

Decision No. 88576 OCT 31 1978

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

COUNTY OF INYO, A Political
Subdivision of the State of
California,)

Complainant.)

vs.)

THE LOS ANGELES DEPARTMENT OF
WATER AND POWER, A Public
Utility.)

Defendant.)

Case No. 10209
(Filed November 22, 1976)

Antonio Rossmann, Attorney at Law, for
complainant.

Edward A. Shlotman, Deputy City Attorney,
for defendant.

O P I N I O N

The complainant, county of Inyo, a consumer of water supplied by the defendant, the city of Los Angeles Department of Water and Power, purchases the water to operate its facilities within said county, and as a political entity, is charged with the responsibility of protecting the health, safety, and welfare of its residents within its jurisdiction. The defendant is a municipally owned and operated public utility holding title to extensive areas of land within the complainant's geographical boundaries, commonly known as the Owens Valley, from which it extracts great quantities of water for export to the defendant's service area in and adjacent to the city of Los Angeles. It also separately supplies water from

the same source to four unincorporated communities of the Owens Valley, as well as to the complainant county itself.

The complainant alleges that the defendant totally acquired the water supply systems of the four communities of Big Pine, Lone Pine, Independence, and Laws at various times in past years and supplies water to the residents of the county of Inyo and to the complainant, in the capacity of a "person" or "water corporation" without ever having sought the consent or approval of the Public Utilities Commission (Commission). It is alleged by the complainant that Article XII, Section 3, of the California Constitution,^{1/} and implementing legislation thereunder, requires the defendant, in its acquisition and operation of the aforementioned water supply systems, to submit to the authority and control of this Commission.

The complainant further alleges that the defendant has purported to raise the rates of water supplied through each of the four water systems which are unjust, unreasonable, and without application to, review by, or approval of the Commission. The complainant alleges that prior to February 20, 1976, the defendant supplied water to the complainant at a monthly flat rate of approximately \$223.10. Since that time

1/ Article XII, Section 3, (formerly Section 23) provides:

"Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities."

the defendant is alleged to have assessed the complainant with a monthly rate from approximately \$377.80 to \$1,937.29. Since February 20, 1976 and up to October 20, 1976 the defendant has billed and demands from the complainant the sum of \$10,978.42. The complainant disputes approximately \$9,249.62 of the defendant's billing and has deposited that amount in an escrow account pending final determination of the validity of the defendant's rates.

The complainant seeks an order from the Commission directing the defendant to seek approval of its acquisition of the water supply systems for the communities of Lone Pine, Big Pine, Independence, and Laws, and an order directing the defendant to seek approval of the rates at which water will be supplied to the residents and consumers of said communities through the four water supply systems from February 20, 1976. In addition, the complainant seeks an order compelling the defendant to thereafter supply water to the county and the customers of the aforementioned four water systems at the same rates billed by the defendant prior to February 20, 1976, pending a determination of jurisdiction and the Commission's fixing of rates.

The defendant filed a Demurrer and Motion to Dismiss the complaint for failing to state a cause of action within the jurisdiction of the Commission. The defendant contends that it is a municipally owned and operated public water utility and as such, does not come within the purview of the Commission's jurisdiction as defined in Article XII, Section 3 (formerly Section 23), of the California Constitution, or within the contemplation of Sections 204, 205, 216, or 241 of the Public Utilities Code (PU Code) in defining the terms "public utility," "water

corporation," "corporation," or "person."^{2/} The defendant argues that the acquisition of the Big Pine water system and 40 percent of the stock of the Independence water system in the 1930's was confirmed, validated, and declared legally effective by the Legislature in the Statutes of 1951, Chapter 402, Section 3. It further argues that the remaining 60 percent interest in the Independence Water Company was acquired in 1972 by a stipulated judgment in condemnation and that the acquisition of the Lone Pine water system from the Lone Pine Community Services District in 1967 was from a public entity.

2/ PU Code Sections: "204. 'Corporation' includes a corporation, a company, an association, and a joint stock association. (Former Sec. 2(c).)

205. 'Person' includes an individual, a firm, and a copartnership. (Former Sec. 2(c).)"

* * *

"216. (a) 'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, wharfinger, warehouseman, and heat corporation where the service is performed for or the commodity delivered to the public or any portion thereof. (Former Sec. 2(dd).)"

* * *

"(c) When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality or other political subdivision of the State, which in turn either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof, such person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part. (Part former Sec. 2(ee). Amended 1970, Ch. 1109.)"

* * *

"241. 'Water corporation' includes every corporation or person owning, controlling, operating, or managing any water system for compensation within this State. (Former Sec. 2(x).)"

Oral argument on the matter was held in Los Angeles, California, on May 4, 1978 before Administrative Law Judge William A. Turkish and the matter was submitted. Although the defendant's response to the complaint is entitled "Demurrer" and "Motion to Dismiss," it is noted that the Commission's Rules of Practice and Procedure contain no provisions for the filing of demurrers. For this reason we shall consider only the defendant's Motion to Dismiss.

Only two primary questions are presented for decision. The complainant first contends that Article XII, Section 3, of the California Constitution, and implementing legislation thereunder, requires the defendant, in its acquisition and operation of the aforementioned four water supply systems, to submit to the authority and control of this Commission; and that pursuant to the constitutional grant of plenary powers conferred upon the Legislature by Article XII, Section 3 and 5 (formerly Section 23), the Legislature has conferred jurisdiction upon the Commission to control and regulate all public utilities, publicly owned as well as privately owned. The complainant argues that the defendant falls within the general provisions and definitions contained in Division 1, Part 1, Chapter 1, of the PU Code, specifically, that the defendant is both a "private corporation" and a "person" as defined in Section 241 and thus falls within the jurisdiction of the Commission under Section 216. The complainant relies primarily on the holdings contained in Los Angeles Metropolitan Transit Authority v P.U.C. (1963) 59 Cal 2d 863 and City of Los Angeles (LA City) v City of San Fernando (1975) 14 Cal 3rd 199 to sustain its argument. We do not agree. ✓

In the Los Angeles Metropolitan Transit Authority case the Legislature's granting of jurisdiction to the Commission over the safety rules and other operating regulations of a publicly owned transportation authority was challenged as

being unconstitutional and contrary to former Article XII, Section 23 (now Section 3), of the California Constitution, which the authority contended allowed the Commission regulatory jurisdiction over private transportation utilities only and not over public transportation corporations. The court rejected that contention, stating that the Constitution must receive a liberal, practical, and commonsense construction, and held that the clause "and every common carrier," in Constitution Article XII, Section 23, was severable and independent from the preceding portion of Section 23, beginning with "Every private corporation." The court went on to state that the Legislature, rather than being restricted by that section from conferring jurisdiction on the Commission over entities, such as the Los Angeles Metropolitan Transit Authority, may grant the Commission regulatory powers over a common carrier however organized. Thus, the court overruled statements of previous cases to the effect that the Legislature was prohibited by the Constitution from conferring regulatory jurisdiction over municipally or publicly owned public utilities. It did not, as complainant urges, confer Commission jurisdiction over all municipally or publicly owned public utilities. Until the holding in the Los Angeles Metropolitan Transit Authority case, the courts and the Commission had consistently held that the Legislature had been restricted by Article XII, Section 23, from conferring jurisdiction upon the Commission over a public utility operated by a municipality or other public corporation and because of the constitutional authority granted by Article XI, Section 9, to municipal corporations to establish, purchase, and operate

public works.^{3/} Both Constitution Article XI, Section 9, and Article XII, Section 3 (formerly Section 23), appear to set forth the general scheme of regulation of all public utilities in California. Section 9 appears to make municipal utilities subject to municipal control and regulation while Section 3 makes all privately owned utilities subject to legislative control and regulation and, since the Los Angeles Metropolitan Transit Authority case, all publicly owned common carriers as well. It is noted that in the 1961 amendment to Section 3.2 of the Los Angeles Metropolitan Authority Act, the Legislature did not confer complete jurisdiction over the authority upon the Commission but limited such jurisdiction as to safety rules and other regulations governing operation only.

The complainant also places heavy reliance upon the LA City v City of San Fernando case, supra wherein the court held that the term "person" included a municipality. We do not agree that the court intended such definition be granted universal application. That case involved a series of complex issues dealing with, among other things, prescriptive water rights between various municipal litigants, and among the many issues involved was the interpretation and effect of California Civil Code Section 1007 on prescriptive claims

^{3/} Article XI, Sec. 9: "(a) A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent.

"(b) Persons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law. (Added June 2, 1970.)"

involving ground basin water, against cities.^{4/} Among several arguments revolving around Section 1007 was one contended by the defendant cities, that even if Section 1007 immunized the property of cities and other public entities from the acquisition of prescriptive rights by private parties, it did not interfere with such acquisitions by public entities against each other and that the phrase "person, firm, or corporation," by which the statute describes the class of parties whose possession is not permitted to ripen into prescriptive rights against specified publicly owned property, refers only to private persons, firms, and corporations. In support of this contention the defendant cited previous statements by the court upholding the rule that in the absence of express words to the contrary, neither the State nor its subdivisions are included within the general words of a statute (citations). The court disagreed, holding that such rule excludes governmental agencies from the general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers. "Where...no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental

4/ Civil Code Sec. 1007. [Title by prescription, how acquired]

"Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, but no possession by any person, firm or corporation no matter how long continued on any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof."

bodies even though it used general statutory language only. (Hoyt v Board of Civil Service Commissioners (1942) 21 Cal 2d 399, 402; see Nestle v City of Santa Monica (1972) 6 Cal 3d 920, 923; and Flournoy v State of California (1962) 57 Cal 2d 497, 498." Pursuant to this principle, governmental agencies have been held subject to legislation which by its terms applies simply to any "person" (Hoyt v Board of Civil Service Commissioners, supra; Flournoy v State of California, supra; State of California v Marin Municipal Water District (1941) 17 Cal 2d 699). Thus, the court construed the word "person", contained in Section 1007, to include governmental agencies because such construction did not infringe on their sovereign powers. Such agencies were thus not deprived of anything except the property rights of their fellow public entities through adverse possession. The result is not a diminution of sovereign powers but only the elimination of prescription as a means of transferring property from one arm of the government to another.

In the matter before us, if we were to conclude that the words "person" and "corporation" as defined in Division 1, Part 1, Chapter 1, of the PU Code, include a municipal corporation, it would violate the rule of construction discussed above because it would infringe on the sovereign powers of the LA City which are granted to it by Constitution Article XI, Section 5, Section 9, and by the terms of Sections 2(4) and 2(11)(g) of the LA City charter. The provision of the Constitution which grants to municipal corporations the power to operate public works is self-executing and does not require enabling legislation (Glenbrook Development Co. v City of Brea (1967) 253 Cal App 2d 267). Likewise, the regulation of municipally owned

public utilities is generally considered to be a municipal affair (Mullins v Henderson (1946) 75 Cal App 2d 117; Los Angeles Gas and Electric Corp. v Los Angeles (1922) 188 Cal 307).

It is also worthwhile to note that, in addition to the general scheme of regulation of public utilities as set forth in the Constitution, the Legislature has further considered privately owned and municipally owned public utilities as being under different control and regulatory authority by dealing with each separately within the PU Code. Contrary to the complainant's contention, Division 1, Part 1, Chapter 1, of the PU Code, deals with the regulation of public utilities and appears to relate solely to the regulation of private corporations or persons operating a public utility. Supporting this premise is the fact that the words "municipal" and "municipality" appear only three times in Chapter 1. In PU Code Section 207, the word municipality follows the words "person, private corporation" within the context of "public or any portion thereof" which is defined as meaning the public generally, or any limited portion thereof for which the service is performed or to which the commodity is delivered. It again appears in Section 216(c) in the context that when any person or corporation performs any service or delivers any commodity to any person, private corporation, or municipality, which in turn performs such service or delivers such commodity to the public, then such person or corporation is a public utility subject to the control and jurisdiction of the Commission (referring to the person or corporation first performing the service or delivering the commodity to the "middleman"). The word "municipal" appears once in PU Code Section 240 which defines a "water system" and it is mentioned merely in the context of one type of water system usage.

Surely had the Legislature intended to include municipal or publicly owned public utilities within the context of Division 1, it would have included the words "municipal," "municipally owned," "municipal corporation," or "publicly owned utilities" within the various definitions of public utilities placed under jurisdiction of the Commission within that division.

PU Code Section 2701, Part 2, Chapter 2, Division 1, relates specifically to water companies and declares that "Any person, firm, or corporation...who sells...or delivers water to any person, firm, corporation, municipality, ...is a public utility and is subject to the provisions of Part 1 of Division 1 and to the jurisdiction, ...and regulation of the commission, ..." (emphasis added). It is only reasonable to assume that if the Legislature intended a municipality or municipal corporation to be subject to this section it would have included it at the beginning of the section as well as within the body of the section. Its omission at the beginning of the section must be deemed intentional. Indeed, the Legislature, following the lead contained in the Constitution, provided separately for municipal corporations by the establishment of Division 5 in the PU Code to deal with utilities owned by municipal corporations. In this division a "public utility" is again defined in Section 10001 and refers specifically to the supply of water, light, heat, power, etc. of a municipal corporation. Sections 10002 through 10004 grant the municipal corporation various powers in its operation of public utilities, including the power to operate without the corporate limits when necessary to supply the municipality or its inhabitants with the service desired. Thus, the failure of the Legislature to include municipal public utilities within the classes of public utilities to be regulated by the Commission in Division 1 and its establishment of Division 5 which deals with municipally owned utilities must be deemed to have been intended as such by the Legislature.

Although it is true that Constitution Article XII, Section 5, confers plenary powers, unlimited by the other provisions of the Constitution but consistent with Section 5, upon the Legislature to confer additional authority and jurisdiction upon the Commission, the Legislature has so far elected not to do so with respect to publicly owned public utilities with the exception of the jurisdiction granted to the Commission to regulate publicly owned common carriers, the authority being specifically granted to the Legislature in Constitution Article XII, Section 3 (formerly Section 23). The Commission has no jurisdiction over municipally owned utilities unless expressly provided by statute. (Orange County Air Pollution District v. Public Utilities Commission (1971) 4 Cal 3d 945.) Thus, absent legislative enactment, it is concluded that the Commission does not have jurisdiction over the defendant in the operation of its public utilities.

Brief comment is necessary on the complainant's charge that municipal ownership of a public utility only earns exemption from this Commission's regulation when the electorate of the municipality can directly protect themselves from abuses against which this Commission would otherwise provide protection, and that the situation of people of Inyo County (suffering from lack of political influence or control over the rate-setting mechanism of LA City) requires this Commission to assume jurisdiction so as to protect the interests of the people of Inyo County and provide an independent review of such ratemaking. We recognize that the people of Inyo County do not participate in the electoral process of selecting the elected management of the defendant. The Inyo County residents do not, therefore, have the same direct voice in the management of the Los Angeles Department of Water and Power (including ultimately, a voice in the ratemaking process) as residents of Los Angeles County. However, this does not mean that Inyo County residents have no remedy should their rates be unreasonably established by Los Angeles. Customers under a

municipal system are protected from a municipal district's possible arbitrary treatment of them through Superior Court review while customers of a private utility may appeal to the Commission (D.68010, California-Pacific Utilities Company and the City of Napa (1964) 63 PUC, 439), and ultimately the California Supreme Court.

The second question presented for decision is whether or not Section 851^{5/} or any other section of the PU Code renders the transfers of the water supply systems of the communities of Big Pine, Lone Pine, Independence, and Laws to LA City without Commission approval as void.

In its complaint, the complainant contends that the defendant has never sought the consent or approval of this Commission in its acquisition of the four water systems mentioned herein. It cites present Constitution Article XII, Section 3, supra, and implementing legislation thereunder as requiring the defendant in its acquisition and operation of the four water systems to submit to the authority and control

5/ PU Code Section 851:

"No public utility other than a common carrier...shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its...plant, 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 so to do. Every such sale, ...other than in accordance with the order of the commission authorizing it is void. . . .

"Nothing in this section shall prevent the sale, ...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, ...dealing with such property in good faith for value; ..."

of this Commission and cites Section 851 as authority for requiring the defendant to seek the approval of this Commission for its acquisition of the four water systems. As we stated previously, California Constitution, Article XI, Section 9, grants a municipal corporation the authority to establish, purchase, and operate public works to furnish the inhabitants within its boundaries and also to inhabitants outside its boundary with water. ✓

Section 851 is directed toward those privately owned public utilities over whom the Commission exercises jurisdiction, control, and regulation. Although the complaint alleges that the defendant failed to seek or attain Commission consent for the transfers of the water systems to the defendant, which is not denied, there is likewise no evidence that the sellers sought or received approval from this Commission for their transfers of the water systems to the defendant. In the case of those transferors who were privately owned public utilities and sold their water systems to the defendant, it appears that such sales to the defendant are void under Section 851 unless exempt under some other applicable code provision. Section 851 deals, in part, with the sale, lease, assignment, mortgage, or other disposal of or encumbrance of the whole or any part of its plant, system, or other property necessary or useful in the performance of its duties to the public.

PU Code Section 852 deals with the transfer or acquisition of stock in a public utility.^{6/} An examination of each transfer of the water systems involved herein reveals factually different circumstances whereby acquisition by the defendant was achieved. The acquisitions were achieved partly by direct sale and purchase, partly by stock acquisition, and partly by condemnation proceedings as will be discussed separately below.

The acquisition of the four water systems is tied historically as well as emotionally to the acquisition of the land and water rights in the Owens Valley by LA City from around 1905 to the 1930's. Initially, LA City acquired most of the privately owned ranches in the Owens Valley in order to obtain riparian rights to the sources of water which was to be carried to the city of Los Angeles via the Los Angeles aqueduct.

In the late 1920's the town residents of Bishop, Laws, Big Pine, Lone Pine, and Independence, believing the economy of the towns had been damaged by the LA City's ranch purchases in the Owens Valley, requested that LA City purchase the town properties as well. In response to these requests,

6/ PU Code Section 852:

"No public utility shall purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this State, without having been first authorized to do so by the commission. Every assignment, transfer, contract, or agreement for assignment or transfer of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility. Nothing herein contained shall prevent the holding of stock heretofore lawfully acquired. (Former Sec. 51(b).)"

LA City began a program of purchasing town property in those communities which eventually resulted in LA City acquiring 80 to 90 percent of all town residential and commercial properties.

In the 1930's, LA City acquired approximately 40 percent of the stock of the Independence Water Company along with its purchases of town properties in Independence. Although Commission approval was not obtained for these stock transfers, the Commission was aware in D.78385 dated March 2, 1971 that LA City was the second largest shareholder among the 11 shareholders in the company. Likewise, in D.34636 dated September 30, 1941, the Commission recognized LA City as holding approximately 40 percent of all outstanding shares in the company. In 1972 the remaining 60 percent interest in the company was acquired by the defendant by way of a stipulated judgment in condemnation under the power of eminent domain with final judgment entered on June 8, 1972. Under the power of eminent domain, inherent in government and regulated solely by the Legislature, a city may by condemnation take property already appropriated to a public use if the public use to which it is applied is a more necessary use. (People ex rel. Public Utilities Commission v City of Fresno (1967) 254 CA 2d 76.)

Neither Sections 851 or 852, requiring approval by the Commission of the disposition by a public utility of its property by sale, etc., or the acquisition of any part of the capital stock of a public utility by another public utility, regulates the otherwise unrestricted power of a city to condemn public utility property under Code of Civil Procedure Section 1241, by requiring the consent of the Commission before

the Superior Court may enter a final judgment of condemnation. The specific provisions of Code of Civil Procedure Section 1241 control the general provisions of Sections 851 or 852 and dispel any ambiguity or uncertainty in the latter sections which might otherwise give rise, through a very weak influence, to an interpretation requiring Commission approval of eminent domain proceedings. (People ex rel. Public Utilities Commission v City of Fresno, supra.) With respect to the earlier 40 percent stock acquisition by LA City, it appears that Section 851 is not applicable since it relates to the sale, etc., of public utility property rather than to stock transfers. An examination of Section 852, however, indicates that it is applicable to the purchase, acquisition, taking or holding, assignment, transfer, contract or agreement, or transfer of any capital stock by one public utility of any other public utility which, without Public Utilities Commission authorization, is void and of no effect. Unlike the wording in Section 851 which places a requirement upon a public utility selling, leasing, etc., the whole or any part of its plant to first secure an order from this Commission authorizing it to do so, and which was found to be applicable to a "sale" by a public utility to a political subdivision in Brookdale Land Co. v County of Santa Cruz (1916) 9 CRC 307, Section 852 appears to be applicable only to the purchase or acquisition of capital stock of a privately owned public utility by another privately owned public utility. The Court in People ex rel. Public Utilities Commission v City of Fresno, supra, construed the language "no public utility" to mean "no private company or individual." Thus, it is concluded that the defendant's acquisition of the 40 percent interest in the Independence

Water Company does not fall under Commission jurisdiction pursuant to Section 852. The remaining 60 percent interest acquired by the defendant in 1972 was acquired through condemnation at the request of the Inyo County Health Department because of water quality problems affecting the public's health and because of the company's serious financial difficulties. In D.78385 we discussed the problems confronting the Independence Water Company and its water system and we urged the utility to vigorously pursue efforts to interest the (Los Angeles) Department of Water and Power to take over the system in the best interests of the water users.

Section 854, which was added to the PU Code by the Statutes of 1971, Chapter 1373, relates to the acquisition or control of a public utility after the effective date of such section and voids any such acquisitions or control without Commission approval. In view of our previous discussion on the construction and meaning of the phrase "no person or corporation," we hold that Section 854 is not applicable in this instance since the controlling interest was obtained by condemnation and is valid under the power of eminent domain without Commission approval.

The acquisition of the Big Pine domestic water system in 1934 occurred in connection with the purchases of the town properties and was obtained partly through the acquisition of stock from the owners of the town properties purchased and partly by direct purchase from the Big Pine Building and Improvement Association (Association). Aside from the allegation contained in the complaint, as amended, there was no evidence or offers of proof introduced at the hearing to indicate that the Association was a public utility

subject to the jurisdiction of the Public Utilities Commission. The records of the Commission, which go as far back as the implementation of the Public Utilities Act in 1912, are void of any dealings between the Association and the Commission which, although not highly probative, raise some doubt as to whether the Association was a public utility subject to the jurisdiction of the Commission. Assuming for the sake of discussion that it was, only PU Code Section 851 is applicable to the transfer since the acquisition of stock by the defendant does not fall within the provisions of Section 852 for the same reasons as discussed previously with respect to the stock acquisition of the Independence Water Company. Thus, in the absence of Commission authorization, is the direct sale portion of the water system by the Association to the defendant void?

Two statutes, Sections 851 and 853 of the PU Code, are applicable together and in the alternative to determine whether the 1934 sale of the Big Pine water system to the defendant is void, with ownership reverting to Big Pine's original owners.

Section 851 (Section 3 of Stats. 1951, Ch. 402) provides in part:

"Any sale...made by any public utility of its property to a purchaser...dealing with such property in good faith for value shall be conclusively presumed to have been of property which is not useful or necessary in the performance of such public utility's duty to the public and such past transactions are hereby confirmed, validated and declared legally effective..." (Emphasis added.)

Here, over forty years have elapsed since the acquisition. In that time no party has contended before this Commission that the defendant was not a good faith purchaser for value. The complainant alludes to no direct evidence it could present to show the defendant was not a good faith purchaser for value. Further, after such

passage of time, probative evidence on the good faith intentions of parties involved in the transaction forty years ago would be scarce indeed. ~~The time logically comes when exhaustively looking back at what could have, would have, and might have occurred is not in the public interest. We observe that this time has probably come with respect to the defendant's purchase of the Big Pine water system.~~ While the passage of time and ensuing reliance does not absolve all alleged regulatory transgressions, given the passage of time, years of reliance by Owens Valley inhabitants and the defendant, and the lack of any offered evidence to the contrary (Tr. 22), we find that the defendant was a good faith purchaser for value. Accordingly, the purchase (assuming Big Pine was a public utility) by the defendant is validated and legally effective pursuant to Section 851. We trust this finding puts to rest a long dormant and apparently unsupportable contention, and that the parties herein will pursue a more constructive course to resolve differences. In the alternative, we will proceed to apply Section 853 to the facts presented herein by the complainant.

We have previously held that where a purported transfer of a system without prior Commission approval is void under Section 851, the Commission under PU Code Section 853^{7/}

7/ PU Code Section 853:

" . . . 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. (Former Sec. 51(c).)"

has power in its discretion to take whichever of the following actions it determines is in the public interest, namely:

- (1) under Section 851 permit the transfer to remain void;
- (2) under Section 853, exempt the transfer from the provisions of Section 851, under appropriate terms and conditions; or
- (3) under Section 853, exempt the transfer from the provisions of Section 851, without restrictive terms and conditions.

(Erwin, In re (1967) 67 CPUC 254.) Likewise, we held in Golconda Utilities Co. In re (1968) 68 CPUC 296 that although ordinarily a purported transfer of public utility property without prior authorization is void, the Commission has the discretion, where public interest so requires, to exempt the transaction otherwise void.

Under the assumption posed above, we conclude that it would be in the public interest to exempt the transfer of the Big Pine water system to the defendant under PU Code Section 853 without any retroactive restrictive terms or conditions. Approximately 44 years has elapsed since the Big Pine water system was acquired. To void the sale until the former owners could be located and be required to seek approval from the Commission for the sale after the passage of so long a period of time, would be impractical. To require the defendant to apply to this Commission for its consent would be merely pro forma inasmuch as they have been operating the Big Pine water system and furnishing water to the inhabitants of that community for so many years. The complainant concedes that the defendant would no doubt receive the consent and approval of the Commission were it required to apply for the Commission's approval. Furthermore, the complainant did not assert, in its complaint, oral argument or brief that it had evidence to present that would demonstrate the transfer was not in the public interest or that the defendant acted in bad faith (see Tr. 22). We see no need under the circumstances to go through what is very apparently an idle motion. There

has been no evidence to date (and the complainant does not allege that it has any to present), to indicate that the defendant failed in any way to assume the public utility obligations and responsibilities previously imposed on the prior owners of the Big Pine water system, that it failed to extend water service to the residents in the area, or that its acquisition of the system was adverse to the public interest.

In 1967 the Lone Pine Community Services District (District) was formed and acquired the Lone Pine Water Company through condemnation proceedings under the power of eminent domain. The District, a public entity, thereafter offered the water system to the defendant who accepted the terms and subsequently purchased it. The complainant alleges that the Lone Pine Water Company was, at the time of its acquisition, a public utility subject to the jurisdiction of this Commission and concedes that it was acquired by the defendant through the District (emphasis added). The defendant contends that the District was not a public utility as defined in PU Code Section 216(a) and that the sale to the defendant was a transfer between two public entities and not subject to Commission jurisdiction. An examination of the agreement contained in Exhibit 1 attached to the defendant's Demurrer and Motion to Dismiss lends support to the defendant's position. It appearing to the Commission that the District was a public entity formed under Parts 1 and 2, Division 3, Title 6, of the Government Code, we conclude that it was not a public utility subject to the jurisdiction of the Commission at the time of its sale of the water company to the defendant and thus not subject to review under Section 851 of the PU Code.

The earlier acquisition of the water company by the District through condemnation proceedings did not require Commission approval.

The complaint alleges that the defendant acquired the Laws water system from party or parties unknown and at a time unknown. In a declaration attached as an exhibit to its Demurrer and Motion to Dismiss, the defendant contends that the Laws system does not appear to have ever been formally organized as any type of water company and that water was supplied by the defendant to the few remaining people in Laws when it acquired the property containing the well from which they had previously taken water for domestic purposes. In that the allegation in the complaint concerning the acquisition of the Laws water system by the defendant is vague and lacks sufficient information upon which to make any determination, it is our opinion that the matter with respect to the Laws water system be dismissed.

Findings of Fact

1. The complainant is a political entity charged with the responsibility of protecting the health, safety, and welfare of the residents within its geographical boundaries.
2. The complainant is also a consumer of water supplied by the defendant.
3. The defendant is a public utility, municipally owned and operated by LA City.
4. The defendant holds title to extensive areas of land within the complainant's geographical boundaries from which it extracts great quantities of water for export to the defendant's service area in and adjacent to the city of Los Angeles.

5. The defendant owns and operates the water systems which furnish water to the four unincorporated communities of Big Pine, Independence, Lone Pine, and Laws within the complainant's geographical boundaries.

6. The defendant acquired the Big Pine water system and 40 percent of the stock of the Independence Water Company in 1934 in conjunction with the purchases of town properties.

7. The defendant acquired the Lone Pine water system from the District in 1967.

8. The District was a public entity rather than a privately owned public utility at the time of the sale of the Lone Pine water system to the defendant.

9. The defendant acquired the remaining 60 percent of stock of the Independence Water Company in 1967 by a stipulated judgment in condemnation under the power of eminent domain.

10. The Laws water system was acquired by the defendant at a time unknown and from a person or persons unknown.

11. The defendant is not a "private corporation" or "person" as defined in Section 241 of the PU Code.

12. The defendant is not a member of the classes of public utilities to be regulated by the Commission as defined in Division 1, Parts 1 and 2, Chapters 1 and 2, of the PU Code.

13. Section 851 of the PU Code voids any sale where a public utility sells any part of its plant, system, other property necessary or useful in the performance of its duties to the public without having first secured an order from the Commission authorizing it to do so.

14. Section 851 of the PU Code refers to those sales made by privately owned public utilities.

15. Neither Section 851 nor Section 852 of the PU Code is applicable to the stock purchases made by the defendant in the Big Pine Building and Improvement Association or the Independence Water Company.

16. Given the passage of time without its being alleged before the Commission that the defendant was not a good faith purchaser for value of the Big Pine water system, the passage of time since the transaction in 1934, and the lack of any offer of evidence to the contrary by the complainant, we find that the defendant was a good faith purchaser of the Big Pine water system.

17. It is in the public interest to exempt the acquisition of the Big Pine water system by the defendant from Section 851, under authority of Section 853, because affected parties have relied for approximately 44 years on the existing operating management; and further, no party asserts that it has evidence to present that could demonstrate the transfer was not in the public interest.

Conclusions

1. The jurisdiction of the Commission is set forth in Article XII of the California Constitution and Divisions 1 and 2 of the PU Code.

2. The Legislature is granted plenary powers under Article XII, Sections 3 and 5, of the California Constitution, and may confer additional jurisdiction upon the Commission.

3. The Legislature's failure to include municipal public utilities within the classes of public utilities to be regulated by the Commission in Divisions 1 and 2 of the PU Code is deemed to have been so intended by the Legislature.

4. The Commission has no jurisdiction over municipally owned utilities unless expressly provided by statute.

5. The Commission has jurisdiction to regulate all privately owned public utilities and those publicly owned utilities over which it has specifically been granted jurisdiction by the Legislature.

6. The defendant's purchase of the Big Pine water system in 1934 is not void because the defendant was a good faith purchaser for value, and the transaction is validated and legally effective pursuant to Section 851.

7. In the alternative (to above Conclusion 6), the acquisition of the Big Pine water system by the defendant is deemed to have been in the public interest and should be exempt from the provisions of Section 851 under the authority contained in Section 853 of the PU Code.

8. The acquisition of the remaining 60 percent of the stock in the Independence Water Company was acquired from a public entity and did not require approval of the Commission under the provisions of Section 851 of the PU Code.

9. The allegation relating to the acquisition of the Laws water system is vague and lacks sufficient information upon which to make a determination and should thus be dismissed.

10. The defendant is a municipal corporation whose operation of the water systems of Big Pine, Lone Pine, Independence, and Laws does not fall within the jurisdiction of the PU Code.

O R D E R

IT IS ORDERED that the complaint of the complainant is dismissed for lack of Commission jurisdiction over the defendant.

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

Dated at San Francisco, California, this 31st day of OCTOBER, 1978.

I abstain
William Symons Jr.

Robert B. ...
President

Verizon L. Sturgen
Clayton D. ...
Clair T. ...
Commissioners