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DEPARTMENT OF JUSTICE

Washington

Sir:

I have the honor to acknowledge receipt of your communication of June 6, 1930, transmitting a letter dated June 6, 1930, from the Secretary of the Interior, advising that, as required by Section 4 (b) of the Boulder Canyon Project Act (45 Stat. 1057) a contract has been secured with the City of Los Angeles, its Department of Water & Power, and the Southern California Edison Company, Ltd., which will provide revenue adequate in his judgment to pay operation and maintenance costs and insure the repayment to the United States within fifty years from the completion of the dam, power plant and related works, of all amounts to be advanced for the construction of such works, together with the interest thereon made reimbursable by the Act, and that in addition two contracts have been secured with the Metropolitan Water District of Southern California which will provide additional revenues for such purpose, and requesting that the opinion of the Attorney General be obtained as to whether or not these contracts comply with all the requirements of Section 4 (b) of the Boulder Canyon Project Act which are by that section made conditions precedent to the appropriation of money, the making of contracts and the commencement of work for the construction of a dam and power plant in Boulder Canyon.

Responsive to your request for my opinion upon these questions, I have the honor to advise you as follows:

Section 4 (b) of the Boulder Canyon Project Act provides:

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

The contracts in question are:

(1) A contract dated April 26, 1930, between the United States of America and the City of Los Angeles and the Southern California Edison Company, Ltd., entitled "Contract for Lease of Power Privilege" as amended by supplemental contract dated May 28, 1930.

(2) A contract dated April 26, 1930, between the United States of America and the Metropolitan Water District of Southern California, entitled "Contract for Electrical Energy, as amended by a supplemental Contract dated May 31, 1930."

(3) A contract dated April 24, 1930, between the United States of America and the Metropolitan Water District of Southern California, entitled "Contract for Delivery of Water."

The "Contract for Lease of Power Privilege", as amended, recites:

(1) This contract, made this 26th day of April, 1930, pursuant to the Act of Congress approved June 17, 1902 (31 Stat. 388) and acts amendatory thereof and supplementary thereto all of which acts are commonly known and referred to as the Reclamation Law and, particularly, pursuant to the Act of Congress approved June 21, 1928 (45 Stat. 1057) designated the Boulder Canyon Project Act, between the United States of America, hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and severally, the City of Los Angeles, a municipal corporation and its Department of Water and Power (said department acting herein

in the name of the City but as principal in its own behalf as well as in behalf of the City; the term city as used in this contract being deemed to mean both the City of Los Angeles and its Department of Water and Power) and the Southern California Edison Company, Ltd., a private corporation, hereinafter styled the company, both of said corporations being organized and existing under the laws of the State of California and hereinafter styled the lessees:

The original and supplemental contracts for lease of power privilege were executed in the name of the City of Los Angeles, acting by and through its Board of Water & Power Commissioners, by the President of the Board. The supplemental contract contains a recital that it was the intention that the Department of Water & Power of the City of Los Angeles, as well as the City of Los Angeles, should be firmly bound as principals by the original contract of April 26, 1930 and the parties adopt and reaffirm the original contract as amended. The Department of Water & Power Commissioners, by the President of the Board, executed the supplemental contract.

There have been submitted to me certified copies of resolutions adopted by the Board of Water & Power Commissioners, and of resolutions and ordinances adopted by the council of the City of Los Angeles authorizing the execution of these contracts. Section 386 of the charter of the City of Los Angeles provides that contracts shall not be made without advertising for bids; but this section does not apply to contracts such as those here in question relating to a matter about which there is no competition and where advertising for bids would have been futile. Los Angeles Gas & Electric Corp. v. City of Los Angeles, 188 Cal. 307, 319. In my opinion the ordinances and resolutions were sufficient to authorize the President of the Board of Water & Power Commissioners to execute the contracts.

In substance the contract as amended imposes upon the City acting by and through its Department of Water & Power, and therefore upon the Department itself - First: The obligation, when the dam is completed and the generating equipment has been installed by the Government, to take over as lessee the generating plant and operate it, paying as rental in ten annual instalments the cost to the United States of the generating equipment, with interest at four per cent. Second: The obligation to pay for electrical energy, as furnished, at stated rates. Third: An obligation to operate and maintain at cost the transmission lines required for transmitting power to the pumping plants of the Metropolitan Water District, and to transmit over its main transmission line the power allocated to others, for compensation based on a reasonable share of the cost of construction, operation and maintenance. As none of the transmission lines have been built, performance of these obligations will require their construction.

Under the provisions of the Charter of the City of Los Angeles the Department of Water & Power is specifically authorized to construct, operate, maintain, extend, manage and control works and property for the purpose of supplying the City and its inhabitants with water and electric energy. To this Department of the City Government is entrusted full responsibility and control in entering into such contracts as those here involved. Quite in conformity with the Charter provisions the City, in its execution of the original and supplemental contracts for lease of power privilege, is described as acting by and through its Board of Water & Power Commissioners. The contract as amended is therefore to be regarded as made in the name of the City, but subject to all of the provisions

of the Charter of the City of Los Angeles relating to contracts executed by the Department of Water & Power, and the question of the validity of this contract and the character of the resources available to secure its performance must be determined from a consideration of the power of the Board of Water & Power Commissioners of the Department of Water & Power to make such a contract, and the sufficiency of the resources of the City which are specifically allocated under the terms of the Charter to its control and expenditure in the performance of the obligations of such contracts.

Under the Charter of the City of Los Angeles revenues for such purposes as those contemplated by these contracts are provided through the operations of the Department of Water & Power, which, although an entity separate from the City for some purposes (Shelton v. City of Los Angeles, 275 Pac. 421) is a Department of the City Government. Its revenues are revenues of the City, but are allocated to the control and disposition of the Department.

The Charter provisions which are pertinent in this connection are as follows:

> Sec. 220. The Department of Water and Power shall have the power and duty:
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> (1) To construct, operate, maintain, extend, manage and control works and property for the purpose of supplying the City and its inhabitants with water and electric energy, or either, and to acquire and take, by purchase, lease, condemnation or otherwise, and to hold, in the name of the City, any and all property situated within or without the City, and within or without the State, that may be necessary or convenient for such purpose.
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> (2) To regulate and control the use, sale, and distribution of water and electric energy owned or controlled by the City; the collection of water and electric rates, and the granting of permits for connections with said water or electric

works; and to fix the rates to be charged for such connections; and, subject to the approval of the Council by ordinance, to fix the rates to be charged for water or electric energy for use within or without the city, and to prescribe the time and the manner of payment of the same. * * *

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(7) To control and order, except as otherwise in this charter provided, the expenditure of all money received from the sale or use of water, or from any other source in connection with the operation of said water works, and all money received from the sale or use of electric energy, or from any other source in connection with the operation of said electric works; provided, that all such money pertaining to said water works shall be deposited in the City Treasury to the credit of a fund to be known as the "Water Revenue Fund", and all such money pertaining to said electric works shall be deposited in the City Treasury to the credit of a fund to be known as the "Power Revenue Fund"; and the money so deposited in each such fund shall be kept separate and apart from other money of the city, and shall be drawn only from said fund upon demands authenticated by the signature of the chief accounting employee of the board.

Sec. 221. None of the money in or belonging to the Water Revenue Fund or the Power Revenue Fund shall be appropriated or used for any purpose except the following purposes pertaining to the municipal works from or on account of which such money was received, to-wit:

First: For the necessary expenses of operating and maintaining such works.

Second: For the payment of the principal and interest, or either, due or coming due upon outstanding notes, certificates, or other evidences of indebtedness issued against revenues from such works, in pursuance of Sec. 224, or bonds or other evidences of indebtedness, general or district, heretofore or hereafter issued for the purpose of such works, or parts thereof.

Third: For the necessary expenses of constructing, extending and improving such works, including the purchase of lands, water rights and other property; also the necessary expenses of conducting and extending the business of the department pertaining to such works; also for reimbursement to another bureau on account of services rendered, or material, supplies, or equipment furnished; also for expenditures for purposes for which bonds, or evidences of indebtedness provided for in Section 224, shall have been authorized, subject to reimbursement as soon as practicable, from monies derived from the sale or issuance of such bonds or evidences of indebtedness.

Fourth: To return and pay into the General Fund of the City, from time to time, upon resolution of the board, from any surplus money in either such revenue fund, any sums paid by the city from funds raised by taxation for the payment of the principal or interest of any municipal bonds issued by the city for or on account of the municipal works to which such revenue fund pertains, or of liability arising in connection with the construction, operation or maintenance of the municipal works to which said fund pertains.

Fifth: For defraying the expenses of any pension system applicable to the employees of the department, that shall be established by the city.

Fifth (a): For establishing and maintaining a reserve fund to insure the payment at maturity of the principal and interest on all bonds now outstanding or hereafter issued for the purpose of the Municipal Works, and such other reserve funds pertaining to such works as the Board may provide for by resolution subject to the approval of the Council by ordinance. The money set aside and placed in such fund or funds so created shall remain in said fund or funds until expended for the purposes thereof and shall not be transferred to the "Reserve Fund" of the city.

Sixth: To be transferred as provided in Sec. 382 of this charter.

Sec. 222. The board shall provide for the cost of extensions and betterments of said water works and electric works from the funds derived from the sale of bonds, general or district, so far as such funds shall be made available for the use of the board for said purposes, and so far as such funds shall not be made available for the use of the board therefor, from revenues received from the works to which such extensions and betterments pertain, and from the proceeds of loans contracted as provided by Sec. 224.

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Sec. 382. At the close of each fiscal year the Controller and Treasurer shall transfer all surplus money remaining in each fund over and above the amount of outstanding demands and liabilities payable out of such fund to the "reserve fund", except such surplus money as is in the several bond funds, interest and sinking funds, trust funds, the fire and police pension fund, the harbor revenue fund, the library fund, the park fund, the permanent improvement fund, the playground and recreation fund, the power revenue fund and the water revenue fund, but the Council may by ordinance direct that any or all said surplus money in either the harbor revenue fund, the power revenue fund or the water revenue fund be transferred to such reserve fund with the consent of the board in charge of such fund, but not otherwise.

Leaving entirely out of consideration the proceeds from the sale of bonds, which would no doubt require, under Section 18 of Article 11 of the State constitution, the approval of two-thirds of the electors, and leaving entirely out of consideration the proceeds of loans contracted as provided by Section 224 of the city charter, which are authorized only for emergency purposes, and bearing in mind that the Department of Water & Power is not

authorized to levy taxes, - it is apparent that its resources are limited to its earnings from the sale or use of water and of electric energy, and that over these revenues it has complete control of expenditure for the construction, operation and maintenance of all works and property for the purpose of supplying the City and its inhabitants with water and electric energy.

I am advised by the Secretary of the Interior that yearly revenues of this Department are more than ample to meet all of its liabilities under the original and amended contracts, and, therefore, to relieve the City of any necessity of financing the obligations which will arise under these contracts; that these revenues under the Department of Water & Power are not only amply sufficient for this purpose, but its yearly earnings will in his judgment be amply sufficient to provide for the construction of the transmission lines as well.

The only limitation upon the expenditure of such funds by this Department is found in Sec. 369 of the Charter of the City of Los Angeles, which reads:

> No department, bureau, division, or office of the city government shall make expenditures or incur liabilities in excess of the amount appropriated therefor.

The method of appropriation is, however, provided in Sec. 83 as follows:

> The board of each department *** the finances of which are not included in the general budget, but which department itself has control of definite revenues or funds, as elsewhere in this charter set forth, shall, prior to the beginning of each fiscal year, adopt an annual departmental budget and make an annual departmental budget appropriation, covering the anticipated revenues and expenditures of said department. Such departmental budget shall conform, as far as practicable, to the forms and times provided in this charter for the general city budget. Each such budget shall contain a sum to be known as the "unappropriated balance," which sum shall be available

> for appropriation by the board later in the ensuing fiscal year to meet contingencies as they may arise. A copy of such budget, when adopted, and of every resolution subsequently adopted making appropriation from said unappropriated balance, shall promptly be filed with the Mayor and Controller, each. No expenditure shall be made or financial obligations incurred by any such department except as authorized by the annual departmental appropriation, or appropriations made subsequent to said annual budget.

Question arises under Section 369 of the Charter as to whether by the execution of the original and amended contracts a present liability was incurred for the payments to be made thereunder in the future. No authorities have been found construing this charter provision, but similar questions have often arisen under Section 18 of Article 11 of the Constitution of the State of California, and although this constitutional limitation has no application to contracts made by the Department of Water & Power these authorities must be considered in determining the effect of Section 369 of the Charter upon the validity of the contracts here in question.

Section 18 of Article 11 of the Constitution of California, provides:

> No county, city, town, township, board of education or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same; * * *. Any indebtedness incurred contrary to any provision of this section shall be void; * * *.

The obvious purpose of this limitation is to prevent the City from incurring indebtedness in excess of its yearly revenue, and the question has often arisen in the courts of California as to when an indebtedness or liability

is incurred, within the meaning of this provision, when a contract is executed requiring payments to be made from time to time in the future.

There is authority for the proposition that when a municipality receives the entire consideration for its promise to make payments or incur expenditures in the future, a liability is immediately incurred under the provisions of the state constitution. See Chester v. Carmichael, 187 Cal. 287; In re City and County of San Francisco, 195 Cal. 426; Mahoney v. City and County of San Francisco, 201 Cal. 248. But a municipality does not incur an "indebtedness" or "liability" invalid under the constitutional provision when it enters into a contract to pay for services as and when rendered from time to time in the future. The obligations here involved to pay rental and power rates cannot be said to be incurred until the rental accrues and the power is received. Such liabilities are held, for the purpose of this constitutional provision, to be incurred when the services have been rendered and the obligation to pay for them arises. See McBean v. Fresno, 112 Cal. 195; Smilie v. Fresno County, 112 Cal. 311; Doland v. Clark, 143 Cal. 176; In re City and County of San Francisco, 191 Cal. 172; Compare Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

It may, however, be said that if a contract imposes upon the municipality liabilities to arise in the future which in any year will necessarily exceed the income and revenue provided for such year, it will be invalid. The courts have held that the aggregate of all payments which will be required under such a contract is not to be regarded as a liability presently incurred upon the execution of the contract, and thus incurred within the year of its execution; but they have not held that a municipality may, in

the face of the constitutional limitation incur future liabilities which will exceed the income and revenue for the year in which payment thereof will be required, and so to hold would appear to be in direct contradiction of the express provision of the Constitution.

The City acting through its Department of Water and Power will be under the necessity to construct transmission lines over which the power for which it has agreed to pay may be transmitted, but insofar as the parties to this contract are concerned it is under no express obligation to do so. Under no circumstances will it be necessary for the City to construct transmission lines in advance of the completion of the dam and generating equipment, and, if, therefore, it appears that during this period it will be able to finance such construction out of current revenues of its Department of Water and Power, I am of the opinion that no legal objection can be made to the contract as amended because of the necessity or liability which may arise to defray these construction costs.

Consideration of these authorities leads to the conclusion that the Department of Water and Power has not incurred a present liability upon the execution of these contracts, and therefore the only effect of Section 369 is to require the appropriation in each annual budget of sufficient funds from the Water and Power revenues to meet the obligations which will arise under and in connection with the performance of these contracts. Inasmuch as the Secretary of the Interior is clearly of the opinion that such funds will be available and ample for all such purposes, I see no reason for doubting the validity of the contract or for questioning its effect in securing payment to the United States of the amounts of money which will become payable under its terms.

With reference to the validity of the obligation assumed by the Southern California Edison Company, Ltd., its execution of the original contract has been formally approved by its Board of Directors, and I am informed that the supplemental contract has been duly ratified by the Board. There can be no question, therefore, as to the binding effect of this contract upon this corporation.

By the supplemental agreement amending the original "Contract for Lease of Power Privilege" all objections which might have been raised to the validity of this contract upon the ground that the City, the Department of Water & Power and the Company were not bound to take or pay for any electrical energy except as they might wish, have been removed. Mutuality of obligation is not lacking, and the City and its Department are firmly bound to take and/or pay for certain percentages of firm energy as stated and defined in the supplemental contract and the Company is similarly bound to take or pay for certain percentages of such energy which are also defined and stated in the supplemental contract.

The "Contract for Lease of Power Privilege" between the United States, the City of Los Angeles, its Department of Water & Power and the Southern California Edison Company, Limited, is in my opinion a valid agreement binding upon the City and its Department to the extent to which funds are available under the provisions of the charter to the Department, and is in full compliance with Section 4 (b) of the Boulder Canyon Project Act, since the revenues which it will provide out of such funds are in the judgment of The Secretary of the Interior adequate to meet the requirements of that section.

Objection has been made to the Metropolitan Water District Power contract on the ground that the District has not yet voted bonds to provide funds to build the aqueduct on which this power would be used. It is unnecessary to consider which step must precede the other - provision for the aqueduct or provision for power and water - in view of the sufficiency of the City and Company contracts to meet all requirements of the Act. Even if the aqueduct financing were construed as being a prerequisite, the Secretary's reservation of energy for the District is within his authority under the second paragraph of section 5(c) of the Act.

Giving consideration only to the City and Company contract, I am of the opinion that all the requirements of Section 4 (b) of the Boulder Dam Project Act which are made conditions precedent to the appropriation of money, the making of contracts and the commencement of work for the construction of a dam and power plant in Boulder Canyon have been fully met and performed by the Secretary of the Interior in securing the contracts referred to in his letter.

Respectfully,

(Signed) WILLIAM D. MITCHELL,

Attorney General.

The President,
The White House.

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