

ORIGINAL

Decision No. 79561

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion to determine the feasibility of amending or revising General Order No. 103 by inclusion therein of provisions relating to fire protection standards and services to be offered by Public Utility Water Corporations or in promulgating other general orders, rules, directives or regulations relating to fire protection standards and services.

Case No. 9263
(Filed August 24, 1971)

Lyle G. Isbell, for Alco Water Service; Charles C. Carr, for Broadview Terrace Water Co.; A. K. Fuller, for California-American Water Company; Ross Workman, for California-Pacific Utilities Company; Jeptha A. Wade, Jr., and C. G. Ferguson, for California Water Service Company; McCutcheon, Doyle, Brown, and Enerson, by Ronald Friend, Attorney at Law, for California Water Service Company and San Jose Water Works; Homer H. Hyde, for Campbell Water Co.; A. L. Anderson, for Cobb Mountain Water Company; Carlton J. Peterson, for Diamond Bar Water Co.; C. Marvin Brewer, for Dominquez Water Corp.; Francis H. Ferraro, for Kavagnagh Vista Water Co.; Joseph S. Englert, Jr., Attorney at Law, for Pacific Gas and Electric Company; William S. Cook, for Park Water Co. and Vandenburg Utilities Co.; John E. Skelton, Attorney at Law, for San Gabriel Valley Water Company; R. M. Ritchey, Jr., for San Jose Water Works; R. E. Woodbury, Robert J. Cahall and L. Christian Hauck, Attorneys at Law, for Southern California Edison Company; Charles L. Stuart, for Southern California Water Company; Walker Hannon, for Suburban Water Systems; Harold R. Farr, for Tahoe Park Water Co.; and Bertha Wright Bertillion, for Wright Ranch Water System; respondents.

Byron R. Chaney, for California Fire Chiefs Association; F. S. Blair and Carl London, for Carmichael Fire Protection District; Brobeck, Phleger & Harrison, by Robert N. Lowry, Attorney at Law, for California

Water Association; David H. Rule, Attorney at Law, for City of Jackson; John D. Maharg, County Counsel, by Douglas V. Hart, Deputy County Counsel, for County of Los Angeles; William L. Eichenberg, for County of Tulare; Reginald E. Moorby, for Fire Chiefs Department, League of California Cities; Carl M. Downs, for Orange County Fire Protection Department; Raymond H. Banks, for Tulare County Fire Department and California Rural Fire Association; interested parties.

Cyril M. Saroyan, Attorney at Law, and Parke L. Boneysteele, for the Commission staff.

O P I N I O N

On June 22, 1971 Assembly Concurrent Resolution No. 146 was introduced at the 1971 Regular Session of the California Legislature. The resolved clauses of this resolution read as follows:

"Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Public Utilities Commission of the State of California is requested to study the subject of requiring that water corporations under its jurisdiction be required to undertake a program of constructing and maintaining adequate fire protection systems, including the installation of an adequate network of hydrants and the maintenance of sufficient pressure and the availability of adequate reserves of water to meet emergency situations in accordance with the standards of fire grading and rating bureaus in this State, and to recommend necessary adjustments to the rate structures of such water corporations to permit such extensions and improvements to their systems; and be it further

"Resolved, That the commission is requested to report to the Legislature on its findings and recommendations on the subject of this resolution on or before the fifth calendar day of the 1972 Regular Session; and be it further

"Resolved, That the Chief Clerk of the Assembly transmit a copy of this resolution to the Public Utilities Commission."

Assembly Concurrent Resolution No. 146 was enacted by the Legislature on November 24, 1971.

On August 24, 1971, the Commission issued the Order Instituting Investigation herein. The order provided:

"...that an investigation on the Commission's own motion be and is hereby instituted into the operations and service of all public utility water corporations under the jurisdiction of this Commission, which are hereafter termed respondents, for the purposes of inquiring into the feasibility of implementing and making available any or all of the matters hereinafter referred to, whether through amendment or revision of presently existing Commission General Order No. 103 or by promulgating other general orders, rules, directives, or regulations to achieve said purposes ..."

The Commission further ordered:

"...that said investigation proceed in two phases as follows:

"Phase 1. Hearing be initially held to determine whether the Commission has jurisdiction under presently existing statutes to promulgate rules and regulations setting standards for adequate fire protection service to be furnished by water utilities under the Commission's jurisdiction. If, after hearing, it is found that jurisdiction is lacking in this matter, it shall so apprise the California Legislature so that necessary legislation may be enacted, if so desired by the Legislature, which will require adequate fire protection services by water utilities as aforesaid.

"Phase 2. If the Commission does assert jurisdiction in this matter, further hearings will be undertaken for the purpose of adducing evidence and developing a record which will assist the Commission in formulating appropriate rules to effectuate the requirement that proper and adequate fire protection service be provided at just and reasonable rates by water utilities."

Public hearing on Phase 1 of the investigation herein was held before Commissioner Holmes and Examiners Catey and Cline in San Francisco on September 22, 1971.

At the hearing statements were made by representatives of the Commission staff, California Water Association, San Jose Water Works, the City of Jackson, and Southern California Edison Company. Phase 1 was taken under submission on October 20, 1971, the date for the filing of concurrent briefs. Briefs were filed by representatives of the Commission staff, Pacific Gas and Electric Company, San Gabriel Valley Water Company, California Water Association, California Fire Chief's Association and the County of Los Angeles.

All parties agreed that the Commission has jurisdiction to establish standards of fire protection services for those public utility water corporations which have dedicated service for fire protection.

The representative for the City of Jackson, however, urged that the Commission determine that it should not have jurisdiction to establish standards of fire protection services because of the legal requirements that the Commission give consideration to the economic feasibility of the standards which it would establish. Further, this party was of the opinion that standards which are established by the Commission would be those which are best for the State as a whole and would not meet the requirements of the smaller communities such as the City of Jackson. He stated that each city should be permitted to establish those fire protection rules which are necessary for the safety of its people.

The California Water Association and the respondent water corporations which participated in the proceeding recommend that the Commission report to the Legislature that it appears desirable and in the public interest that public utility water corporations be granted immunity from liability for failure to provide adequate fire protection service similar to the immunity now provided to public water service agencies pursuant to Sections 850, 850.2 and 850.4 of the Government Code, which provide as follows:

"850. Neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service.

"850.2. Neither a public entity that has undertaken to provide fire protection service, nor an employee of such a public entity, is liable for any injury resulting from the failure to provide or maintain sufficient personnel, equipment or other fire protection facilities.

"850.4. Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or fire fighting equipment or facilities or, except as provided in Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code, for any injury caused in fighting fire."

In Heieck and Moran v. City of Modesto (1966), 64 C. 2d 229, the court relied upon the above sections of the Government Code in concluding that the City of Modesto was not liable to a property owner whose property was damaged by fire due to lack of water from a city-owned water supply.

In its brief California Water Association pointed out that when public utility water companies provide water and facilities for fire protection similar to those provided by municipalities and other public agencies, the water companies are performing a service in the nature of a governmental function, Niehaus Bros. Co. v. Contra Costa Water Co. (1911), 159 Cal. 305. This party contends that in fairness, public utility water companies providing such service are entitled to similar protection from liability. Such protection would encourage water utilities to increase the availability of fire protection capacity. Also such obligations would be assumed free of the added costs for insurance and reserves which would otherwise be necessary if such increased burdens were to be accompanied by a substantial increase in potential liability for damages.

The California Water Association recommends that public utility water companies be granted immunity from liability by the Legislature through the addition of Section 774 to the Public Utilities Code reading substantially as follows:

"§ 774. Neither a public utility water corporation subject to the jurisdiction of the Public Utilities Commission that has undertaken to provide fire protection service, nor an employee of any such public utility, is liable for any injury resulting from the failure to provide or maintain adequate water supply, water pressure, equipment or other fire protection service or facilities; provided, however, that nothing herein contained shall preclude the Public Utilities Commission from enforcing its rules and regulations governing the provision or maintenance of such service or facilities or from imposing penalties provided by law for any failure to comply with such rules and regulations."

In its brief the Commission staff reviewed the recent Court of Appeal decision in California Water and Telephone Company et al. v. The County of Los Angeles et al., (1967) 253 C. A. 2d 16, which the staff asserts gives the Commission authority to promulgate rules and regulations relative to standards for adequate fire protection service to be furnished by water utilities under the Commission's jurisdiction.

In that proceeding action was brought by certain water utilities and the California Water Association to test the constitutionality of a Los Angeles County water ordinance relating to fire protection standards and service insofar as it related to investor-owned water utilities. The Court of Appeal, *id.* at 28, declared:

"...If the local legislation conflicts with general law or is a matter of state-wide rather than strictly local concern, the Water Ordinance is void whether or not the general law totally occupies the 'field,' however defined.

"The Water Ordinance as applied to the respondents conflicts with the general law and relates to matters which are of state-wide rather than local concern."

In support of this conclusion the Court of Appeals reviewed Section 23 of Article XII of the California Constitution and the applicable sections of the Public Utilities Code. (Id. at 28-31)

"...Section 23 of article XII of the California Constitution provides in part that the Railroad Commission (now the Public Utilities Commission) 'shall have and exercise such power and jurisdiction to supervise and regulate public utilities... 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 Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors... or other governing bodies of the several counties... shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations... vested in any city and county or incorporated city or town as, at an election..., a majority of the qualified electors...shall vote to retain....'

"Pursuant to section 23 of article XII the Legislature adopted the Public Utilities Act, in which it delegated to the Public Utilities Commission the power to 'supervise and regulate every public utility in the State and [to] do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.' (Pub. Util. Code, § 701.) Article III of division 1 of the Public Utilities Act (Pub. Util. Code, §§ 761-773) contains detailed provisions relating to the equipment and facilities of public utilities:

"Section 761 requires the commission to 'fix the rules, practices equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the

character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.'

"Section 762 requires the commission to issue orders for such extensions, repairs, improvements or changes in the 'existing plant, equipment, apparatus, facilities, or other physical property of any public utility' as the commission finds ought reasonably to be made 'to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities.'

"Section 768 empowers the commission to promulgate orders to require every public utility to 'construct, maintain, and operate its line, plant, system, equipment...and premises in such manner as to promote and safeguard the health and safety of its employees...customers, and the public...and require the performance of any other act which the health or safety of its employees...customers or the public may demand.'

"Section 770 gives the commission power to ascertain and fix standards, regulations, practices, or service to be furnished, imposed, observed, and followed by all utilities furnishing water.

"Section 1001 provides that no water corporation shall begin the construction of a water system or 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.'

"The commission has promulgated rules governing water service, including standards for design and construction, as for example, General Order No. 103, adopted June 12, 1956, containing comprehensive specifications for water systems and facilities. Section III of General Order No. 103, following a recitation that the system 'shall be adequate to deliver the water requirements of all customers,' provides for minimum

pipe sizes and minimum pressures and provides 'specifications, location, installation, and the responsibility for the maintenance of fire hydrants, public and private fire protection facilities, connecting mains, and their ownership may be subject to negotiation between the utility and the applicant. Fire hydrants and public and private fire protection facilities shall be installed to the requirements of the utility and when owned by the utility shall be subject to such conditions as the Commission may determine based upon the compensation received for this service.' The same section of General Order No. 103 further provides: 'The quantity of water delivered to the distribution system from all source facilities should be sufficient to supply adequately, dependably and safely the total requirements of all customers under maximum consumption, and should be determined so as to maintain the specified pressures as required by paragraph II 3 a.'

'No profound exegesis of the contents of the Water Ordinance and the utilities manual and of the contents of the cited sections of the Public Utilities Code and the commission's regulations promulgated pursuant thereto is necessary to conclude that the Water Ordinance as applied to respondents conflicts with general law. Although the wording of both sets of legislation is not identical, the subject matter which is covered by each is substantially identical.

'Moreover, the construction, design, operation and maintenance of public water utilities is a matter of state-wide concern. Of course, the county is vitally interested in the adequacy of the water supply available for fire protection. But the interest is not so parochial. All of the citizens of the complex of communities within the County of Los Angeles and in the neighboring counties are affected by the adequacy of water supply, not only for fire protection but also for other domestic and industrial uses. Under such circumstances, the control of these aspects of water utilities is not a municipal affair subject to a checkerboard of regulations by local governments.

'Neither the public nor the service corporation could tolerate as many standards and policies as there were towns, cities, or boroughs through which they operated... [R]egulations not exclusively local, those affecting the [public utilities] business as a whole, or affecting the public as a whole, and those which the nature of the business and the character of the regulation require should be under the single agency of the state, are by our act committed to the exclusive jurisdiction of the Public Utilities Commission. The subject matter of this ordinance clearly falls within the exclusive jurisdiction of the commission.'

(Los Angeles Ry. Corp. v. Los Angeles (1940)
16 Cal. 2d 779, 787 [108 P.2d 430].)"

Section 451 of the Public Utilities Code also supports a conclusion that the Commission may regulate fire protection standards and services of public utility water corporations.

Section 451 of the Public Utilities Code states in part as follows:

"Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

The Commission presently does exercise some power to prescribe rules for fire protection services.

Paragraph I. 1.b. of General Order No. 103 provides as follows:

"b. Absence of Civil Liability. These rules are adopted by the Commission to establish minimum standards in relation to the design, construction and operation of water works facilities by water utilities operating under the jurisdiction of the Commission. Such establishment shall not impose upon these utilities, and they shall not be subject to, any civil liability for damages, which liability would not exist at law if these rules has not been adopted."

The staff in its brief urges that the safeguards provided by the above section of General Order No. 103 would suffice so far as the investor-owned water utilities are concerned and that such utilities should not be protected in any greater degree than any other business enterprise insofar as the ordinary rules of negligence apply. The staff suggests, however, that the California Water Association and its lobbyists are free to seek the enactment of whatever protective legislation they feel is necessary.

General Order No. 103, Section II, Standard of Service, Subsection 2, Continuity of Service, paragraphs (a) and (b) in part read as follows:

"a. Emergency Interruptions....Where an emergency interruption of service affects the service to any public fire protection device, the utility shall promptly endeavor to notify the Fire Chief or other public official responsible for fire protection of such interruption and of subsequent restoration of normal service.

"b. Scheduled Interruptions....Where public fire protection is provided by the mains affected by the interruption the utility shall promptly endeavor to notify the Fire Chief or other official responsible for fire protection, stating the approximate time and anticipated duration. In addition, the Fire Chief or other official responsible for fire protection shall be notified promptly upon restoration of service."

In addition General Order No. 103, Section III, Standards of Design, Subsection 2, Distribution System, paragraph (b) provides:

"b. Fire Protection. Specifications, location, installation, and the responsibility for the maintenance of fire hydrants, public and private fire protection facilities, connecting mains, and their ownership may be subject to negotiation between the utility and the applicant. Fire hydrants and public and private fire protection facilities shall be installed to the requirements of the utility and when owned by the utility shall be subject to such conditions as the Commission may determine based upon the compensation received for this service."

Based upon a consideration of the foregoing constitutional provision, statutes, cases and recommendations the Commission concludes as follows:

1. The Commission has jurisdiction under presently existing statutes to promulgate rules and regulations setting standards for adequate fire protection service to be furnished by water utilities under the Commission's jurisdiction.

2. This Commission will not take a position at this time on the recommendation of the California Water Association that legislation be enacted to add Section 774 to the Public Utilities Code reading substantially as follows:

"§ 774. Neither a public utility water corporation subject to the jurisdiction of the Public Utilities Commission that has undertaken to provide fire protection service, nor an employee of any such public utility, is liable for any injury resulting from the failure to provide or maintain adequate water supply, water pressure, equipment or other fire protection service or facilities; provided, however, that nothing herein contained shall preclude the Public Utilities Commission from enforcing its rules and regulations governing the provision or maintenance of such service or facilities or from imposing penalties provided by law for any failure to comply with such rules and regulations."

Nevertheless, the Commission is aware that such legislation may be introduced at the request of California Water Association and other investor-owned public utilities water corporations, and if it is enacted such legislation would have an effect on the rules and regulations which this Commission may issue and the just and reasonable rates which this Commission may authorize in connection with fire protection service.

3. The further hearing in this proceeding on Phase 2 for the purpose of adducing evidence and developing a record which will assist the Commission in formulating appropriate rules to effectuate the requirement that proper and adequate fire protection service be provided at just and reasonable rates by water utilities should be held before Commissioner Holmes and Examiner Catey at such times and places as subsequently may be set by the Commission.

O R D E R

IT IS ORDERED that:

1. Further hearings in this proceeding on Phase 2 for the purpose of adducing evidence and developing a record which will assist the Commission in formulating appropriate rules to effectuate the requirement that proper and adequate fire protection service be provided at just and reasonable rates by water utilities shall be held before Commissioner Holmes and Examiner Catey at such times and places as may later be set by the Commission.

2. This decision shall constitute the first report of the Commission to the State Legislature pursuant to Assembly Concurrent Resolution No. 146 enacted by the Legislature on November 24, 1971. The Secretary is directed to cause a copy of this decision to be mailed forthwith to the State Legislature.

C. 9263 vo

3. The Commission is further directed to cause a copy of this decision to be mailed forthwith upon each appearance in this proceeding.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 4th
day of JANUARY, 1972.

John W. ...
Chairman
William ...
[Signature]
Thomas L. ...
[Signature]
Commissioners