

Decision No. 79508

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MARINA DEL REY PIONEER SKIPPERS,  
a Non Profit California Corporation,

Complainant,

vs.

MARINA CITY CORP., a California Corporation; PONTY-FENMORE, a California Corporation; REAL PROPERTY MANAGEMENT, a California Corporation; GLADE INVESTMENT COMPANY, a California corporation; NEPTUNE MARINA, a Corporation; DEAUVILLE MARINA DEVELOPMENT Co., a limited partnership; REGIS DEVELOPMENT, a Corporation; GRENADA MARINE HOLDINGS, a California Corporation; BAR HARBOR DEVELOPMENT Co., LTD., a California Corporation; DOLPHIN MARINA, LTD., a California Corporation; TRADEWINDS MARINA, a California Corporation; HOLIDAY MARINA, INC., a California Corporation; THE PACIFIC BOAT MARINA, a California Corporation; DEL AMO MARINA, a California Corporation; INTERSTATE PROPERTIES, a California Corporation; FORTY FOUR DEL REY PROPERTIES, a California Corporation; CHRIS-CRAFT PACIFIC, INC., a California Corporation; PACIFIC AMERICAN INDUSTRIES, INC., a California Corporation; DEL REY SHORES, a California Corporation; DEL REY SHORES, a joint venture composed of MARINA DEL REY LAND AND DEVELOPMENT Co., INC., a California Corporation, and KIRK DOUGLAS; MARINA POINT, LTD., a California Corporation; MARINA POINT HARBOR, a California Corporation; CALIFORNIA YACHT CLUB, a California Corporation; MARINERS BAY, a Corporation; MARINA DEL REY LESSEES ASSOCIATION, a corporation; TAHITI MARINA, a California Corporation; and PACIFIC HARBOR, a California Corporation,

Defendants.

Case No. 9195

(Filed February 26, 1971)  
(Amended April 30, 1971)

APPEARANCES

Randolph Karr and Edwin C. Martin, Jr.,  
Attorneys at Law, for complainant.  
William G. Wells, Attorney at Law, for  
Marina City Corp., California Yacht  
Club, Ponty-Fenmore, Glade Investment  
Company, Neptune Marina, Grenada  
Marine Holdings, Dolphin Marina, Ltd.,  
Tradewinds Marina, Holiday Marina, Inc.,  
The Pacific Boat Marina, Chris-Craft  
Pacific, Inc., Marina Point, Ltd.,  
Del Rey Yacht Club, Mariners Bay,  
Tahiti Marina, Pacific Harbor, Marina  
Point Harbor, and Marina Del Rey  
Lessees Association; Wyman, Bautzer,  
Rothman & Kuchel, by Robert S.  
Michaels, Attorneys at Law, for  
Pacific American Industries, Inc.;  
Slavitt, Edelman, Weiser and Brady,  
by Marshall S. Zolla, Attorneys at  
Law, for Deauville Marina Develop-  
ment Co., Bar Harbor Development Co.,  
and Regis Development; and Benjamin L.  
Kaplan, Attorney at Law, for Del Rey  
Shores, Del Rey Shores, a joint venture,  
Del Amo Marina, Real Property Management,  
Interstate Properties, and Forty Four  
Del Rey Properties, defendants.  
Fred W. Clough and Jerome A. Johnson,  
Attorneys at Law, for County of Los  
Angeles; Dennis O'Neil, Attorney at Law,  
for City of Newport Beach, intervenors.  
J. Kerwin Rooney, Attorney at Law, for  
Port of Oakland; Don S. Barone, for  
City of San Diego, interested parties.  
Vincent MacKenzie, Attorney at Law, for  
the Commission staff.

O P I N I O N

Complainant asserts that the defendants are furnishing storage and wharfage facilities to the public and, therefore, are public utilities; that the defendants have neither filed nor published tariffs concerning the services they offer; and that the current rates, charges, services, practices, and contracts of the defendants are unreasonable. Complainant requests that this Commission order defendants to file tariffs which are reasonable and nondiscriminatory. The defendants moved to dismiss the complaint on the grounds that the Commission has no jurisdiction over them. The County of Los Angeles and the cities of Newport Beach and San Diego joined in the defendants' motion. The motion came on for hearing August 3, 1971, in Los Angeles before Examiner Robert Barnett. At the hearing on the motion the Commission staff asserted that in its opinion the Commission did not have jurisdiction over the defendants.

The Marina Del Rey is a small craft harbor which borders the Pacific Ocean and is located in Los Angeles County just southerly of the City of Santa Monica. It has been in operation for approximately ten years and is considered to be the largest man-made small craft harbor in the world. While the basic purpose of the marina is to furnish anchorage for private small craft, many large apartment units have been constructed within the area comprising the marina, which will eventually hold a residential population of approximately 10,000. In order to serve these persons numerous service facilities have been established, including markets, clothing stores, beauty and barber shops, a post office, and a number of office buildings and restaurants.

The essential allegations of the complaint, which for the purposes of this motion are taken to be true, set forth the following facts:

The complainant, Marina Del Rey Pioneer Skippers, Inc., is an organization comprised of more than 750 small boat owners who use the storage and wharfage facilities of the defendants in the marina.

The marina was constructed with public funds under and is subject to the provisions of Chapter 14, Part 2, Division 2, Title III of the Government Code of the State of California, Section 26301 et seq.; and Subsection 4, Section 7½, Article XI of the Constitution of the State of California. The marina was in the planning and construction stage since 1949 and has been in operation for the past ten years. It was constructed with moneys obtained from the federal government, state government, Los Angeles County government, revenue bonds, and the motor vehicle fund. As designed, the marina covers a 780-acre site and now contains 6,000 boats which use dock space as well as another 2,000 in dry storage.

The defendants have leased various areas in the marina from Los Angeles County and at their own cost and expense have constructed storage and wharfage facilities in their leased areas.

Each of the defendants has executed a uniform lease with the County of Los Angeles wherein it is provided:

4. ACTIVE PUBLIC USE

The ultimate object of this lease is the complete and continuous use of the premises herein demised by and for the benefit of the public, without discrimination as to race or religion, the immediate object being the development and realization of the greatest possible revenue therefrom.

It is agreed that said immediate and ultimate objects are consistent and compatible. Accordingly, lessee covenants and agrees that he will operate said premises fully and continuously to the end that the public may enjoy maximum benefits and the County may obtain maximum revenue therefrom.

#### 16. CONTROLLED PRICES

Lessee shall at all times maintain a complete list or schedule of the prices charged for all goods or services, or combinations thereof, supplied to the public on or from the premises hereby demised, whether the same are supplied by Lessee or by its sublessees, assignees, concessionaires, permittees or licensees.

Said prices shall be fair and reasonable, based upon the following two considerations: First, that the property herein demised is intended to serve a public use and to provide needed facilities to the public at fair and reasonable cost; second, that Lessee is entitled to a fair and reasonable return upon its investment pursuant to this lease.

Complainant alleges that the just and reasonable charge for storage and wharfage service at the marina is \$1.35 a slip-foot per month, but that generally the charge by the defendants at the marina is in excess of \$2.35 a slip-foot per month. Further, that members of the public, including members of complainant, who have been using the storage and wharfage facilities of the defendants in the marina, have had their use of such facilities terminated without reason or right, and on occasion have been displaced by the defendants for other members of the

public who are later in time and use, and for the benefit of defendants; and that defendants are operating other facilities such as apartment houses, and the persons whom defendants arranged to displace the earlier users, are tenants in other areas, or committed in other ways to defendants. Further, that the rates and charges for services and facilities at the marina between defendants, as well as at other marinas, are higher and greatly in excess of comparable localities in the State of California.

Finally, complainant alleges that the storage and wharfage facilities of the defendants are dedicated to the public use and purpose.

Complainant argues that the defendants are public utilities as defined in Section 23 of Article XII of the Constitution of the State of California in that they are engaged in "furnishing storage or wharfage facilities, either directly or indirectly, to or for the public." The section states in part:

Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any . . . plant, or equipment, . . . for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, . . . is hereby declared to be a public utility subject to such control and regulation by the (Public Utilities Commission) as may be provided by the Legislature . . . .

Complainant asserts that People v. Western Airlines, Inc. (1954) 42 Cal 2d 621, is controlling. In Western Airlines, the question for decision was whether Western Airlines was a "transportation company" within the meaning of Sections 20 and 22 of Article XII of the Constitution. Section 20 states:

No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any

charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the (Public Utilities Commission) provided for in this Constitution, that such increase is justified, and the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property.

Section 22 states in part:

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; . . .

In Western Airlines, the Commission attempted to impose its rate regulation on Western Airlines, who defended on the ground that the Commission had no jurisdiction to regulate it as the Public Utilities Code did not provide for regulation of airlines. The Supreme Court, in holding that Western Airlines was a transportation company within the meaning of Sections 20 and 22 of Article XII of the Constitution, said, "The fact that airline transportation companies were not in existence when the Constitution was adopted in 1879 does not make them any the less 'transportation companies' within the meaning and contemplation

of Article XII." (42 Cal 2d at 635.) The Supreme Court went on to say, "the comprehensive grant of power over rates conferred upon the commission by sections 20 and 22 is not nullified or limited by the language appearing in sections 17 and 23 to the effect that such rates are 'subject to legislative control'. The provisions of these sections are not out of harmony, but if there is any doubt about it the special provisions of sections 20 and 22 should prevail over the general provisions of sections 17 and 23. The concluding sentence of section 23 confirms this conclusion." (42 Cal 2d at 636-637.)

Complainant argues by analogy that the constitutional phrase "storage or wharfage" should be given as broad a reading as "transportation companies"; and that the Commission should interpolate its full powers into the phrase, and thereby regulate wharfage facilities. Complainant's reliance upon Western Airlines is misplaced. Western Airlines involved an interpretation of Sections 20 and 22 of Article XII of the Constitution, not Section 23. The Supreme Court was careful to point out this distinction because the provisions of Section 23 of Article XII require enabling provisions by the Legislature.

Section 23 states in part:

(The Public Utilities Commission) shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the (Public Utilities Commission) respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution.

Therefore, as Section 23 of Article XII of the Constitution is not self-executing but requires enabling legislation by the Legislature, we do not have the power to regulate storage or wharfage facilities unless we can find such enabling legislation in the Public Utilities Code. A reading of the Public Utilities Code shows only one section conferring power analogous to that asserted by complainant. That is in Section 242 which defines a wharfinger as follows:

"Wharfinger" includes every corporation or person owning, controlling, operating, or managing any dock, wharf, or structure used by vessels in connection with or to facilitate the receipt or discharge of freight, other than bulk liquid commodities, or passengers for compensation within this State.

Without going into a definition of vessels (see Section 238 of the Code), there is no allegation that the defendants, or any of them, are operating any dock, wharf, or structure to facilitate the receipt or discharge of freight or passengers for compensation. No other provisions of the Public Utilities Code being applicable to the kind of operation asserted in the complaint, we conclude that this Commission has no jurisdiction to grant the relief requested and that the complaint must be dismissed.

Our analysis of the effect of Section 23 follows the reasoning of the Supreme Court in Pacific Tel. & Tel. Co. v. Public Utilities Commission (1965) 62 Cal 2d 634. In Pacific Telephone the Commission ordered Pacific Telephone to refund to customers amounts collected during the pendency of a rate case in excess of the amount of rates finally ordered reduced.

In holding that this order was beyond the powers of the Commission, the Supreme Court stated, "As amended in 1911, Section 23 of Article XII of the California Constitution specifies in pertinent part that the commission 'shall have and exercise such power and jurisdiction to supervise and regulate public utilities . . . and to fix the rates to be charged . . . as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the . . . Commission respecting public utilities hereby declared to be plenary and to be unlimited by any provision of this Constitution . . .'. As to the scope of the commission's power in this respect 'we look to the legislation enacted . . . principally the Public Utilities Code and to the decisions of this court in construing them.' (People v. Western Airlines, Inc. (1954) 42 Cal 2d 621, 634.) So doing, we have concluded that the Legislature has not undertaken to bestow on the Commission the power to roll back general rates already approved by it under an order which has become final, or to order refunds of amounts collected by a public utility pursuant to such approved rates and prior to the effective date of a commission decision ordering a general rate reduction." (62 Cal 2d at pp. 649-650.)

Other considerations support a dismissal. Laws concerning the construction, maintenance, and operation of small craft harbors, including regulation of rates and services, show that the Legislature is aware of problems such as presented by complainant and has placed the resolution of those problems in other entities. Marina Del Rey was financed in large part by revenue bonds issued under Government Code Section 26301 et seq.

These sections set forth in great detail the methods by which counties may fund certain types of improvements. Government Code Section 26301 states in part:

Subject to the provisions of this chapter, boards of supervisors in their respective counties shall have authority to undertake and to issue revenue bonds to finance the following public improvements:

(b) The acquisition, construction, maintenance, operation, improvement and development of public small boat harbors and such facilities and improvements in connection therewith as in the opinion of the board may be reasonably necessary to provide for the full, complete and convenient public use of such small boat harbors.

(c) The acquisition, construction, maintenance and operation of facilities for the public convenience in conjunction with any public beach or public small boat harbor.

Section 26307 states in part:

. . . The management, operation and control of all improvements acquired, constructed or completed by the board under this chapter shall be fixed in the board and the powers, rights, functions and duties of the board with respect thereto shall not be impaired or interfered with.

Section 26360 states in part:

The board shall fix the rental rates, fees and all other charges to be made for all facilities furnished, acquired, constructed or completed under this chapter for the use thereof by any persons utilizing such facilities. Subject to such contractual obligations as may be entered into by the board and the holders of the revenue bonds issued under this chapter, the board is authorized to change such rental rates,

charges and fees from time to time as conditions warrant. . . . The board may provide that the rental rates, fees and charges established are minimum rental rates, fees and charges and subject to increase or decrease in accordance only with the terms of the indenture under which the revenue bonds were issued.

As an alternate method of operating small craft harbors the Legislature has enacted the Small Craft Harbor District Law. (Harbors and Navigation Code Section 7000 et seq.) After providing for the organization of the District, the code grants the following power to the District: Section 7149 states:

The district may acquire, construct, reconstruct, improve, repair, develop, maintain and operate a harbor and all facilities appurtenant thereto, connected therewith or incidental thereto, including, without limiting the generality of the foregoing, the following:

(a) The dredging of channels, shipways, berths, anchorage places and turning basins.

(b) The acquisition, reconstruction, repair and maintenance of jetties, breakwaters, bulkheads, seawalls, wharves, docks, ways, ferry slips, warehouses, streets, roads, drives, parkways, avenues, approaches, marinas, aquatic playgrounds, beach parks, bathing beaches and other recreation facilities, together with structures and facilities incidental thereto.

(c) The acquisition, construction, reconstruction, repair, maintenance, operation, development and regulation of fueling, loading and unloading, towing, repair, warehousing, shipping and reshipping, and other facilities, aids, equipment or property necessary for or incidental to the development and operation of the harbor.

(d) The acquisition, construction, reconstruction, repair, maintenance and operation of fireboats, sanitary, and other facilities necessary for the proper protection of the harbor.

In addition thereto, the District is governed by a board of directors which has the following powers, among others:

Section 7152 states:

"The board may, by ordinance, establish general rules for the government of the harbor, including, without limiting the generality of the foregoing:

(a) The regulation of anchoring, mooring, towing, wharfage and docketage of vessels and the establishment and collection of rates, fees and charges therefor.

(b) The establishment and collection of rates, fees and charges for service from or use of any of the facilities owned, controlled, furnished or operated by the district.

(c) The supervision of pilots and the pilotage of all vessels within the harbor and the establishment and collection of fees and charges therefor.

(d) The regulation of the construction of wharves, docks, buildings and improvements of all types on property owned or controlled by the district.

(e) The issuance of licenses and permits for privileges to be exercised in and about the harbor upon equal terms and the establishment and collection of rates, fees and charges therefor.

It is apparent from the above excerpts that the Legislature has provided a complete statutory scheme for the construction, maintenance, and operation of small craft harbors such as the one at the Marina Del Rey. This statutory scheme

includes provision for the regulation of rates, charges, and services. The powers that complainant wishes us to exercise by inference from the constitutional reference to storage and wharfage are already specifically provided for in the Government Code and the Harbors and Navigation Code.

For the reasons stated above, we conclude that the Commission has no jurisdiction over the subject matter of the complaint, and that the complaint should be dismissed.

O R D E R

IT IS ORDERED that the complaint is dismissed.

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

Dated at San Francisco, California,  
this 21st day of DECEMBER, 1971.

[Signature]  
Chairman  
William J. [Signature]  
[Signature]  
Vernon L. Stungen  
[Signature]  
Commissioners