

Decision 91-05-019 May 8, 1991

MAY 9 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

UPPER KERN ISLAND WATER ASSOCIATION, )

Complainant, )

vs. )

KERN DELTA WATER DISTRICT AND THE )  
CITY OF BAKERSFIELD, )

Defendants. )

ORIGINAL

Case 90-08-057  
(Filed August 22, 1990)

William A. Anderson, Attorney at Law, for Upper Kern Island Water Association, complainant.  
McMurtrey & Hartsock, by David G. Duket, Attorney at Law, for Kern Delta Water District, defendant.  
Scott S. Slater and Christopher A. Jacobs, Attorneys at Law, for City of Bakersfield, defendant.

OPINION

Statement of Facts

Historical Background

A predecessor to the Kern Island Canal Company (aka Kern Island Water Company) was organized about 1870 to serve an area known as the Kern River Delta Region below the City of Bakersfield in Kern County, distributing water for crop irrigation. In 1914, the canal company began extending its water distribution system contiguous to its original area, using the New Rim Ditch, a ditch constructed and owned by the Kern County Land Company. In 1917 or 1918, it further extended its distribution system into a non-contiguous area designated as the Panhandle Area, doing this without seeking a certificate of public convenience and necessity—

to do so from this Commission.<sup>1</sup> As the land company by then had come to own all or a majority of the canal company stock, as well as owning the other private and public utility canal systems serving in the Panhandle Area, no questions concerning its right to serve the area were raised. As the years passed, and as the entitlement of the canal company was a first right on the Kern River water supply, there was powerful incentive leading the land company to bring its land holdings within the canal company's water distribution system.

But then, starting in 1950, much of the Panhandle Area land came to be devoted to growing cotton. Cotton required irrigation beyond the winter rain season into July and August, the latter months a time when the Kern River flow is normally low. Some of the old area consumers complained to the Commission (Case No. 2711) that the canal company's unauthorized extension had led to diminution of water supply available for use on their lands. The Commission thereupon opened an investigation (Case No. 2755) embracing the service area of the canal company issue, as well as the respective service areas of other public utility canal companies in the delta. Noting the canal company's earlier unauthorized extension of service into the non-contiguous Panhandle Area, the Commission declined to grant a certificate of public convenience and necessity nunc pro tunc, and ordered the canal to cease and desist furnishing or delivering water to that area without first obtaining a certificate. However, the canal company and the other utility suppliers were not prevented from selling surplus water at times and in amounts not required by their respective service area consumers.

---

<sup>1</sup> On March 23, 1912, Section 50 of the Public Utilities Act provided that water corporations should not begin construction in non-contiguous territory before obtaining Commission authorization to do so.

Both the land company and the canal company sought review before the California Supreme Court. The Supreme Court annulled in part and remanded for further proceedings, observing that the new area had been served without complaint for ten years with water unneeded by the old users, so that the Commission, rather than issuing a cease and desist order which is equitable in nature, should have framed its orders to permit the canal company to continue to deliver water to the new area provided it could be done without prejudice to the old users.<sup>2</sup> The Court also held that the Commission should have determined the quantum of such waters, if any, that would be available for the new area. The canal company was held not entitled, without first securing certification, to serve any waters to the new area except those determined by the Commission to be available beyond the requirements of the old area. Petitions for rehearing and modification of the Supreme Court's decision were denied, although the Court stated that it was intended that the Commission should retain a continuing jurisdiction over the matter and would undoubtedly have the power to formulate and enforce necessary rules and regulations for the protection of consumers of the canal company and to permit sales of water for the Panhandle Area when such would not prejudice the old area consumers for present and prospective domestic and irrigation purposes.

Following remittitur from the Supreme Court, further hearings were held before the Commission. The parties to that further hearing approved a draft presented of proposed changes to the then existing Rules and Regulations Governing the Distribution and Use of Water Under the System Operated by the Kern Island Canal

<sup>2</sup> See Kern County Land Company v. Railroad Commission (1934) 30 Cal. 2d 15130.

Company. By D.27722, issued February 4, 1935, the Commission approved these revisions. The Rules of the canal company, including Rules 4-1/2, 5, and 10, provided two separate service areas, the Old Area, and the Panhandle Area. Rule 10 further provided that in times of water shortage the Old Area must be first served to the extent of the limitations defined in Rule 6 before service is provided to the Panhandle Area. While in the years since 1935 there have been rate changes, there has been no Commission order including the Panhandle within the Canal Company's service area on the same basis as the Old Area.

During the years leading up to 1990, Tenneco West, Inc., (Tenneco), a Delaware corporation qualified to do business in California, had come to own all but the directors' qualifying shares of the Canal Company and its sister company, Kern River Canal and Irrigating Company. Meanwhile, the City of Bakersfield, having concerns about future water supplies, on September 30, 1970, had filed Action No. 111404 in Kern County Superior Court against Tenneco and its subsidiaries, and others, seeking an adjudication of water rights with the expectation of having the City declared to be owner of some unspecified amount of Kern River water.

This filing by Bakersfield for an adjudication led to negotiations, and on July 30, 1973, to settle Bakersfield's further threat to exercise its power of eminent domain, Tenneco and its subsidiaries agreed that Bakersfield could acquire certain of Tenneco's local assets and all of the assets of the two subsidiaries for a stipulated sum of money. It was further agreed that a Bakersfield instrumentality, the City of Bakersfield Water Facilities Corporation (CBWFC), would be formed to issue bonds to finance the acquisition, with part of the acquisition to be transferred to the City and part to CBWFC and in turn leased to the City. The agreement further provided in part that Bakersfield would initiate legal action to validate the agreement and proposed

water contracts, and could initiate legal action in eminent domain to condemn the assets. Meanwhile, the Kern Delta Water District (District) which historically had been allocated a certain number of acre feet of water by the canal company, perceived in Bakersfield's July 30, 1973 agreement a threat to continuation of that allocation. Consequently, after unsuccessfully seeking assurance from Bakersfield that this allocation would not be affected, the District in 1973 filed an eminent domain action (Case No. 54140 in Ventura County Superior Court) to condemn the canal company.

Thereafter Bakersfield and the District resolved their differences so that both could benefit from Bakersfield's 1973 proposed acquisition of the Tenneco and Tenneco subsidiary assets. Accordingly, on February 3, 1976, Bakersfield obtained a dismissal of its earlier filed complaint for declaratory relief (Case No. 111404). On April 12, 1976, differences resolved, Bakersfield, CBWFC, Tenneco, Kern Island Water Company, and Kern River Canal and Irrigating Company formalized the July 30, 1973 agreement into an executed contract setting forth the precise terms for completing the proposed acquisition. On April 13, 1976, as contemplated earlier, Bakersfield filed an amended complaint in Case No. 140616 in Kern County Superior Court to acquire certain of Tenneco's assets and all of the two subsidiaries' assets by eminent domain. On May 7, 1976, Bakersfield also filed Case No. 141050 in Kern County Superior Court to formally validate its bonding, warrants, contracts, obligations and evidence of indebtedness in the acquisition.<sup>3</sup>

Meanwhile, Bakersfield had determined that its future water requirements would not require continued ownership of all the

<sup>3</sup> On July 30, 1976 in its Action in Rem, Case No. 141050, the Court validated the terms of Bakersfield's acquisition agreement.

Kern Island Water Company assets, so that while it would keep the Ashe Water Service Area and certain other rights, it could convey the rest of the assets to District. Accordingly, on June 15, 1976, Bakersfield and the District made and executed an agreement to that effect. The agreement provided that District would pay to Bakersfield \$3.5 million on the closing date for the Bakersfield-Tenneco transaction, and that District would dismiss its condemnation suit in Ventura County Superior Court (Case No. 54140).

As relevant in the present proceeding, the Bakersfield-District agreement dated June 19, 1976 provides, under Article 1, Section 1.2.a as follows:

"a. District hereby agrees that all rights or claims of rights in and to the use of Kern River water acquired hereunder are subject to all those agreements, documents and decrees to which City's predecessors in interest (Sellers) are a party, the same as if the District itself had executed such agreements or documents or it had been a party bound by said decree, and subject to the legal consequences, if any, of the actual administration of said agreements, documents and decrees, and subject to the so-called Shaw Decree to the same extent as if it had been a party defendant in said litigation and to all agreements executed by North Kern Water Storage District, acting for itself and for other first point interests, the same as if the District had expressly requested North Kern to so act for the benefit of City's predecessors and to the same extent as if the District itself had administered and interpreted said agreements in place and stead of City's predecessors in interest."  
Agreement No. 76.70 - Agreement for the Sale of Kern River Water Rights and Canals.

On November 16, 1976, in the Case No. 140616 eminent domain proceeding, the City, the canal company and the irrigation company stipulated that upon payment as provided in their agreement

the assets set forth in that agreement would be condemned to Bakersfield, waiving findings of fact and conclusions of law except to incorporate these from the July 30, 1976 validation judgment in Case No. 141050. On December 13, 1976, a final judgment in condemnation was entered for Bakersfield, the Court having approved the stipulation.

Thus, in 1976, the Kern Island Canal Company assets were taken in condemnation by Bakersfield and in turn sold to Delta. Proceedings Under the Captioned Case

On August 22, 1990, the Upper Kern Island Water Association (Association), an unincorporated association of 133 landowners and water users with approximately 11,566.77 acres of property in the Old Area, filed the captioned complaint against Bakersfield and the District. The complaint asserts that under the terms of the Bakersfield-District sale contract (specifically Article 1, Section 1.2a quoted above), District was to continue serving the landowners within the Kern Island Water Company service area according to the rules and regulations previously adopted by this Commission (specifically, those in accordance with D.27727 of February 4, 1935). The complaint asserts that commencing in 1989, District delivered water to the Panhandle despite objection by the Association, and that in 1989 and 1990 delivery to the Old Area was reduced and prorated, while District continued to serve the Panhandle with the same proration as the Old Area. The Association seeks an order clarifying the rule that the Panhandle is a secondary area to be served only after full service to the Old Area.

Bakersfield's Answer admitted that under the Bakersfield-District sale contract, District was to continue to serve according to the rules and regulations previously set by this Commission. Bakersfield then denied Commission jurisdiction, asserting that a judgment in a mid-1970's eminent domain action had effectively divested the Commission of jurisdiction. Bakersfield supported its

assertion only with a copy of proposed findings and conclusions in a contemporary special proceeding relating to validation of Bakersfield powers to finance and acquire the assets; all referenced to a purchase agreement made earlier between Bakersfield and the canal company. One of the validation proceeding findings stated that the acquisition did not require Commission approval.

District's Answer denied that District under the terms of the Bakersfield-District sale contract was under obligation to continue service pursuant to the rules and regulations stated. District's Answer also denied Commission jurisdiction, both by virtue of the fact that District is not a public utility, and in reliance upon the judgment in the special validation proceeding brought by Bakersfield in Case No. 141050. District attached copies of the April 12, 1976 Bakersfield-Tenneco and Tenneco Subsidiaries agreement, and the June 15, 1976 Bakersfield-District sale agreement. District further asserted, without citing any authority for the assertion, that in 1960 new rules had been promulgated which appeared to have abolished Old Area-Panhandle Area service distinctions. Finally, District gave notice of its intention to move for dismissal for lack of jurisdiction.

On December 10, 1990, a duly noticed Prehearing Conference (PHC) was held in San Francisco before Administrative Law Judge (ALJ) John B. Weiss. Before the PHC started, the Association filed a Memorandum of Points and Authorities in Opposition to the Motion to Dismiss, contending that the Commission retained jurisdiction since Bakersfield's July 30, 1973 with Tenneco et al., and its April 12, 1976 agreement contract to acquire the latter parties' assets had been a voluntary



purchase,<sup>4</sup> without Commission approval pursuant to PU Code § 851.<sup>5</sup> The Association further pointed out that the water users had not been notified of the 1976 special validation action in Superior Court, and that the Court therein had found that it "expressly makes no finding as to any water rights or claims to water rights of whatever nature, ...." The Association thus concluded that the Commission retains jurisdiction.

In addressing the dismissal motion, the ALJ discussed the distinction between a voluntary transfer in lieu of eminent domain (including one under the threat of eminent domain), which transfer is subject to PU Code § 851 and under Commission jurisdiction, and a transfer associated with an eminent domain action fully prosecuted to consummation by a final judgment in eminent domain and payment to the owners of the determined compensation, which "taking" serves to divest the Commission of jurisdiction over the taken property or rights.

Based on the Association's characterization of Bakersfield's acquisition as a voluntary purchase, and the contract statement that the sale was made in lieu of acquisition by the City by exercise of its powers of eminent domain, the ALJ asked the

4. Article IX, Section 9.1 states that: "Sellers, in lieu of acquisition by the City by exercise of its power of eminent domain, hereby agree to sell, convey, transfer, assign, and deliver the Assets ..."

5. PU Code § 851 provides that no public utility other than a common carrier by railroad shall sell the whole or any part of its system or other property necessary or useful in the performance of its duties to the public, without first having secured from the Commission an order authorizing it to do so.

parties to brief the issue, with opening briefs to be due on or about January 15, 1991, and reply briefs due February 1, 1991.

On January 15, 1991, District filed a memorandum of Points and Authorities in support of its earlier Motion to Dismiss, and asked the Commission to take official notice of various court documents, including the December 1976 Notice of Entry of Judgment in Condemnation and Stipulation for Judgment in City of Bakersfield vs. Kern Island Water Co., et al., Case No. 140616, Superior Court of the State of California, County of Kern. This judgment, incorporating the findings and conclusions from the validation action Case No. 141050, decreed that upon payment pursuant to their agreement, the canal company assets at issue herein would be condemned to Bakersfield. The District also pleaded laches as a defense.

Bakersfield filed a Notice of Joinder in District's Motion to Dismiss, stating that its review of Superior Court records relating to City's acquisition of the assets of the canal company indicated that the City's eminent domain action No. 140616 had been fully prosecuted to a judgment in condemnation granted on December 14, 1976 in Kern County Superior Court. The City attached copies of notice of entry of judgment and judgment in condemnation. The City cited App. of Cal-Pacific Utilities (1964) 63 PUC 439 and County of Inyo v. Public Utilities Commission (1980) 26 C 3d 154, as authority to the point that the Legislature has not granted the Commission jurisdiction to review complaints against municipal utilities by customers whose complaints may be asserted in Superior Courts.

In reply, the Association on January 31, 1991 argued that the City and the public utility in 1976 were merely trying to avoid submitting a sale by contract to the Commission; that in the eminent domain action no issue of any substance was submitted to the Court. It argues that, as the Commission has the historical records and background on the issues, it would place an "extreme

burden and expense" on the Association to make it go to Superior Court for redress.

The matter was submitted for decision on jurisdiction with the last filing on February 20, 1991.

Discussion

Bakersfield, Tenneco, Kern Island Canal Company and the Kern River Canal and Irrigation Company resolved their differences and made a July 30, 1973 agreement, supplemented by a Memorandum of Understanding dated November 9, 1973, by which it was agreed that the City would acquire certain of Tenneco's assets and all the assets of Tenneco's two subsidiaries in a proposed sale in settlement of the City's threatened exercise of its eminent domain power. While thereafter completing its financing arrangements for the proposed acquisition, the City also resolved its differences with District, settling on a proposed division of the assets with District, thereby enabling the City to put together an acquisition financing scheme using the proposed payment from District for its share of the assets, as well as bond proceeds to be obtained through use of the CBWFC instrumentality, to meet the cost of the proposed acquisition. These arrangements all came together in the Agreement of April 12, 1976.

Had the proposed acquisition been consummated as a purchase and nothing more, the transaction would have been nothing more than a sale and not valid until authorized by the Commission pursuant to PU Code § 851 provisions. The validation proceeding in Superior Court Case No. 141050 could not have effectively conveyed title to Bakersfield. The jurisdiction of the Commission in relation to a voluntary sale, or even a sale under threat of eminent domain proceedings, is exclusive. But in this instance, Bakersfield followed through with an eminent domain action prosecuted through to a final judgment of condemnation in Superior Court Case No. 140616. The Commission was divested of its jurisdiction by the successful completion of that eminent domain

action on December 14, 1976, tender of the stipulated just compensation on the closing date, and receipt and recording of an order of possession. Nor was the Commission invited to participate in the Superior Court acceptance of the stipulated amount as being the just compensation (PU Code §§ 1401-1421). We concur with the City's position, as argued in the briefing, that People ex rel Public Utility Commission v. Fresno (1967) 254 CA 2d 76, is dispositive of the jurisdiction issue relative to the stipulated taking of the assets of Tenneco and its subsidiaries by Bakersfield.

The transfer of the former Kern Island Canal Company assets by Bakersfield to the District requires the same result. The District acquired these assets by paying the City \$3.5 million on the closing date of the City's acquisition of the Tenneco and Tenneco subsidiary assets from the latter entities following the final judgment in condemnation on December 14, 1976. This sale to District was not consummated on the June 15, 1976 date of the Agreement 76-70 between Bakersfield and the District, although it was consummated pursuant to the terms of that executory agreement once City later acquired the assets. And when the sale was consummated, this Commission no longer had any jurisdiction with regard to the former Kern Island Canal Company assets. This Commission generally has no jurisdiction over municipalities (Los Angeles Metropolitan Transit Authority v. Public Utilities Commission (1959) 52 CA 2d 655) or irrigation districts (Modesto Irr. Dist. v. City of Modesto (1962) 210 CA 2d 652).

Finally, the right to service is unaffected by the condemnation of a public utility; it continues by operation of law and customers may have relief against the condemnor (City of Fresno v. Fresno, 254 CA 2d 76). Customers may initiate a suit, as the City here points out, in Superior Court seeking relief for claims of unfair, unreasonable, arbitrary or fraudulent treatment (Durant v. City of Beverly Hills (1940) 39 CA 2d 133). The Legislature has

not granted the Commission jurisdiction to review complaints against governmental entities where those complaints may be asserted in Superior Court. (App. of Cal-Pacific Utilities Co. (1964) 63 CPUC 439; County of Inyo v. Public Utilities Comm. (1980) 26 CA 3d 154).

In that we have determined that the captioned complaint must be dismissed as to both District and Bakersfield for lack of jurisdiction we need not address the issue of laches brought as a separate defense by the District.

#### Findings of Fact

1. The Kern Island Canal Company, later aka Kern Island Water Company, for almost 3/4 of this century provided public utility water distribution service for irrigation and other uses in the Kern River Delta below Bakersfield, and held water rights and claims to Kern River water.

2. The Canal Company's published Rules and Regulations, as amended in 1935 to comply with D.27722 of this Commission, provided for two separate service areas, the Old Area and the Panhandle Area.

3. The Canal Company's published Rules further provided that in times of water shortage, the Old Area must first be served before service to the Panhandle Area.

4. In the years leading to 1970, Tenneco came to own substantially all of the Canal Company's stock.

5. In 1970, Bakersfield, concerned over future water supplies, filed an action in Kern County Superior Court seeking declaratory relief against Tenneco and its subsidiary canal company, asking for an adjudication of Kern River water rights to obtain some unspecified allocation for itself.

6. In 1973, partially to settle Bakersfield's threat to exercise eminent domain powers, Tenneco and its subsidiary canal company made an executory agreement which provided that the City would, inter alia, acquire the canal company's assets by purchase.

7. District, perceiving a threat to its historic allocations of water from the canal company in the Tenneco/Canal Company-Bakersfield agreement, and unable to secure assurances from the City, filed an eminent domain action in Ventura County Superior Court to take the Canal Company.

8. On April 12, 1976, Bakersfield, Tenneco and the Tenneco subsidiaries firmed up their 1973 agreement with another agreement whereby, inter alia, Bakersfield would acquire the Canal Company assets using in part a financing instrumentality and leaving open to Bakersfield whether the City would also proceed in eminent domain.

9. On April 13, 1976, Bakersfield filed an amended complaint in Kern County Superior Court to acquire the Canal Company assets by eminent domain, following up this filing by a stipulation for judgment.

10. Meanwhile, Bakersfield and District had resolved their differences and made a June 15, 1976 executory agreement whereby the District would purchase the Canal Company portion of the Tenneco, et al. assets concurrent with the City's acquisition of these assets, and dismiss District's pending eminent domain action.

11. Both the April 12, 1976 Bakersfield-Tenneco et al. agreement and the June 15, 1976 Bakersfield-District agreement contained covenants agreeing to respect the service obligations of the Canal Company.

12. Bakersfield on December 14, 1976 obtained a judgment in condemnation which essentially incorporated the covenants in the April 12, 1976 agreement.

13. Bakersfield thereafter tendered the just compensation and recorded possession, in turn consummating the sale of the canal company assets just acquired to District pursuant to the June 15, 1976 agreement.

14. Neither Bakersfield nor District is generally subject to the jurisdiction of this Commission.

15. Complainant Association has recourse available in Superior Court for review of its complaints.

Conclusions of Law

1. The Legislature has not granted the Commission jurisdiction to review complaints against municipalities or irrigation districts by customers whose complaints may be asserted in Superior Court.

2. The complaint should be dismissed with prejudice.

3. In view of fast moving events in the water and drought situation in California, this decision should be made effective immediately.

ORDER

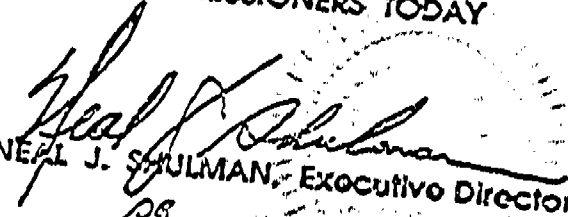
IT IS ORDERED that the complaint is dismissed.

This order is effective today.

Dated May 8, 1991, at San Francisco, California.

PATRICIA M. ECKERT  
President  
G. MITCHELL WILK  
JOHN B. OHANIAN  
DANIEL Wm. FESSLER  
NORMAN D. SHUMWAY  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY

  
NEAL J. SHULMAN, Executive Director  
25