

ORIGINAL

BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
Bay Cities Home Telephone Company,)
Pacific Telephone and Telegraph)
Company and City of Berkeley for an)
Order authorizing the Transfer and)
Assignment of a Franchise and for a)
Certificate that Public Convenience)
and Necessity require the exercise)
of such Franchise.)

Application
No. 1285.

William Thomas for Bay Cities Home Telephone Company.
Pillsbury, Madison and Sutro and Felix T. Smith
for Pacific Telephone and Telegraph Company.
Frank V. Cornish, City Attorney, for City of Berkeley.

THELSEN, Commissioner.

OPINION

This is an application by Bay Cities Home Telephone Company for authority to assign a certain franchise to Pacific Telephone and Telegraph Company and of the latter company for a certificate that public convenience and necessity require the exercise by said company of the rights granted by said franchise. The City of Berkeley joins in the application. A public hearing on said application was held in the City Hall, Berkeley, on August 29, 1914. The entire City Council was present. No one appeared in opposition.

The franchise referred to was granted by the Town of Berkeley to Home Telephone Company of Alameda County, on January 28, 1907, by Ordinance No. 468-A, and was later assigned by the grantee

to Bay Cities Home Telephone Company, one of the applicants herein. A copy of said ordinance is attached to the petition herein, and marked Exhibit A, and reference is hereby made thereto.

Ordinance No. 468-A grants to Home Telephone Company of Alameda County, its successors and assigns, for the period of 50 years, the right to use the public streets of Berkeley for the construction and operation of a telephone system. Among other provisions, are the following:

1. The telephone company agrees to furnish 50 free telephones for the use of the city.
2. The telephone company agrees to pay to the city, after five years, as provided by the Broughton Act, two per cent of its gross revenue from business under the franchise.
3. Paragraph five provides in part as follows:

"That the said grantee, his or its successors or assigns, shall not without the consent of the Town of Berkeley, evidenced by ordinance duly passed by the Board of Trustees thereof, sell or transfer its property or any of the rights or privileges authorized or granted by said franchise to any person, company, combination, trust or corporation now engaged in the telephone business in the Town of Berkeley, and shall not at any time enter into any agreement directly or indirectly with any person, company, trust, combination or corporation now engaged in the telephone business in the Town of Berkeley concerning the rate to be charged for telephone service."

4. The telephone company agrees to furnish the city wires in its cables for the city's fire alarm and police telegraph systems and to allow the city to install wires for these purposes in the underground conduits and upon the poles of the telephone company.

5. Provision is made for the purchase of the telephone company's property by the city at the termination of the franchise at a price to be fixed by arbitration under a method prescribed by the ordinance.

At the time this ordinance was adopted, Sunset Telephone

and Telegraph Company, the predecessor of Pacific Telephone and Telegraph Company, was engaged in the telephone business in Berkeley. The undoubted purpose of paragraph five of Ordinance No. 468-A was to prevent the consolidation of the existing or Bell system with the new and competing Home system, unless the city's consent had been first secured. Nevertheless, on March 15, 1912, Bay Cities Home Telephone Company transferred all its physical properties in Berkeley, through the instrumentality of Home Long Distance Telephone Company, a corporation created for that purpose, to Pacific Telephone and Telegraph Company, the rival company, without securing the consent of the City of Berkeley. The city thereafter brought suit in the superior court of Alameda County to set aside the conveyance as void for the reason that the city's consent had not been secured. A general demurrer to the complaint was sustained on the ground that any corporation may dispose of its property by consent of two-thirds of its stockholders, and that Berkeley had no power to impose the additional requirement that the city's consent should be secured before such disposition could be made. The net result of these transactions was that the Home Telephone Company of Alameda County secured from the public valuable privileges freed from the condition which the public authorities in good faith thought they were attaching thereto.

I do not deem it necessary to comment upon the ethics of such conduct. The transaction speaks for itself. As Pacific Telephone and Telegraph Company, however, is now to become the beneficiary of the rights granted by Ordinance No. 468-A, I believe that, in all honesty and decency, it should not be allowed to exercise rights under this ordinance unless it will agree, in good faith, to take the rights granted by the ordinance subject to all the conditions specified therein, without any intention to try to break any condition which may not hereafter be to the company's

liking. Pacific Telephone and Telegraph Company agreed at the hearing that this position is fair and just. An appropriate condition will be inserted in the order herein.

The transfer of physical properties from Bay Cities Home Telephone Company to Pacific Telephone and Telegraph Company was made, as hereinbefore stated, on March 15, 1912. By making this transfer eight days before the effective date of the Public Utilities Act, the parties avoided the necessity of applying to the Railroad Commission for authority to make the transfer and deprived the cities of San Francisco, Oakland and Berkeley of the protection which the necessity of application to the Railroad Commission would have accorded them. The Bay Cities Company, however, failed to transfer its franchise. Hence it becomes necessary now, under the provisions of Sections 50 and 51 of the Public Utilities Act, to secure this Commission's authorization before this company can transfer its franchise and before Pacific Telephone and Telegraph Company can exercise rights thereunder.

The Pacific Telephone and Telegraph Company already has a franchise in Berkeley, as successor of Sunset Telephone and Telegraph Company. This franchise was granted to the latter company on August 13, 1894, by Ordinance No. 573 of the Town of Berkeley. This franchise was granted without consideration and without any provision for the payment to the city of any percentage of gross income. The term of this franchise is 25 years. The franchise accordingly expires on August 13, 1919, at which time it would be necessary for Pacific Telephone and Telegraph Company to secure a new franchise. Under the provisions of the Berkeley Charter, such new franchise would expire within not to exceed 35 years, or two years before the expiration of the Home Telephone Company franchise, and would subject the recipient thereof, under the provisions of Section 77 (2) of the Berkeley Charter, to a

payment to the city of percentages of gross receipts not less than two per cent during the first ten years, three per cent during the second ten years, four per cent during the third ten years and five per cent during the remaining life of the franchise. It is accordingly of decided advantage to ^{the} Pacific Company to secure an assignment of the Home Telephone franchise, under which only two per cent of the gross receipts must be paid to the city, instead of waiting and securing a new franchise in 1919. While the City of Berkeley gains two per cent on the company's gross revenue between 1914 and 1919, it loses the revenue in excess of two per cent after 1919.

In settlement of all matters of dispute, Bay Cities Home Telephone Company, Pacific Telephone and Telegraph Company and City of Berkeley have reached an agreement which is embodied in a proposed ordinance which was ordered printed by the City Council of Berkeley on August 7, 1914. A copy of this proposed ordinance is attached to the petition herein and is marked Exhibit C. Reference is hereby made thereto.

The ordinance provides in part as follows:

1. Berkeley consents to the sales of March 15, 1912.
2. Berkeley consents to the transfer to Pacific Telephone and Telegraph Company of the franchise granted by Ordinance No. 468-A.
3. Pacific Telephone and Telegraph Company agrees to pay to the City of Berkeley two per cent of gross receipts annually as prescribed by Ordinance No. 468-A.
4. Pacific Telephone and Telegraph Company agrees to furnish 75 free telephones for the use of the City of Berkeley.
5. Pacific Telephone and Telegraph Company agrees to surrender its existing franchise.

6. Bay Cities Home Telephone Company, the Home Telephone Company of Alameda County and the sureties on the bond of the former company shall be discharged from liability and the suit brought by the City of Berkeley shall be dismissed.

While the ordinance provides that the agreement therein provided for "shall cancel and supersede all existing agreements and arrangements for furnishing telephone service to the City of Berkeley," Pacific Telephone and Telegraph Company's representatives stated that it is not intended by this language to diminish the obligation of the grantee under Ordinance No. 468-A with reference to the city's fire alarm and police telegraph systems and that the company assumes all the obligations specified in said ordinance except in so far as expressly changed by the proposed new ordinance.

Pacific Telephone and Telegraph Company agreed that the provisions as to free telephones for the city be deemed effective as of August 1, 1914.

After the acquisition of the property of Bay Counties Home Telephone Company, Pacific Telephone and Telegraph Company increased its plant account by the amount paid for this property, although a large portion thereof represents useless duplication and other ~~portions~~ portions have been "scrapped" by the new purchaser. The public interest clearly demands that the order asked for in this proceeding should not be made except on condition that the price paid for this property shall not be taken before the Railroad Commission or any other public authority as representing for rate fixing or any other purpose the real value thereof. The order herein will contain such a condition.

The telephone companies and the City of Berkeley have all agreed upon the settlement hereinbefore outlined. This settlement is a reversal of the policy of competition which the City

Council intended to establish when Ordinance No. 468-A was adopted. That the failure of the Bell Company at that time to give efficient and courteous service in Berkeley justified competition can not be doubted. At that time, there was no strong public authority to compel good service and competition was the only means to secure it. This Commission will observe carefully the service given by the Bell Company under the restored condition of monopoly brought about by the ordinance of settlement, to see whether the company will now voluntarily give efficient service and, if not, whether the public authorities are strong enough to compel such service. If such service is not given, the only alternative is public ownership.

I recommend that the application be granted, but only on the conditions specified in the order.

I submit the following form of order:

ORDER

Bay Cities Home Telephone Company having applied to the Railroad Commission for an order authorizing the transfer to Pacific Telephone and Telegraph Company of the rights and privileges granted by the Town (now City) of Berkeley on January 28, 1907, by Ordinance No. 468-A, and Pacific Telephone and Telegraph Company having applied for a certificate that public convenience and necessity require and will require the exercise by it of said rights and privileges, and the City of Berkeley having joined in said application, and a public hearing having been held thereon,

THE RAILROAD COMMISSION HEREBY AUTHORIZES SAID TRANSFER and declares that the public convenience and necessity require the exercise by Pacific Telephone and Telegraph Company of said rights and privileges, but only on the following conditions and not otherwise:

1. This order shall not become effective unless the

City of Berkeley shall first have enacted an ordinance substantially in the form of the proposed ordinance attached to the petition herein and marked Exhibit C.

2. This order shall not become effective unless Pacific Telephone and Telegraph Company shall file with the Railroad Commission within twenty days after the final adoption of such ordinance by the City of Berkeley, a stipulation executed on behalf of said company by its officers thereunto duly authorized by a resolution of its board of directors, agreeing as follows:

(a) That the company accepts the transfer of the rights and privileges granted by the City of Berkeley by Ordinance No. 468-A in good faith intending to abide by every provision thereof except in so far as expressly modified by the provisions of the ordinance of settlement to be adopted by the City of Berkeley.

(b) That the company accepts the provisions of the ordinance of settlement of the City of Berkeley, intending in good faith to abide thereby.

(c) That the price paid for the physical properties of Bay Counties Home Telephone Company in Berkeley shall not be taken before the Railroad Commission or any other competent public authority as representing for rate making or any other purpose the real value of the property.

3. The Railroad Commission reserves the right to revoke this order if Pacific Telephone and Telegraph Company fails to comply with any of the provisions of its settlement with the City of Berkeley.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 1st day of September, 1914.

John M. Eshleman
Alfred Gordon
Marvin Johnson
Edwin A. Edgerton
Commissioners.