain types of factual questions because of the impact thereof on the general public. (Water Code §§ 11590-92; Public Utilities Code §§ 1201-20, 1351-54, 1401-21, 30503; Los Angeles Met. Transit Authority v. Public Util. Comm., 59 Cal. 2d 863, 867; Miller v. Railroad Commission, 9 Cal. 2d 190, 195; Hanlon v.

Eshelman, supra.) The Commission may be called upon to make such determinations in situations where it is necessary to provide for the continued operation of a utility system so that service to customers will not be interrupted by disputes involving ownership. (Investigation of Miraflores Water Co., Inc., 60 Cal. P.U.C. 462.)

Section 1001 of the Public Utilities Code provides that: "No . . . water corporation shall begin the construction of a . . . line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction." Section 1006 of the Public Utilities Code authorizes the Commission to issue a cease and desist order where someone is engaged or about to engage in construction of a system without having first secured the certificate of public convenience and necessity provided for in Section 1001. The Commission takes official notice that over the years water systems have been constructed without first obtaining the certificate provided for in Section 1001 and that water systems which were originally not public utilities have subsequently changed their status and become utilities subject to the Commission's jurisdiction. In such instances, the public interest requires the Commission to assert its jurisdiction to provide that the rates and practices of the utility are subject to applicable provisions of law and that the customers of the system and the general public receive the benefit of the regulation provided for in the Constitution and Statutes of the State.

Status matters are usually determined in investigations for that purpose. There are, however, instances where the status of a

utility has been determined in an application or complaint proceeding, but the issue was raised within the scope of that proceeding and the utility in question was given notice so that it could litigate the issue. (Suburban Water System, 63 Cal. P.U.C. 649, petition for writ of review denied by California Supreme Court, June 16, 1965; petition for writ of certiorari denied by United States Supreme Court, December 6, 1965; Residents of Patton Village v. Patton Village #2 Water Co., 61 Cal. P.U.C. 552; Consumers, etc. v. Stanley, 49 Cal. P.U.C. 232.) Status may be considered in a transfer proceeding or one involving the issuance of an in lieu certificate of public convenience and necessity where the question of abandonment of operating rights is properly raised by a litigant. (M. Lee, 65 Cal. P.U.C. 635.)

Facts relating to status or other matters may come to light in an application or complaint proceeding. It is not always necessary for the Commission to pass upon or resolve these matters in the proceeding in which they came to light. Due process may require that parties affected by a prospective determination be given appropriate notice of its consideration. The public interest may require prompt action on another phase of the proceeding (e.g. rate relief where a company faces bankruptcy). The Commission may desire to develop a complete record on the facts disclosed. In the present matter, each of the investigations was based on facts disclosed in earlier proceedings.

The Order Instituting Investigation in Case No. 8166 states in part that:

"The record in Application No. 47259 indicates that Golconda Utilities Company may have:

". . .

"4. Directly or indirectly merged or consolidated its systems with other public utilities, in violation of Section 851 of the Public Utilities Code;"

The Order Instituting Investigation in Case No. 8377 states that:

"The record in Case No. 8166 and Application No. 45772 indicates that one or more of the above-named respondents may have dedicated to public use water systems serving Tracts Nos. 3309 and 6089, San Bernardino County, and the SE 1/4 of Section 26, T 10 N, R 3 W, S B B & M, operated the systems as public utilities, and thereafter transferred the systems without prior Commission authorization to Golconda Utilities Company."

That Order further indicates that the purpose of the investigation was to determine the following:

- "1. Dedication by respondents of water systems to public use.
- "2. Utility status of respondents at the time of transfer of each water system to Golconda Utilities Company.
- "3. Validity of each of the aforementioned transfers."

Application No. 47259 was filed on January 15, 1965. Decision No. 67347 in Application No. 45772 was entered on June 10, 1964. If Golconda's contention, that Decision No. 67347 is determinative, is correct, the same facts developed in the Application No. 47259 proceeding and used as the basis for instituting the investigation Case No. 8166 add nothing to the Commission's jurisdiction in these consolidated proceedings.

We conclude that certain matters were litigated and determined in Application No. 45772 and that we are bound by the findings, conclusions and order in Decision No. 67347, regardless of how the findings appear in retrospect. Insofar as Decision No. 72567 conflicts with Decision No. 67347 it must be revised.

Paragraph VII of Application No. 45772 alleges:

"That Applicant has previously acquired water systems serving Tracts 3309, 6089 and the Southeast 1/4 of Section 26, Township 10 North, Range 3 West, SBBM, all located within the County of San Bernardino. Said systems having been installed by original owners and subdividers of the said parcels. Applicant has operated and maintained said systems, collected rates therefor in the same amounts and manner as the original owners." Paragraph XIX states: "That the consolidation herein requested will bring under one management two small separately operated utilities and bring under the jurisdiction of the Public Utilities Commission three systems that have been operating without proper authority. Said consolidation should result in lower operating costs to the utilities concerned and greater ease of regulation." Paragraph I of the prayer in Application No. 45772 requested: "That the Public Utilities Commission of the State of California grant a certificate of public convenience and necessity to the applicant for the purpose of operating a public utility water system in Tracts 3309, 6089, and the Southeast 1/4 of Section 26, Township 10 North, Range 3 West, SBBM, and adjacent areas, all located within San Bernardino County."

Decision No. 67347 in Application No. 45772 states:

"The Commission staff's Exhibit No. 4 shows that the Tract No. 3309 system was installed in 1949 and serves 88 of a potential 110 customers, the Tract No. 6089 system was installed in 1958 and serves three of a potential 22 customers, and the Section 26 system was constructed in 1959 and serves three of a potential 40 customers. Descriptions of the systems are set forth in Exhibit No. 4.

"These systems were installed by the subdividers, who in at least two instances were the individuals making up the partnership Erwin & Wood, and were operated without authorization of this Commission. Golconda acquired these systems early in 1963 and continued the unauthorized utility service. Golconda's president testified that no additional construction, other than replacements and improvements, is needed to serve the three areas." (D.67347, P. 2.)

Further along in Decision No. 67347, the Commission states that:

"In this proceeding, Golconda requests a certificate of public convenience and necessity to construct systems that are already constructed. The record shows that Golconda is already a public utility and should continue to provide service."

Findings of Fact 1 and 8 in Decision No. 67347 state that:

"1. Golconda owns, controls, operates and manages water systems within the areas for which it requests a certificate of public convenience and necessity herein, sells and delivers water to the public within those areas, has dedicated its properties to the public use, and is a public utility water corporation subject to the jurisdiction of this Commission, pursuant to Section 2701 of the Public Utilities Code."

"8. Golconda should be directed to continue operating its present system."

Ordering Paragraph 1 of that decision provides that:

"A certificate of public convenience and necessity is hereby granted to Golconda Utilities Company (Golconda), authorizing the construction of a public utility water system to supply its dedicated service areas in San Bernardino County, as such areas are delineated on the maps, Exhibit No. 5 herein, except that Golconda shall not serve any additional customers within the present boundaries of South San Bernardino County Water District without first having obtained authorization by further order of this Commission."

Exhibit 5 in Application No. 45772 consists of three maps which describe the systems in Tracts 3309 and 6089 and in Section 26. Not only were the facts relating to the various transfers before the Commission in Application No. 45772, but they were alleged in the application itself and specific relief was requested and granted with respect thereto. The effect of the order granting Golconda a certificate for the three areas in question was to validate under Section 353 the previously unauthorized transfers.

Can the Commission in these consolidated proceedings reexamine the transfers, which were the basis for the certificate

granted in Decision No. 67347, and now hold some or all of them void under Section 851? It has been said that: "The problem of res judicata in Administrative law, then, is not one of accepting or rejecting the doctrine as developed for the judicial process. The doctrine in some areas of judicial action is strong and in other areas is weak, and the extent of the application of the doctrine to judicial action is often doubtful or variable. The problem in administrative law is to develop a set of rules that are especially designed for the special problems resulting from the differences between the judicial and the administrative processes. The starting point is usually the traditional doctrine as applied to judgments of courts; that doctrine should be qualified or relaxed to whatever extent is desirable for making it a proper and useful tool for administrative justice." (Treatise on Administrative Law, Davis, pp. 558-59.) Section 1708 of the Public Utilities Code provides that:

"The commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as an original order or decision."

We construe Section 1708 as authorizing the Commission to rescind, alter or amend decisions with respect to its prospective regulatory jurisdiction. (California Manufacturers Assn., 54 Cal. P.U.C. 189; Panhandle Eastern Pipe L. Co. v. Federal Power Com'n., 236 F. 2d 289, 292; Certiorari denied, 335 U.S. 854.) Where jurisdiction has been reserved a point may be reopened or considered at a later time. (Investigation of Miraflores Water Co., *supra*; United States v. Rock Island Co., 340 U.S. 419, 434.) However, absent extrinsic fraud or other extraordinary circumstances, where jurisdiction has not been

reserved and the Commission passes upon a past transaction, and the adjudication has become final, Section 1708 does not permit the Commission to readjudicate the same transaction differently with respect to the same parties. (United States v. Seatrain Lines, 329 U.S. 424; Pacific Telephone & Tel. Co. v. Public Utilities Com., 62 Cal. 2d 634; cf., Prudence Corp. v. Ferris, 323 U.S. 650; Strickland Transportation Co. v. United States, 274 F. Supp. 921, affd., 19L Ed. 2d 782; Treatise on Administrative Law, Davis, p. 559.) In this connection, the Seatrain case has relevance to the matters here under consideration. In Seatrain the Interstate Commerce Commission had, in an appropriate prior proceeding, granted Seatrain a certificate of public convenience and necessity to operate as "a common carrier by water of commodities generally" between various points. More than one year after its decision became final, the I.C.C., on its own motion, reopened the proceeding to determine whether the certificate should be modified so as to deprive Seatrain of the right to carry commodities generally. The I.C.C. modified the certificate and Seatrain sought judicial relief. The United States Supreme Court reversed the order modifying the certificate. In so doing, it construed a statute similar to Section 1708 and stated:

"Nor do we think that the Commission's ruling was justified by the language of § 315(c), 49 USCA § 915(c), 10A FCA title 49, § 915(c), which authorizes it to 'suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.' That the word 'order', as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used in the Act. Section 309 describes the certificate, the method of obtaining it, and its scope and effect, but it nowhere refers to the word 'order'. Section 315 of the Act, having specific reference to

orders, and which in subsection (c), here relies on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word 'certificate'. It is clear that the 'orders' referred to in 315(c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding. The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress. Consequently, the Commission was without authority to revoke Seatrain's certificate. That certificate, properly interpreted, authorized it to carry commodities generally, including freight cars, on the routes for which the certificate originally issued." (329 U.S. 424 at pages 423-33.)

We do not believe that Section 1708 authorizes the Commission to revoke the certificate granted in Decision No. 67347 based on the same facts which were before the Commission when the certificate was granted.

Decision No. 72567 herein had conclusions of law which concluded that the transfers of the Ersul (Tract 3309) and Hinkley (Section 26) Systems was void under Section 851 and that the transfer of the Calvert System, (Tract 6809) although void, should be ratified under Section 853. The action taken herein with respect to the Calvert System does not change the result required by Decision No. 67347 but the action taken with respect to the Ersul and Hinkley Systems does and must be changed. It will be necessary to change certain findings of fact, make additional findings and different conclusions of law and a different order. Before doing so, it is necessary to consider one further point. The record ^{2/} herein

^{2/} The record includes the file in Application No. 47908 and was incorporated herein by reference. (R.T. 21.)

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discloses that as part of the transaction in the transfer of the Ersul System on February 1, 1963, Golconda executed an installment note to the Erwins which was secured by a deed of trust. The agreement and bill of sale for the transfer of the system included the real property upon which the well site is located together with the mains, services and hydrants in Tract 3309 and adjacent areas. The deed of trust only refers to the real property upon which the well is located. In August of 1964 (after Decision No. 67347 became final) Golconda discontinued making payments on the note. On May 5, 1965, the trustee, First Western Bank and Trust Company of Los Angeles, recorded a notice of default and election to sell under the deed of trust. On September 21, 1965, the Erwins filed Application No. 47908 which sought authority to acquire and operate the Ersul System in the foreclosure proceedings. On October 25, 1965, Application No. 47908 was amended and the trustee joined in the application. A duly noticed public hearing was held on December 8, 1965. In it the Commission entered Decision No. 70295 on February 1, 1966. The Commission made the following findings and conclusions and order:

"Findings and Conclusions

"The Commission finds that:

"1. Under the conditions prescribed in the order which follows, the transfer of Lot 54, Tract No. 3309, San Bernardino County, will not be adverse to the public interest.

"2. If the Erwins can obtain title to the distribution system serving Tract No. 3309, the transfer of that system to them will not be adverse to the public interest.

"3. Any purchaser of the aforementioned Lot 54 who does not also own the related water distribution system will be a public utility obligated to provide resale water service to the owner of the distribution system.

"4. Upon transfer of the distribution system as discussed herein, it is reasonable for the Erwins to adopt the tariffs then in effect for GUC's Ersul Tariff Area.

"5. It is in the public interest that the Erwins be responsible for refund of all customers' deposits and advances for construction, if any, which have not yet become due and payable as of the date of transfer of the distribution system serving Tract No. 3309.

"6. Upon transfer of the distribution system, the Erwins will need all records held by GUC relative to that system.

"7. GUC has presented no valid grounds for dismissal of this application.

"The Commission concludes that the application should be granted to the extent, and in the manner, set forth in the order which follows.

O R D E R

"IT IS ORDERED that:

"1. Within two years after the effective date of this order, First Western Bank and Trust Company (First Western) as trustee named in the deed of trust, a copy of which is Exhibit B-2 attached to the amended application herein, is authorized to proceed with the sale of certain property of Golconda Utilities Company (GUC) known as Lot 54, Tract No. 3309, San Bernardino County, in accordance with the terms of that deed of trust, provided that before completing the sale First Western obtains, and within ten days after the sale files in this proceeding, a stipulation by the purchaser that:

- "(a) The purchaser has read this decision and recognizes that the property purchased includes utility plant dedicated to public use.
- "(b) The purchaser will not take physical possession of the property until tariffs have been accepted and made effective by this Commission prescribing rates and rules to be applied by purchaser in the sale of water.

"2. Within two years after the effective date of this order, Robert J. Erwin and Charlotte R. Erwin (the Erwins), husband and wife, are authorized to effect the transfer to them, by appropriate legal means, of the distribution system now owned by GUC and serving in and about Tract No. 3309, San Bernardino County.

"3. Before taking physical possession of the utility property pursuant to the sale authorized in paragraph 1 of this order, any purchaser not also owning the water distribution system referred to in paragraph 2 of this order shall:

- "a. File an application for authority to operate a water utility providing resale service. The application shall show the basis for whatever resale rates and rules are proposed.
- "b. Obtain an order of this Commission establishing resale rates and rules.
- "c. File and place in effect the resale rates and rules prescribed in such order.

"4. After the effective date of this order, and not less than five days before the date of actual transfer of the distribution system pursuant to paragraph 2 of this order, the Erwins shall file a notice of adoption of GUC's tariffs applicable to its Ersul Tariff Area. Such filing shall comply with General Order No. 96-A. The effective date of the notice of adoption shall be the date of actual transfer of the distribution system.

"5. On or before the date of actual transfer of the distribution system pursuant to paragraph 2 of this order, GUC shall refund all customers' deposits and advances for construction, if any, which are due and payable as of the date of transfer. All unrefunded deposits and advances shall be transferred to the Erwins, who shall be responsible for their refund when due.

"6. Within ten days after the date of actual transfer of the distribution system pursuant to paragraph 2 of this order, GUC shall:

"(a) Deliver to the Erwins the originals or verified copies of all memoranda, records and papers held by GUC pertaining to the construction and operation of that distribution system.

"(b) File in this proceeding written notification of the date of its compliance with subparagraph (a) of this paragraph.

"7. GUC's motion to dismiss is denied.

"8. Within five days after the date of each transfer authorized herein, the transferor and the transferee each shall file in this proceeding a written statement showing the date of transfer. A true copy of the instrument of transfer shall be attached to the transferee's statement.

"9. Upon compliance with all of the conditions of this order, if the entire water system is transferred as authorized herein, GUC shall stand relieved of its public utility obligations in the area served by the transferred system and may discontinue service concurrently with the commencement of service by the Erwins."

The trustee's sale was held on March 15, 1966 and the Erwins were the successful bidders. A dispute arose between the Erwins and Golconda over the foreclosure proceeding. On May 5, 1966, the Erwins filed a suit in the San Bernardino Superior Court to obtain possession and control of the Ersul System. The Erwins have indicated that they do not intend to file tariffs or attempt to operate the system until that suit has been determined. Golconda is still operating the Ersul System.

As indicated, the Commission is charged with determining whether or not the transfer of a public utility system is adverse to the public interest and is not the forum in which questions of title to real property should be litigated. (Hanlon v. Eshelman, supra; Hempy v. Public Util. Com., 56 Cal. 2d 214.) The Superior Court is one of general jurisdiction possessing legal and equitable powers and

can adjudicate the question of ownership of the Ersul System. If it decides in favor of the Erwins, they are authorized to acquire and operate the system pursuant to Decision No. 70295. As long as Golconda operates the system its operations are subject to regulation by the Commission. (Public Utilities Code § § 216, 240, 241, 701.)

Cases Nos. 8166 and 8377 were for the purpose of inquiring into certain transfers of public utility property and the status of the water systems involved.^{3/} No matters concerning operations or service are presently before us. No other points require discussion. The Commission makes the following findings and conclusions:

Findings of Fact

1. Portions of Decision No. 72567 are unjust and unwarranted and that decision should be changed and modified.

2. Prior to 1963, Robert J. Erwin and Charlotte R. Erwin (the Erwins) performed the service of delivering water to the public in Golconda's present Ersul Tariff Area (Tract 3309). Such service was not to stockholders or members of a mutual water company nor was it surplus or accommodation service to neighbors, and the Erwins received payment for such service.

3. On January 10, 1963, Golconda and the Erwins entered into an agreement whereby the Erwins purported to sell and transfer the Ersul System to Golconda. Golconda has been in possession of and has operated the Ersul System from January 10, 1963 to date.

^{3/} The Order Instituting Investigation in Case No. 8166 also specified that inquiry should also be directed to whether Golconda charged for services at rates other than those set forth in its tariffs, in violation of Section 532 of the Public Utilities Code, failed to obey specific orders and General Orders of this Commission as required by Section 702 of the Public Utilities Code and issued long term notes in violation of Section 818 of the Public Utilities Code. These facets of the investigation were considered and determined in Decisions Nos. 69843, 70047, 70234, 70396, 70466, 70578, and 72504.

4. The Calvert Investment Company (Calvert) was a California corporation (No. 239748) which was organized in Los Angeles County on October 18, 1949 and dissolved on November 2, 1964. The former secretary of Calvert is presently doing business as an individual under the fictitious name of Calvert Investment Company. Tract No. 6089 was subdivided by Calvert in 1961 and 1962. The water system in Tract No. 6089 was installed for Calvert by Forrest J. Wood, a partner in the Hinkley Valley Water Company (Hinkley), a public utility. Only three residences were constructed within the 22-lot subdivision. Commencing in 1962, Calvert charged its customers a flat rate of \$5.00 per month for water service. Tract No. 6089 is located 3/4 of a mile south and noncontiguous to Hinkley's certificated service area. In a letter dated June 26, 1961, Hinkley advised the Real Estate Commissioner that financial arrangements for the installation of the water system in Tract No. 6089 had been made, that the tract was within Hinkley's service area, and that water would be supplied to every lot in the tract. A water supply permit for the tract was issued to Hinkley on November 22, 1961, by the Director of Public Health for San Bernardino County. A water supply questionnaire was submitted by Hinkley on January 8, 1962 to the Commission and was not acceptable. Hinkley never collected any revenues for water in Tract No. 6089. In January of 1963 Calvert sold and transferred the water system in Tract No. 6089 to Golconda, which has operated the system ever since then.

5. From 1962 until January of 1963 Calvert performed the service of delivering water to the public in Tract No. 6089. Such service was not to stockholders or members of a mutual water company nor was it surplus or accommodation to neighbors and Calvert received payment for such service.

6. Hinkley is not a respondent in either of these consolidated cases. It was not served with notice of the hearings herein. Forrest J. Wood is a partner in Hinkley and a respondent in Case No. 8377.

7. The operation of the three-customer water system in Tract No. 6089 is not now economically feasible for Golconda but could reasonably be operated by Hinkley.

8. In 1958, the SE 1/4 of Section 26, Township 10 North, Range 3 West, SBEM was sold as two separate parcels to Randolph Properties and Mary Jane Mynatt. A well for suitable domestic purposes and one for agricultural purposes were deeded to Randolph Properties and Mary Jane Mynatt who in turn deeded them to Forrest J. Wood (Wood). In 1962, the land was subdivided into approximately 15 parcels and Wood was granted an easement for the construction, maintenance, repair and replacement of water mains. Pursuant thereto, in 1962, Wood installed approximately 1,300 feet of 4-inch and 200 feet of 6-inch asbestos-cement main along with a pressure tank, fire hydrants and fittings to serve the area. The system originally served two customers whom Wood charged a flat rate of \$5.00 per month. Construction of residences on the subdivided parcels did not occur as anticipated. As of May 16, 1966, the system was serving three customers. On October 19, 1963, Wood sold and transferred the Section 26 Water System to Golconda which has operated it ever since.

9. During 1962 and until October 19, 1963, Wood performed the service of delivering water in the Southeast 1/4 of Section 26, Township 10 North, Range 3 West, SBEM, within the County of San Bernardino. Such service was not to stockholders or members of a mutual water company nor was it surplus or accommodation service to neighbors and Wood received compensation for such service.

10. Application No. 45772 was filed on September 12, 1963.

Paragraph VII of Application No. 45772 alleges:

"That Applicant has previously acquired water systems serving Tracts 3309, 6089 and the Southeast 1/4 of Section 26, Township 10 North, Range 3 West, SBBM, all located within the County of San Bernardino. Said systems having been installed by original owners and subdividers of the said parcels. Applicant has operated and maintained said systems, collected rates therefor in the same amounts and manner as the original owners." Paragraph XIX states: "That the consolidation herein requested will bring under one management two small separately operated utilities and bring under the jurisdiction of the Public Utilities Commission three systems that have been operating without proper authority. Said consolidation should result in lower operating costs to the utilities concerned and greater ease of regulation." Paragraph I of the prayer in Application No. 45772 requested: "That the Public Utilities Commission of the State of California grant a certificate of public convenience and necessity to the applicant for the purpose of operating a public utility water system in Tracts 3309, 6089, and the Southeast 1/4 of Section 26, Township 10 North, Range 3 West, SBBM, and adjacent areas, all located within San Bernardino County."

11. Decision No. 67347 in Application No. 45772 states:

"The Commission staff's Exhibit No. 4 shows that the Tract No. 3309 system was installed in 1949 and serves 88 of a potential 110 customers, the Tract No. 6089 system was installed in 1958 and serves three of a potential 22 customers, and the Section 26 system was constructed in 1959 and serves three of a potential 40 customers. Descriptions of the systems are set forth in Exhibit No. 4.

"These systems were installed by the subdividers, who in at least two instances were the individuals making up the partnership Erwin & Wood, and were operated without authorization of this Commission. Golconda acquired these systems early in 1963 and continued the unauthorized utility service. Golconda's president testified that no additional construction, other than replacements and improvements, is needed to serve the three areas."
(D.67347, P.2.)

Further along in Decision No. 67347, the Commission stated that:

"In this proceeding, Golconda requests a certificate of public convenience and necessity to construct systems that are already constructed. The record shows that Golconda is already a public utility and should continue to provide service."

Findings of Fact 1 and 8 in Decision No. 67347 state that:

"1. Golconda owns, controls, operates and manages water systems within the areas for which it requests a certificate of public convenience and necessity herein, sells and delivers water to the public within those areas, has dedicated its properties to the public use, and is a public utility water corporation subject to the jurisdiction of this Commission, pursuant to Section 2701 of the Public Utilities Code."

"8. Golconda should be directed to continue operating its present system."

Ordering Paragraph 1 of that decision provides that:

"A certificate of public convenience and necessity is hereby granted to Golconda Utilities Company (Golconda), authorizing the construction of a public utility water system to supply its dedicated service areas in San Bernardino County, as such areas are delineated on the maps, Exhibit No. 5 herein, except that Golconda shall not serve any additional customers within the present boundaries of South San Bernardino County Water District without first having obtained authorization by further order of this Commission."

Exhibit No. 5 in Application No. 45772 consists of three maps which describe the systems in Tracts 3309 and 6089 and in Section 26.

12. As part of the transaction in the transfer of the Ersul System on February 1, 1963, Golconda executed an installment note to the Erwins which was secured by a deed of trust. In August of 1964 (after Decision No. 67347 became final) Golconda discontinued making payments on the note. On May 5, 1965, the trustee, First Western Bank and Trust Company of Los Angeles, recorded a notice of default and election to sell under the deed of trust. On September 21, 1965, the Erwins filed Application No. 47908 which sought authority to acquire and operate the Ersul System in the

foreclosure proceedings. On October 25, 1965, Application No. 47908 was amended and the trustee joined in the application. A duly noticed public hearing was held on December 8, 1965. In it the Commission entered Decision No. 70295 on February 1, 1966. The Commission made the following findings, conclusions and order:

"Findings and Conclusions

"The Commission finds that:

"1. Under the conditions prescribed in the order which follows, the transfer of Lot 54, Tract No. 3309, San Bernardino County, will not be adverse to the public interest.

"2. If the Erwins can obtain title to the distribution system serving Tract No. 3309, the transfer of that system to them will not be adverse to the public interest.

"3. Any purchaser of the aforementioned Lot 54 who does not also own the related water distribution system will be a public utility obligated to provide resale water service to the owner of the distribution system.

"4. Upon transfer of the distribution system as discussed herein, it is reasonable for the Erwins to adopt the tariffs then in effect for GUC's Ersul Tariff Area.

"5. It is in the public interest that the Erwins be responsible for refund of all customers' deposits and advances for construction, if any, which have not yet become due and payable as of the date of transfer of the distribution system serving Tract No. 3309.

"6. Upon transfer of the distribution system, the Erwins will need all records held by GUC relative to that system.

"7. GUC has presented no valid grounds for dismissal of this application.

"The Commission concludes that the application should be granted to the extent, and in the manner, set forth in the order which follows.

"O R D E R

"IT IS ORDERED that:

"1. Within two years after the effective date of this order, First Western Bank and Trust Company (First Western) as trustee named in the deed of trust, a copy of which is Exhibit B-2 attached to the amended application herein, is authorized to proceed with the sale of certain property of Golconda Utilities Company (GUC) known as Lot 54, Tract No. 3309, San Bernardino County, in accordance with the terms of that deed of trust, provided that before completing the sale First Western obtains, and within ten days after the sale files in this proceeding, a stipulation by the purchaser that:

- (a) The purchaser has read this decision and recognizes that the property purchased includes utility plant dedicated to public use.
- (b) The purchaser will not take physical possession of the property until tariffs have been accepted and made effective by this Commission prescribing rates and rules to be applied by purchaser in the sale of water.

"2. Within two years after the effective date of this order, Robert J. Erwin and Charlotte R. Erwin (the Erwins), husband and wife, are authorized to effect the transfer to them, by appropriate legal means, of the distribution system now owned by GUC and serving in and about Tract No. 3309, San Bernardino County.

"3. Before taking physical possession of the utility property pursuant to the sale authorized in paragraph 1 of this order, any purchaser not also owning the water distribution system referred to in paragraph 2 of this order shall:

- "a. File an application for authority to operate a water utility providing resale service. The application shall show the basis for whatever resale rates and rules are proposed.
- "b. Obtain an order of this Commission establishing resale rates and rules.
- "c. File and place in effect the resale rates and rules prescribed in such order.

"4. After the effective date of this order, and not less than five days before the date of actual transfer of the distribution system pursuant to paragraph 2 of this order, the Erwins shall file a notice of adoption of GUC's tariffs applicable to its Ersul Tariff Area. Such filing shall comply with General Order No. 96-A. The effective date of the notice of adoption shall be the date of actual transfer of the distribution system.

"5. On or before the date of actual transfer of the distribution system pursuant to paragraph 2 of this order, GUC shall refund all customers' deposits and advances for construction, if any, which are due and payable as of the date of transfer. All unrefunded deposits and advances shall be transferred to the Erwins, who shall be responsible for their refund when due.

"6. Within ten days after the date of actual transfer of the distribution system pursuant to paragraph 2 of this order, GUC shall:

- "(a) Deliver to the Erwins the originals or verified copies of all memoranda, records and papers held by GUC pertaining to the construction and operation of that distribution system.
- "(b) File in this proceeding written notification of the date of its compliance with subparagraph (a) of this paragraph.

"7. GUC's motion to dismiss is denied.

"8. Within five days after the date of each transfer authorized herein, the transferor and the transferee each shall file in this proceeding a written statement showing the date of transfer. A true copy of the instrument of transfer shall be attached to the transferee's statement.

"9. Upon compliance with all of the conditions of this order, if the entire water system is transferred as authorized herein, GUC shall stand relieved of its public utility obligations in the area served by the transferred system and may discontinue service concurrently with the commencement of service by the Erwins."

The trustee's sale was held on March 15, 1966 and the Erwins were the successful bidders. A dispute arose between the Erwins and Golconda over the foreclosure proceedings. On May 5, 1966, the Erwins filed a suit in the San Bernardino Superior Court to obtain possession and control of the Ersul System. The Erwins have indicated that they do not intend to file tariffs or attempt to operate the system until that suit has been determined. Golconda is still operating the Ersul System.

Conclusions of Law

1. The Commission by granting Golconda, in Decision No. 67347, a certificate of public convenience and necessity to operate the water systems in Tracts 3309, 6089 and Section 26 impliedly validated the previously void transfers of public utility operating property pursuant to Section 853 of the Public Utilities Code.

C. 8166, 8377 hjh

2. Decision No. 67347 became final on June 30, 1964, and the question of whether the public interest should permit Golconda to acquire and operate the three water systems as of that date has become final.

3. The Commission cannot on the record herein hold, on the same facts which were before it in Application No. 45772, that any of the three transfers of public utility operating property to Golconda is void in the light of our previous final Decision No. 67347.

4. The question of whether the Erwins are the owners of the Ersul System (Tract 3309), because of events occurring after Decision No. 67347, is presently before the San Bernardino Superior Court. The Commission has in Decision No. 70295 in Application No. 47908 authorized the Erwins to acquire and operate the system. If the Superior Court decides in favor of the Erwins, there is nothing further for the Commission to do. They may immediately operate the system as provided in Decision No. 70295.

5. The Commission has jurisdiction over Golconda while it operates these or any other public utility water systems.

6. The investigations in Cases Nos. 8166 and 8377 should be discontinued. If there are matters involving Golconda which should receive the attention of the Commission they should be considered in a new proceeding directed toward any such matters.

O R D E R

IT IS ORDERED that:

1. Decision No. 72567 is hereby vacated.

C. 8166, 8377 hjh

2. The Investigations on The Commission's own Motion in Cases Nos. 8166 and 8377 are hereby discontinued.

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

Dated at San Francisco, California, this 21st day of MAY, 1968.

John E. Mitchell
President

William L. Brown

Augusta

William J. Brown

Shed P. Morrissey
Commissioners