EX-7

L/bh

Decision No. 93033

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the suspension and investigation on the Commission's own motion of tariff filed by Advice Letter No. 29 of Bakman Water Company.	)))))	Case No. 10524 (Filed March 21, 1978)

ORDER DISMISSING THE PETITION FOR REHEARING OF DECISION NO. 92606

Since we issued our order in Decision No. 92606, it has come to our attention that Westcal, Inc., has withdrawn its request that the Bakman Water Company serve Westcal's proposed development in the city of Fresno.

The fact that Westcal, Inc., has withdrawn its request to be served by the Bakman Water Company has rendered these proceedings moot. Therefore,

IT IS HEREBY ORDERED that the petition for rehearing of Decision No. 92606 filed by the city of Fresno is dismissed.

IT IS FURTHER ORDERED that Bakman Water Company's Advice Letter No. 29 is rejected.

The effective date of this order is the date hereof.

Dated MAY 5 1981, at San Francisco, California.

President

Commissioners

ALJ/ks

Decision No. 92606 January 21, 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the suspension and investigation on the Commission's own motion of tariff filed by Advice Letter No. 29 of Bakman Water Company.	Case No. 10524 (Filed March 21, 1978)

William G. Fleckles, Attorney at Law, for Bakman Water Company, respondent.
James A. McKelvey, City Attorney, by Wayne N. Witchez and Dale Ikeda, Attorneys at Law, for City of Fresno, protestant.
Floyd K. Anderson, for Fresno County Waterworks District 26; and Robert K. Hillison, Attorney at Law, and Paul E. Winter, for Westcal, Inc.; interested parties.

O P I N I O N

Respondent Bakman Water Company (Bakman) is a public utility water company serving approximately 1,400 customers within and adjacent to the eastern city limits of the city of Fresno (Fresno). Westcal, Inc. (Westcal) builds tract homes in the Fresno area. It is in the process of developing a residential subdivision on a 140-acre parcel, located southwest of the intersection of Belmont and Fowler Avenues on the east side of Fresno. The Westcal tract is not within Bakman's service area. It is, however, contiguous to Bakman's service area. In January of 1978, Bakman and Westcal agreed that Bakman should extend its plant to provide water service to the new subdivision. On February 17, 1978, Bakman filed its Advice Letter No. 29[1/] thereby proposing

1/ Under Section 1001 of the Public Utilities Code no certificate of public convenience and necessity is required when a utility extends into contiguous unoccupied territory. Hence, no formal application was required.

tariff changes to expand Bakman's service area to include Westcal's parcel. As required by General Order No. 96-A, Bakman provided copies of the advice letter to Fresno County Waterworks District No. 26 (District) and the Fresno County Local Agency Formation Commission (LAFCO).

On February 22, 1978 LAFCO adopted a resolution protesting the advice letter. At that time, LAFCO was considering a request that the parcel in question be annexed by Fresno. The resolution indicated that LAFCO was considering both District's and Fresno's municipal water systems as potential water suppliers for the tract. A similar resolution was passed and submitted by the Board of Supervisors of Fresno County (acting as the governing body of District) on February 28, 1978.

On March 7, 1978 Fresno protested the advice letter on the following grounds:

> "1. The subject extension area is within the City's sphere of influence and by virtue of Council approval of Urban Growth Management Application No. 040 (Feb. 14, 1978) is to be served upon development, by an extension of the City's water system.
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> "2. If the area included in the City's proposed Belmont-Fowler No. 3 District Reorganization is approved by LAFCO, but conditioned upon District No. 26 water service, that water service designation would be more reasonable and feasible than the proposal included in Advice Letter No. 29."

On March 29, 1978 this Commission suspended the advice letter filing and instituted this proceeding.

On May 22, 1978 LAFCO passed its Resolution No. RO-77-37 which approved the annexation of the tract by Fresno, but did not select any of the three potential water suppliers. Subsequently, on June 30, 1978 LAFCO informed this Commission that it had

reconsidered that decision and had again determined not to designate a water purveyor. LAFCO thereupon withdrew its protest to Bakman's service area extension.

Having secured annexation approval by LAFCO, Fresno initiated formal annexation proceedings on May 30, 1978; the tract became part of Fresno on July 11, 1978.

Duly noticed public hearing in this case was originally held before Administrative Law Judge Wright on July 13, 1978, the matter being submitted for decision on September 25, 1978. Fresno was the only party to appear in protest. As a result of those hearings the Commission issued Interim Decision No. 90313.

The Commission summarized Decision No. 90313 as follows:

> "We have concluded that Bakman should be allowed to proceed to extend its service area to include the Belmont-Fowler tract. And, in doing so, we have resolved the three issues in this case in favor of Bakman. These are:
>
> "1. Must the Commission accept as a fact that Fresno will deny Bakman's application for a municipal franchise prior to official action by the municipality upon an application for such franchise by Bakman? Answer: No.
>
> "2. Do the water supply water requirements of Fresno which are more stringent than those adopted by the Commission apply to the extension of the Bakman service area? Answer: No.
>
> "3. Does public convenience and necessity justify the lifting of the Commission's suspension of Advice Letter No. 29? Answer: Yes on condition."

The condition required that Bakman must obtain a franchise from Fresno. As justification for imposing this condition, the

Commission relied on Section 1003,[2/] which permitted a similar condition to be attached to a certificate of public convenience and necessity.

The decision also stated:

> "We reserve our opinion as to whether a municipality serving water to its residents in competition with other public and private entities can deny a franchise to a public utility under this Commission's jurisdiction which has established in public hearings that it can better serve a particular proposed development than can the local water purveyor.
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> "We do not accept as a fact that Fresno will deny an application to it by Bakman for a municipal franchise. We assume, rather, that Fresno will consider such request when made by Bakman, upon consideration germane to the application." (Mimeo. pp. 7 and 8.)

Since that decision was issued there have been several changes in circumstances which require us to reconsider our previous resolution of the issues.

In the first place, the Legislature has recently repealed Sections 1002 and 1003. Secondly, Fresno has heard and denied applicant's franchise application. It has also adopted a new franchise ordinance. Also, the Commission's Water Main Extension Rule is now being actively reconsidered in Case No. 9902, Inv., Revisions of Uniform Main Extension Rules. One of the alternatives being considered would require the developer of a subdivision such as this to contribute in-tract facilities. If

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2/ All statute citations are to the Public Utilities Code unless otherwise noted. Section 1003 reads as follows: "If a public utility desires to exercise a right or privilege under a franchise or permit which it contemplates securing, but which has not as yet been granted to it, such public utility may apply to the commission for an order preliminary to the issue of the certificate. The commission may thereupon make an order declaring that it will, upon application, under such rules as it prescribes, issue the desired certificate upon such terms and conditions as it designates, after the public utility has obtained the contemplated franchise or permit. Upon the presentation to the commission of evidence satisfactory to it that the franchise or permit has been secured by the public utility, the commission shall issue the certificate (Former Sec. 50(c), last 3 sents.)"

the Commission were to adopt this alternative it could reduce or eliminate one of the principal differences between public and private service relied on in our prior decision.[3/]

The time within which Fresno could have sought rehearing or review of Decision No. 90313 has long since expired. However, in response to pleadings by Bakman and Fresno the Commission held a second hearing in Fresno before ALJ Gilman on January 17, 1980. The hearing was intended to determine whether and in what manner a final opinion should be issued.

All three parties were offered an opportunity to present evidence (cf. Section 1708) particularly with regard to construction plans and fire insurance ratings. The only further evidence received was a transcript of the City Council proceedings on Bakman's franchise application and a LAFCO resolution. A resolution of the City Council conditionally approving Westcal's tentative subdivision map was offered but not received as a late-filed exhibit since no permission was requested prior to submission.

Subsequent to the second submission of this matter Fresno filed with us an application to fix the just compensation for the taking of Bakman's existing plant (Application No. 59775 filed June 30, 1980).

Position of the Parties

Bakman claims that Fresno was bound by the Commission's prior decision and could not collaterally attack adverse findings by refusing to issue a franchise. It also argues that Fresno's power to deny

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3/ If plant is contributed rather than constructed under the present main extension rule, this fact may affect the way in which the utility plant is assessed. Many local assessors do not consider the value of contributed plant in evaluating water utility plant.

a franchise has been waived. It concludes, therefore, that the Commission must declare that no franchise is required, and accept the service area extension.

Westcal informed us that its project is now close to realization and that any substantial delay in deciding which utility should serve will be intolerable. It still prefers to deal with Bakman.

Fresno seeks either to have Bakman's service area extension finally rejected or to have the condition made permanent. It claims that we should ratify Fresno's policy that the only new water utility plant within the Fresno city limits should be constructed, owned, and operated by Fresno. While Fresno would prefer a final order, it would also be satisfied to have the interim order remain in effect indefinitely.

Fresno makes it plain that it will not issue a franchise to Bakman regardless of the outcome of this proceeding. It is confident that it cannot be compelled to issue a franchise and that Bakman cannot lawfully extend within city limits without a franchise.

Fresno claims that its charter, by authorizing it to issue franchises, confers upon the city authority to regulate construction and extension, rates, service, and financing of any privately owned utility or carrier which serves the public within Fresno city limits. It has adopted an ordinance which purports to deny any such enterprise the right to institute or extend service in Fresno unless it submits to whatever regulations Fresno chooses to impose. This local power is assertedly superior to, and would supersede any statewide regulation of such businesses regardless of whether the affected business also serves unincorporated territory or even other cities.

Fresno's Jurisdictional Claims

Section 1300 of the Fresno City Charter provides:

"Any person, firm or corporation furnishing the City or its inhabitants with transportation, communication, terminal facilities, water, light, heat, electricity, gas, power, refrigeration, storage or any other public utility or service, or using the public streets, ways, alleys or places for operation of plants, works or equipment for the furnishing thereof, or traversing any portion of the City for the transmitting or conveying of any such service elsewhere, may be required by ordinance to have a valid and existing franchise therefor. The Council is empowered to grant such franchise to any person, firm, corporation, whether operating under an existing franchise or not, and to prescribe the terms and conditions of any such grant. It may also provide, by procedural ordinance, the method of procedure and additional terms and conditions of such grants, or the making thereof, all subject to the provisions of this Charter.

"Nothing in this section, or elsewhere in this article, shall apply to the City, or to any department thereof, when furnishing any such utility or service."

Fresno's franchise ordinance adopted subsequent to Decision No. 90313, includes the following definition:

> "'Utility' means transportation, communication, terminal facilities, water, light, heat, electricity, gas, power, refrigeration, storage or any other public utility or service, or using the public streets, ways, alleys or places for operation of plants, works or equipment for the furnishing thereof, or traversing any portion of the city for the transmitting or conveying of any service thereof, except utilities otherwise regulated by this Code; to construct, operate, and maintain a utility within all or a specified area in the city.
> "'Service Area' means the territory within the city throughout which grantee shall be authorized hereunder to construct, maintain, and operate its system and shall include any enlargements thereof and additions thereto."

The ordinance provides that:

> "A nonexclusive franchise to install, construct, operate, and maintain a new utility or to enlarge the service area of an existing utility within all or a specific portion of the city may be granted by the Council to any person, whether operating under an existing franchise, or not, who offers to furnish and provide such utility service pursuant to the terms and provisions of this article. No provision of this article may be deemed or construed to require the granting of a franchise when in the opinion of the Council it is in the public interest to restrict the number of grantees or operate such service as a municipal utility."

It is a violation "to install, construct, operate or maintain any new utility or to enlarge the service area of an existing utility within all or a specific portion of the city" until a franchise is obtained.

The ordinance requires that a franchise applicant submit:

(a) A copy of the proposed subscriber's contract.

(b) Detailed information concerning its financial condition and relationships with subsidiaries or parent corporations.

(c) An indication that it specifically possesses the capital needed to complete the franchise project.

(d) Details of the operational plans.

(e) A service area map.

(f) A schedule of "proposed classification of rates and charges."

(g) A statement of operational standards proposed.

It can be inferred that Fresno will entertain competitive applications from two or more public service corporations and would award disputed territory to the one it feels best qualified. If there is only one such corporation, it apparently claims the power to prevent expansion if dissatisfied with any aspect of an applicant's performance or history.

A franchise may be terminated and forfeited if there is a violation "without just cause". Upon termination of the franchise for a violation[4/] Fresno employees may seize all of the plant and facilities (not merely those facilities serving Fresno residents).

After termination, the franchisee has a limited time to find a buyer for its "entire system". If it cannot sell, the franchisee may have to remove its entire plant from Fresno streets. If it does neither the property may be auctioned off or be expropriated by Fresno.[5/]

4/ Under the charter each franchise must be issued for a fixed term. The franchise ordinance makes no provisions for termination upon expiration of a franchise. We assume the process described above would apply to an expiration.

5/ The City Attorney claims that this is merely an exercise of the power of eminent domain. The document itself, however, does not indicate that an offending utility has any right to compensation either before or after it loses possession.

Thus the ordinance claims the power to review every aspect of a Commission-regulated utility's service, rates, and financing regardless of whether any of these characteristics has been approved or even required by order of this Commission.

Furthermore, Fresno asserts that it has the right to attach conditions to franchises giving its council the power to regulate governing rates, service, and financing. It also claims the power to determine whether a privately owned utility's service territory within Fresno will be exclusive or occupied in competition either with another privately owned or publicly owned operation.[6/]

Fresno's attorney argued that its franchise ordinance is based solely on Fresno's charter powers; hence, it contends that the statutory limitations of the Broughton Act (Section 6001 et seq.) or the Franchise Act of 1937 (Section 6201 et seq.) are inapplicable.

The Commission's Basic Jurisdiction Over Municipal Water Systems

The fundamental rule is that this Commission, as an administrative agency, has no jurisdiction to regulate the operations of a municipal utility, except where statutes confer such jurisdiction. (County of Inyo v PUC (1980) 26 Cal 3d 154.)

However, we also have nonstatutory in personam jurisdiction to decide factual questions concerning a municipal utility's service, in certain limited circumstances.

6/ Compare Sections 1501 et seq. which set forth a statewide policy for service paralleling.

Ventura Cty. v PUC (1964) 61 C 2d 462 compels us to resolve certain territorial disputes between publicly and privately owned utilities. When a utility regulated by this Commission proposes to serve new vacant territory, a publicly owned rival can, under the Ventura rule, claim the territory by asking that the Commission decide which would render better service to the potential customers. If we find in favor of the publicly owned utility, the Ventura doctrine contemplates that the Commission will refuse the regulated utility the authority to expand. The court's opinion does not specify what should happen if the Commission should find, as in this case, that it is the publicly owned utility which renders less satisfactory service.

That issue is partially resolved by statute and by other cases. While the Commission does not have general jurisdiction to restrain a city from extending,[7/] its findings on matters subject to its jurisdiction are final and binding on all parties to the litigation, including governmental agencies. (§§ 1708, 1731, and 1732; Union City v S.P. Co. (1968) 261 CA 2d 277; Pellandini v Pacific Limestone Products (1966) 245 CA 2d 774; cf. People v Superior Court (1965) 62 C 2d 515.)

Thus, a city which loses a Ventura-type proceeding is not at liberty to look for another tribunal which will retry the dispute and issue more favorable findings. It follows then that any findings issued by the Fresno City Council regarding the respective merits of public and private ownership in the tract are a legal nullity, if inconsistent with Decision No. 90313.

7/ The Commission has jurisdiction to control a city's construction of utility plant only when the conditions described in § 1001 occur:

> ". . . If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility or of the water system of a public agency, already constructed, the commission on complaint of the public utility or public agency claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable."

What is the Legal Effect of Decision No. 90313?

Decision No. 90313 made the findings required by the Ventura rule, i.e. that of the two rivals, Bakman would render better service. The decision did not, however, allow Bakman's tariff filing to go into effect. Rather the tariff proposed was indefinitely suspended to allow Fresno time to exercise its franchise authority. The decision concluded that the authority to impose such an indefinite suspension could be found in Section 1003.[8/] That section empowered the Commission to issue a conditional certificate of public convenience and necessity for a utility project which also needed a certificate. Under such a conditional certificate, the authority to construct would remain inoperative until the utility had secured the required city franchise.

Section 1003 was repealed by the Legislature in the 1979 session. This tariff filing is now governed by Section 455, which provides:

> "Whenever any schedule stating an individual or joint rate, classification, contract, practice, or rule, not increasing or resulting in an increase in any rate, is filed with the commission, it may, either upon complaint or upon its own initiative, at once and if it so orders without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, enter upon a hearing concerning the propriety of such rate, classification, contract, practice, or rule. Pending the hearing and the decision thereon such rate, classification, contract, practice or rule shall not go into effect. The period of suspension of such rate, classification, contract, practice, or rule

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8/ See FN 2, supra.

> shall not extend beyond 120 days beyond the time when it would otherwise go into effect unless the commission extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates, classifications, contracts, practices, or rules proposed, in whole or in part, or others in lieu thereof, which it finds to be just and reasonable.
>
> "All such rates, classifications, contracts, practices, or rules not so suspended shall become effective on the expiration of 30 days from the time of filing thereof with the commission or such lesser time as the commission may grant, subject to the power of the commission, after a hearing had on its own motion or upon complaint, to alter or modify them."9/

If Section 1003 had not been in effect at the time Decision No. 90313 was adopted, the Commission could not have imposed a condition suspending the tariff filing for more than 11 months after it was filed. Its subsequent repeal took away whatever power the Commission had to impose an indefinite suspension. In our opinion the loss of that authority converted Decision No. 90313 from an interim to a final decision.

Since that decision unequivocally found that Fresno's service was second best, it became a final decision approving Bakman's extension; the proposed tariff item is now therefore effective and governs the relationship between the utility and subdivider.

What Effect should be given to Bakman's Lack of a Franchise?

Utility and subdivider can claim the benefit of a final Commission decision and of a tariff under which the subdivider can demand that Bakman provide service to the Belmont-Fowler tract.

9/ It should be emphasized that this is not an application for a certificate of public convenience and necessity under § 1001. That section provides that a certificate is not needed for a plant extension within any city in which the utility has already commenced operations or into unserved territory contiguous to its plant. Rather it involves an expansion of service area (§ 2709); since service area statements are incorporated in tariffs, §§ 455 and 489-491 are applicable to any proposed expansion.

The city, on the other hand, can only rely on a decision of the City Council which is doubly void.[10/] First it is either a collateral attack on or an attempt to reverse or review Decision No. 90313; the Legislature has exercised its constitutional (Article XII, § 5) plenary power to prohibit collateral attacks altogether (§ 1709) and to allow only the Supreme Court the power to review Commission decisions (§ 1759). Furthermore, even if there had been no prior Commission decision, the council decision would have been void. No city council has jurisdiction to consider or decide a Ventura-type dispute between its own utility operation and that of a regulated utility. The Legislature, using its plenary power, has given this Commission the exclusive power to establish water utility service areas and to approve the tariffs of privately owned utilities (§§ 486-495, 1001-1006, and 2709). A city has no power to prevent a state-regulated utility from commencing its business or extending its plant to additional city residents. (PT&T Co. v Los Angeles (1955) 44 C 2d 272; Bay Cities Transit v Los Angeles (1940) 16 C 2d 772.) The construction, design, operation, and maintenance of water utilities is a matter of purely statewide concern. (Cal. Wtr. & Tel. Co. v County of Los Angeles (1967) 253 CA 2d 16.) When the Legislature has given the Commission power to regulate a utility function, that power may supersede a city's control of its own streets. If a conflict occurs the city must "conform to the orders of the Commission so as to avoid such interference". (Northwestern Pacific Ry. Co. v Superior Court (1949) 34 C 2d 454 at 457.)

10/ This Commission has the authority to consider whether a local ordinance and a local decision implementing such an ordinance are void because of conflict with the Code or Commission decisions App. of Southern Pacific Co. (1974) 76 CPUC 736; rev. den. S.F. Nos. 23191 and 23192; Woodside v PG&E (1978) 83 CPUC 418.

Even when a city has the general power to regulate an activity normally conducted by both utilities and nonutilities, that power cannot be exercised to prevent a utility from commencing a state-authorized operation. (Harbor Carriers, Inc. v Sausalito (1975) 46 CA 3d 773.) While that case involved an attempt to use the zoning power to prevent a carrier from instituting a certificated operation, the same principle applies to an exercise of a city's franchise power to control the use of city streets for purposes other than vehicular traffic. Article XII, Section 8 preserves the municipal power for franchise utilities "on terms, conditions and in the manner prescribed by law". An attempt to use the franchise as a second certificate of public convenience and necessity is not a use of the power in the manner prescribed by law; the franchise power cannot govern any topic already governed by statewide law.

The city has stated that if Bakman reapplies for a franchise, the council will again issue another void decision for the purpose of preventing Bakman and Westcal from exercising the rights they have now perfected under the Code. If possible, we should find a way to break this impasse without creating unnecessary delay or litigation. We will therefore order Bakman to ignore the void city decisions. It is necessary, of course, to ensure that this step does not interfere with valid local interests regarding the use of city streets. Consequently, we have adopted orders which will, generally speaking, require Bakman to extend its mains as if a franchise had been issued with normal or customary conditions.[11/]

11/ The city has not introduced sufficient evidence to support orders regarding problems peculiar to the Fresno area. For example, Fresno claimed that the utility serving the tract should contribute to its program to recharge the local aquifer. We could have entertained a proposal that Bakman should have such a responsibility. However, the city made no such request, and there is insufficient evidence to support such an order on our own motion.

Should We Consider the City's Claim That It can Control Bakman's Rates, Service, Financing, and Establish Provisions for Public Acquisition of Utility Plant?

This decision may not end the dispute between Fresno and Bakman. The Public Utilities Code provides only one method to review our conclusions on the jurisdictional issues. (§§ 1731 et seq. and §§ 1756 et seq.) If the city were to employ certain alternate means of asserting its claim to serve the Belmont-Fowler tract or of demonstrating its power to regulate utility service, there could be adverse circumstances to Bakman's present and potential customers.

If the city were to insist that construction pursuant to this order was in violation of its franchise ordinance, it might demand a forced sale of utility plant, apparently without regard for the new utility's qualifications. If the utility could not quickly find a successor which would pay it a fair price, the city could attempt to seize the utility and possibly to auction it off to the highest bidder. Even more serious, the city claims the power to oust a utility's existing mains or lines from the city streets. In some circumstances this could leave customers without necessary services for many months; in almost any circumstance, the result would be intolerable economic waste. Such economic waste is against public policy (cf. § 1501). If the city were to institute any of those methods of enforcing its ordinance, most likely the result would be expensive and delay-producing litigation.

The city could also pursue its objective by issuing a franchise containing a condition which no responsible state-regulated utility could accept. For example, a condition giving the city the power to veto proposed utility financing would almost certainly have adverse effects on Bakman's customers, including those who live outside the city. Our experience teaches us that even a few day's regulatory lag in such matters can cost consumers heavily. Furthermore, conflict between two regulators could well prevent a utility from obtaining any financing until a final court judgment disentangles the question.

A prudent utility would also avoid the possibility of conflicting rate or service orders. Rate issues are particularly difficult. Careless or dilatory ratemaking law can adversely affect both service and financing.[12/] Conflicting service reqirements could force a utility to design its plant to meet both regulators' standards, possibly producing economic waste.

Here again, almost any conflict between state and local rates or service orders can produce litigation at both trial and appellate levels.

We are confident that the city's jurisdictional theories would be rejected by a trial court, by a district court of appeal, and ultimately by the California Supreme Court. However, neither utility customers nor taxpayers should have to foot the bill for such pointless litigation. Furthermore, the subdivider should not have to wait until all of the judgments are final before he learns who will lay the mains to serve his tract. Nor should we tolerate any situation which unnecessarily increases the risks imposed on a utility. Our experience teaches that sooner or later customers pay for most of the risks of any utility operation. We will therefore adopt conclusions and orders on these jurisdictional claims

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12/ There was at one time a substantial public debate whether to retain local rate regulation for some utilities whose service and financing were regulated by this Commission. That debate ended with a conclusive victory for unitary regulation, when the electorate adopted the 1914 amendment to Article XII. That amendment deleted rates from the list of topics which could be regulated by cities with pre-1912 charters.

rather than leaving them to be dealt with in future litigation. This is a further exercise of the powers described in S.P. Co., supra.[13/]

We recognize that Fresno has the ultimate right to test all of its jurisdictional claims in a court. Because we have considered all of these claims, it will have the opportunity to present them all directly to the Supreme Court without having to spend taxpayers' money on proceedings at the trial and appellate level. Further, they can all be presented simultaneously. The parties will thus be able to avoid piecemeal litigation and possibly inconsistent judgments. Thus extending our decision to cover these additional regulatory functions is the only way we can find to give the parties (and the public they all claim to represent) an opportunity for a quick, complete, and inexpensive means of resolving the jurisdictional problem.

We can find no basis for concluding that the city can use the franchise power to create a system of local utility regulation.

Since rates,[14/] service,[15/] financing,[16/] and public acquisition[17/] are each subject to an integrated statewide regulatory scheme, we have concluded that a local franchise cannot directly or

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13/ The Federal Communications Commission recently adopted a similar course of action. It had found that a state regulation conflicted with its own policies on interconnection. The American Telephone and Telegraph Company argued that the FCC should not consider questions concerning the scope of state jurisdiction; rather, AT&T urged, such matters should be considered only in a federal court. The Commission rejected that advice. Instead it declared the state regulation void, so that the issue could be resolved immediately and completely. (FCC Dkt. 80-519, Memorandum Opinion issued September 10, 1980.)

14/ §§ 451, 453, 454, 454.5, 456, 457, 728, and 729.

15/ §§ 761, 762, 767, 768, and 770.

16/ §§ 816 et seq.

17/ Cf. §§ 851 et seq.; § 1005 authorizes the Commission to adopt:

> "...provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder and all works constructed or maintained by authority thereof, as in its judgment the public convenience and necessity require;..."

indirectly provide for city regulation of those topics (Cal. Const. Art. XII, § 8: PUC Code § 1011). We have therefore concluded that the city's franchise ordinance is void insofar as it purports to provide for such regulation. We have also ordered Bakman not to accept any franchise which includes conditions purporting to effect such matters. This is intended to forestall any future argument that the utility or the public it serves has waived the right to challenge the city's power to control such matters.

Affected Parties

Telephone, gas, and electric utilities now operating in or near Fresno are directly affected by the city's claim that it can regulate their utility operations. Copies of this decision will therefore be served on each such utility as well as on local water utilities.

The effect on state or nationally regulated carriers is possibly somewhat more remote. The Executive Director will transmit copies of this decision to associations most likely to represent such carriers on an industrywide basis and also on the League of California Cities. If Fresno elects to petition for rehearing, it will be expected to serve copies on the organizations and utilities selected by the Executive Director. Potentially affected utilities and carriers should have the opportunity to be heard before any decision on rehearing is issued.

The Evidence

No additional evidence relating to the comparative merits of city service was introduced during the second hearing. Therefore no additional findings on that issue are appropriate.

Insofar as previous Finding of Fact 7 declares that a franchise is necessary, it is both a conclusion of law and an incorrect statement of the legal effect of the city's franchise ordinance. It is rescinded. Except for that change, the findings of Decision No. 90313 may stand. There is not likely to be any controversy over the substitute Finding of Fact 7 we have adopted.

Substitute Finding of Fact

7a. Only After Fresno becomes the owner of Bakman's property will it commence construction of the plant necessary to serve Westcal's subdivision.

b. As Application No. 59775 is a litigated matter, it will not be concluded for some time, and Fresno will not become the owner of the Bakman system in the near-term future.

c. Westcal will be substantially injured by inability to receive water service without further delay.

d. Bakman should be authorized to commence construction as soon as this order is final.

Conclusions of Law

1. Decision No. 90313 is by operation of law now a final decision.

2. Bakman's service area now includes the Belmont-Fowler tract; Westcal now has an unconditional right to receive utility service pursuant to Bakman's tariff.

3. The Commission, after the repeal of Section 1003, had no authority to suspend Bakman's tariff filing for a period longer than that provided in Section 455.

4. The city's denial of franchise to Bakman was a collateral attack of the outcome of Decision No. 90313 and hence void insofar as it purports:

a. To impose franchise conditions regulating rates, service or service areas, and financing of public utilities;

b. To authorize or prohibit public utility construction or operations; or

c. To require that utility service be terminated or that utility plant be sold or auctioned off or expropriated.

O R D E R

IT IS ORDERED that:

1. Bakman Water Company (Bakman) shall not delay or defer construction activities to serve the Belmont-Fowler tract for the purpose of obtaining a franchise from Fresno; it shall continue to attempt to obtain a lawful franchise from Fresno until such construction is completed.

2. In planning and laying mains in Fresno city streets Bakman shall observe all precautions and requirements customarily observed by the Fresno city water department for the protection of other street users. It shall obey all existing orders of the city, whether contained in a franchise or not, which relate to this topic.

3. Bakman shall not accept any franchise which imposes any conditions regarding matters regulated by the Public Utilities Code or one which does not specifically waive the city's power to require removal, forced sale, or to seize or auction all used and useful utility plant, except as such conditions may subsequently become lawful by changes in general California law.

4. If Bakman is offered a franchise containing terms not relating to the protection of other street users or not specifically permitted by the Broughton Act or Franchise Act,

it shall serve a copy of the proposed franchise on the Executive Director; it shall not accept such franchise until twenty days after such service.

In order that Westcal Inc.'s tract may be completed without further delay, this order is effective on the date hereof.

Dated January 21, 1981, at San Francisco, California.

JOHN E. BRYSON
President
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