

Decision No. \_\_\_\_\_

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the matter of the application of  
CITY AND COUNTY OF SAN FRANCISCO,  
BAY CITIES HOME TELEPHONE COMPANY and  
THE PACIFIC TELEPHONE AND TELEGRAPH  
COMPANY 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.

ORIGINAL

Application No. 1440.

Decision No. 2459

Thomas, Beedy and Lanagan for Bay Cities Home  
Telephone Company.  
Pillsbury, Madison and Sutro for The Pacific  
Telephone and Telegraph Company.  
Percy V. Long, City Attorney, for City and County  
of San Francisco.  
Daniel O'Connell in propria persona.

BY THE COMMISSION.

O P I N I O N .

This is an application by Bay Cities Home Telephone Company for an order authorizing the transfer to The Pacific Telephone and Telegraph Company of a franchise granted on October 3, 1906, by Ordinance No. 75 (New Series), of the City and County of San Francisco, and of The Pacific Telephone and Telegraph Company for a certificate declaring that the public convenience and necessity require the exercise by The Pacific Telephone and Telegraph Company of said franchise.

Ordinance No. 75 (New Series), of the City and County of San Francisco grants to Home Telephone Company of San Francisco a franchise to construct, maintain and operate a telephone system in the City and County of San Francisco and to construct, maintain and operate poles, cables, underground conduits and other appliances through, along and under and in the public streets, alleys and highways of the City and County of San Francisco for the purpose of transmitting sound, signals and conversation by means of electricity or otherwise. The term of the franchise is fifty years.

The franchise is granted on the following conditions:

1. That the telephone system to be constructed under the franchise be constructed, maintained and operated in accordance with the applicable provisions of the statutes of California and of the charter and ordinances of the City and County of San Francisco.

2. That work under the franchise shall commence within four months, and that thereafter, two million dollars shall be expended in construction work within twelve months after the commencement of work; three million dollars within twenty-four months and four million dollars within thirty-six months, and that the work shall be completed within three years after its commencement.

3. That 600 free telephones shall be supplied to the City and County of San Francisco, and that the same will be kept in good repair and working order during the term of the franchise without expense to the City and County of San Francisco, and that the City and County of San Francisco shall, during the life of the franchise, have the use, without expense to the City and County of San Francisco, of two continuous ducts throughout the entire length of all conduits laid by the Company, or its assigns or successors, for the exclusive use of the fire alarm, fire patrol, police alarm and Department of Electricity service.

4. That the grantee of the franchise, its successors and assigns, shall pay to the City and County of San Francisco, as provided by the Broughton Act, for the first five years, 2 per cent each year of the gross receipts from the exercise of the franchise rights.

We desire to draw particular attention to the fifth condition, reading as follows:

"That said grantee, his or its successors or assigns shall not without the consent of the City and County of San Francisco, evidenced by ordinance duly passed by the board of supervisors 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 City and County of San Francisco and shall not at any time enter into any agreements directly or indirectly with any persons, company, combination, trust or corporation now engaged in the telephone business in the City and County of San Francisco concerning the rates to be charged for telephone service in the City and County of San Francisco."

Then follow certain provisos which it is not necessary here to consider.

Home Telephone Company of San Francisco filed with the Board of Supervisors of the City and County of San Francisco a bond in the penal sum of \$250,000, to secure the due performance of the terms and conditions of the franchise awarded to it.

On July 1, 1910, Home Telephone Company of San Francisco conveyed to Bay Cities Home Telephone Company, one of the applicants herein, all its property, including the franchise granted by said Ordinance No. 75 (New Series). Bay Cities Home Telephone Company immediately entered into possession of the property and proceeded to operate the same and to exercise the franchise rights theretofore granted under said ordinance to Home Telephone Company of San Francisco.

On March 15, 1912, Bay Cities Home Telephone Company, under an arrangement with The Pacific Telephone and Telegraph Company, executed a conveyance to Home Long Distance Telephone Company of all its property except the franchise. On the same day, Home Long Distance Telephone Company executed a conveyance to The Pacific Telephone and Telegraph Company of all the property acquired by it from Bay Cities Home Telephone Company. The Pacific Telephone and Telegraph Company immediately entered into possession of the property described by these conveyances, and ever since March 15, 1912, has been in possession thereof, operating certain

portions thereof as a part of its own telephone system in the City and County of San Francisco. Since March 15, 1912, the franchise granted by said Ordinance No. 75 (New Series), has not been exercised. It is now proposed to have the franchise follow the property which was formerly operated thereunder, into the hands of The Pacific Telephone and Telegraph Company.

After the transfer of the property by Bay Cities Home Telephone Company, through Home Long Distance Telephone Company, to The Pacific Telephone and Telegraph Company, the City and County of San Francisco brought an action in the Superior Court of the State of California in and for the City and County of San Francisco, against The Pacific Telephone and Telegraph Company and others, to have the transfer of the property set aside. The case was heard by Judge John F. Ellison, of Tehama county, sitting in San Francisco. In the course of his opinion, a copy whereof was introduced in evidence in this proceeding, Judge Ellison concluded that the provision in Ordinance No. 75 (New Series), purporting to forbid a transfer of telephone properties from the grantee of the franchise, its successors or assigns, to any other telephone <sup>company</sup> engaged in the telephone business in the City and County of San Francisco at the time the franchise was granted, was void in that it undertook to deprive the grantee, its successors and assigns, of the right granted by Sections 361-a and 540 of the Civil Code of this State to sell the property of the corporation, except the corporate franchise, with the consent of persons holding two-thirds of the issued stock of the corporation. In conclusion, Judge Ellison said:

"I find nothing in the provisions of the charter of the City and County of San Francisco that either expressly or by inference confers upon the city the power to place in the franchise the provision that the grantee thereof should not sell or dispose of its property. No law of this state conferred such power and the condition is clearly against the policy of the state as expressed in its statutes granting to telephone companies the power to sell their property."

Thereafter, the City and County of San Francisco perfected its appeal from Judge Ellison's decision to the Supreme Court of this State, where the case is now pending.

The Pacific Telephone and Telegraph Company is now operating in San Francisco under a 50-year franchise granted by the Board of Supervisors of San Francisco on March 24, 1890. This franchise was granted before the Broughton Act was enacted, and under its terms The Pacific Telephone and Telegraph Company is under no obligation to pay to City and County of San Francisco any portion of its gross annual revenues. The City of San Francisco is given the right to use one continuous duct through the entire length of the conduits laid by the Company, for the exclusive use of the fire alarm, fire patrol and police alarm service.

By a supplemental ordinance, The Pacific Telephone and Telegraph Company is obligated to supply to the City and County of San Francisco 600 free telephones.

After the transfers of property hereinbefore referred to and the litigation ensuing thereon, the parties finally agreed upon a compromise settlement, the terms whereof are contained in Ordinance No. 3018 (New Series), adopted by the Board of Supervisors of the City and County of San Francisco on November 23, 1914. Sixteen supervisors voted in favor thereof, one supervisor voted against the ordinance and one supervisor was absent. By this ordinance, the City and County of San Francisco consents to and ratifies the sale and transfer by Bay Cities Home Telephone Company <sup>of</sup> all its physical and tangible properties to Home Long Distance Telephone Company, and the sale and transfer by Home Long Distance Telephone Company of said physical and tangible properties to The Pacific Telephone and Telegraph Company. The City also consents to the transfer by Bay Cities Home Telephone Company to The Pacific Telephone and Telegraph Company, of the franchise granted to Home Telephone Company by Ordinance No. 75 (New Series).

hereinbefore referred to. The City's consent and ratification is given on certain conditions, including the following:

1. The instrument conveying the franchise is to be filed in the office of the Clerk of the Board of Supervisors of San Francisco within 60 days after the sale and transfer are approved by the Railroad Commission.

2. Within 60 days after the approval by the Railroad Commission, The Pacific Telephone and Telegraph Company is to file with the Clerk of the Board of Supervisors of the City and County of San Francisco its duly executed agreement to pay to the City and County of San Francisco in the manner provided by said Ordinance No. 75 (New Series), two per cent of that proportion of its gross toll receipts creditable to the San Francisco exchange, and accruing from telephones within the City and County of San Francisco, from and after December 1, 1914.

3. The Pacific Telephone and Telegraph Company is to file with the Clerk of the Board of Supervisors of the City and County of San Francisco, within 60 days after approval of the sale and transfer by the Railroad Commission, a bond in the sum of \$250,000, to insure the fulfillment of each and every term of the franchise to be assigned to The Pacific Telephone and Telegraph Company.

4. The Pacific Telephone and Telegraph Company is to file with the Clerk of the Board of Supervisors of the City and County of San Francisco, within 60 days after the approval<sup>of the sale and transfer</sup> by the Railroad Commission, an agreement that it will furnish to the City and County of San Francisco certain telephone service, including not to exceed 1,000 free telephones and the use through each street in which underground conduits are constructed or maintained, <sup>of</sup> two continuous ducts in which the City and County of San Francisco may install and maintain wires and cables for low voltage electric circuits.

5. The Pacific Telephone and Telegraph Company is to file with the Clerk of the Board of Supervisors of San Francisco, within 65 days after the approval of the Railroad Commission, an instrument duly executed, surrendering and abandoning to the City and County of San Francisco the franchise granted to its predecessor, Pacific Telephone and Telegraph Company, by Ordinance No. 2186 on March 24, 1890.

6. The Pacific Telephone and Telegraph Company is to agree that the consent and ratification given by the ordinance shall in no wise be deemed a waiver or abridgement of the rights and powers of the City and County of San Francisco--

(a) To acquire at any time the physical properties and franchises of The Pacific Telephone and Telegraph Company located in San Francisco, by voluntary purchase or by proceedings in condemnation;

(b) To grant at any time a telephone franchise to any competing company; or,

(c) To establish, construct and operate a competing municipally owned telephone system.

The ordinance further provides that upon compliance with all its conditions, the principals and sureties on the bond for \$250,000 filed with the Board of Supervisors by Home Telephone Company of San Francisco on the passage of Ordinance No. 75 (New Series), shall be discharged and the appeal now pending in the Supreme Court from Judge Ellison's decision shall be dismissed as fully satisfied. The ordinance further provides that upon compliance with all its conditions, the City Attorney of the City and County of San Francisco shall request the Attorney General of California to dismiss an action brought in the name of the People of the State against The Pacific Telephone and Telegraph Company and tried at the same time as the action brought by the City and County of San Francisco.

The Mayor of the City and County of San Francisco approved Ordinance No. 3018 (New Series), only after The Pacific Telephone and Telegraph Company entered into an agreement with the City and County of San Francisco, dated December 4, 1914, agreeing, in consideration of the City's consent being granted by ordinance,

"that in the event of the purchase hereafter by the City and County of San Francisco, through condemnation proceedings or otherwise, of the physical properties and franchises of said Pacific Telephone and Telegraph Company within the City and County of San Francisco, no consideration whatever shall be paid for said franchises or any of them, and no franchise value shall, in any event, be allowed to said Pacific Telephone and Telegraph Company, its successors or assigns, for said franchises, or any of them."

The Pacific Telephone and Telegraph Company, also agreed that it would exercise the franchise under and in compliance with all laws and ordinances now or hereafter in force with reference to the placing of electric wires and conductors under ground in the City and County of San Francisco, and all laws and ordinances relating to or regulating the placing, erection, use and maintenance of poles and wires in the City and County of San Francisco. It was further agreed that the agreement thus entered into should be made a part of any order which the Railroad Commission might thereafter make in the premises.

No referendum was invoked against Ordinance No. 3018 (New Series), and the ordinance became effective within the time prescribed by the City Charter of San Francisco.

During the hearing of this application, a protest was made and the Commission's attention was drawn to the results of an election held March 29, 1912. At this election 21,168 votes were cast in favor of and 10,463 votes against a proposition worded on the ballot as follows:



"An ordinance determining and declaring that the public interest and necessity require the acquisition, construction, completion, and equipment of a public utility; a telephone system, by the City and County of San Francisco; that the cost thereof, in addition to the other expenses of the City and County, will exceed the income and revenue provided for the said City and County for any one year; and directing the Board of Public Works to procure through the City Engineer and to place on file with the Board of Supervisors, plans and estimates of the cost of original construction, completion and equipment of such public utility; and determining and declaring that the public interest and necessity require the acquisition by said City and County of San Francisco, of the telephone system of the Bay Cities Home Telephone Company, in said City and County of San Francisco; and determining and declaring that public interest and necessity require that any merger of the telephone systems of the said Bay Cities Home Telephone Company, and of the Pacific Telephone and Telegraph Company, be disapproved, rejected and defeated, and that said Bay Cities Home Telephone Company be not released from any of its contracts or other obligations to said City and County."

At the same election 20,492 votes were cast in favor of and 10,759 votes against a proposition worded on the ballot as follows:

"An ordinance calling and providing for a special election to be held in the City and County of San Francisco on the day to be set by the Board of Election Commissioners, in conformity with Chapter III, of Article XI, of the Charter of the City and County of San Francisco, for the purpose of submitting to the voters of said City and County a proposition, to-wit:

'A proposition to incur a bonded debt of the said City and County of San Francisco to the amount of \$6,000,000.00 for the acquisition by said City and County of San Francisco of an existing public utility, to-wit: The Telephone system, works and property of the BAY CITIES HOME TELEPHONE COMPANY, a corporation, to be owned and controlled by the City and County of San Francisco for supplying to said City and County and to the inhabitants thereof, a means of communication by telephone and telepathy between all the inhabitants of the said City and County of San Francisco.'

The second named ordinance failed to receive the required two-thirds vote.

City Attorney Percy V. Long, in an opinion dated February 26, 1912, advised the Board of Supervisors of San Francisco that these ordinances are invalid. Mr. William Thomas, attorney for Bay Cities Home Telephone Company, contends in this proceeding, that, in view of the fact that the people did not approve the

ordinance involving the issue of bonds, the first ordinance was thereby automatically rejected. Under the decision of Judge Ellison, it may further be urged that the ordinances are void, for the reason that they apparently attempt to stop a transfer of property which had already been consummated. It will be noted that neither of the ordinances make any mention of the franchise granted by Ordinance No. 75 (New Series).

Without passing on the question of the validity of these ordinances, it will be sufficient to draw attention to the fact that if the people of the City and County of San Francisco desire to acquire and operate the existing telephone system, the machinery for such action has been provided by the Legislature of California, and the decision on this application will in no way interfere with such acquisition.

All parties to this proceeding concur in admitting that the franchise granted by Ordinance No. 75 (New Series), is a valid franchise. The question now before this Commission is whether there is any valid reason why the compromise agreement which has been entered into between the City and County of San Francisco, Bay Cities Home Telephone Company and The Pacific Telephone and Telegraph Company, as set forth in said Ordinance No. 3018, (New Series), should not be sanctioned by the Railroad Commission in so far as the Commission's consent is necessary.

In this connection, certain matters referring to the action of the board of supervisors of the City and County of San Francisco in voting to advertise for bids for the franchise which was later granted by Ordinance No. 75 (New Series) were brought to this Commission's attention. These matters transpired some 9 years ago. The present board of supervisors of the City and County of San Francisco, with full knowledge of these matters, by a vote of 15 to 1, with one supervisor absent, have concluded that the best interests of the City and County of San Francisco require the consummation of the arrangement herein set forth, and the

mayor has approved their judgment. On the facts of this case, we hesitate to substitute our judgment for theirs and to withhold our approval to the compromise arrangement which they, with much care and thought, have entered into.

We have given careful consideration to this application and are of the opinion that the Commission's consent to the transfer of the franchise and the certificate of public convenience and necessity should be granted as applied for, subject to the conditions specified in the order.

The Pacific Telephone and Telegraph Company claims to have acquired from Bay Cities Home Telephone Company, property of a value in excess of seven million dollars. A portion of this property has been discarded and other portions are idle, while only a part of the property thus acquired is being actually used by The Pacific Telephone and Telegraph Company in the conduct of its business. The order herein will contain a condition to the effect that The Pacific Telephone and Telegraph Company shall file with the Railroad Commission a written agreement to the effect that the price at which this property was transferred shall not be taken before the Railroad Commission or any other public authority as representing the true value of the property.

The franchise is being transferred without the payment of consideration and The Pacific Telephone and Telegraph Company agrees that it will not urge the sum of \$25,000.00 originally paid by Home Telephone Company of San Francisco as justifying any claim to a franchise value.

We are of the opinion that the application should be granted, subject to the conditions specified in the order.

O R D E R .

City and County of San Francisco, Bay Cities Home Telephone Company and The Pacific Telephone and Telegraph Company having applied to the Railroad Commission for an order authorizing the

transfer from Bay Cities Home Telephone Company to The Pacific Telephone and Telegraph Company of the franchise granted to Home Telephone Company of San Francisco by Ordinance No. 75 (New Series), of the City and County of San Francisco, and for a certificate declaring that the public convenience and necessity require the exercise by The Pacific Telephone and Telegraph Company of the rights granted by said ordinance, and a public hearing having been held on said application, and the application having been submitted and being now ready for decision,

IT IS HEREBY ORDERED that Bay Cities Home Telephone Company be and the same is hereby authorized to transfer and assign to The Pacific Telephone and Telegraph Company that certain franchise which was granted to Home Telephone Company of San Francisco by Ordinance No. 75 (New Series), of the City and County of San Francisco, but only on the conditions hereinafter stated; and,

The Railroad Commission hereby declares that public convenience and necessity require the exercise by The Pacific Telephone and Telegraph Company of the rights granted to Home Telephone Company of San Francisco by said Ordinance No. 75 (New Series), but only on the conditions hereinafter specified.

The foregoing order and declaration are made subject to the following express conditions:

1. Within 60 days from the date of the order herein, The Pacific Telephone and Telegraph Company shall file with the Railroad Commission a certified copy of each and every document to be filed by said Company with the Clerk of the Board of Supervisors of the City and County of San Francisco, as provided by said Ordinance No. 3018 (New Series), in full compliance by The Pacific Telephone and Telegraph Company with the provisions of said ordinance.

2. Within 60 days from the date of this order, The Pacific Telephone and Telegraph Company shall file with the Railroad Commission 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 price heretofore paid for the physical properties of Bay Cities Home Telephone Company in the City and County of San Francisco shall not be taken before the Railroad Commission or any other public authority as representing for rate making or any other purpose, the real value of the property.

(b) That neither The Pacific Telephone and Telegraph Company nor any successor or assign, will ever claim in any proceeding before the Railroad Commission or any other public authority any compensation or value for the franchise granted to Home Telephone Company of San Francisco by said Ordinance No. 75 (New Series).

3. That The Pacific Telephone and Telegraph Company will at all times, during the life of said franchise, exercise the same in compliance with all laws and ordinances now in force or that may hereafter be adopted, providing for the placing of electric wires and conductors under ground in the City and County of San Francisco, and all laws and ordinances relating to the placing, erection, use and maintenance of poles and wires in said City and County of San Francisco.

4. The Railroad Commission hereby reserves the right to revoke this order if The Pacific Telephone and Telegraph Company fails to comply with any of the provisions of its settlement with the City and County of San Francisco, as set forth in said Ordinance No. 3018 (New Series), and in the agreement dated

December 4, 1914, between The Pacific Telephone and Telegraph Company and City and County of San Francisco.

Dated at San Francisco, California, this 7th day of June, 1915.

Max Shelton  
W. H. Stanford  
Alex. Gordon  
Frank Berlin

Commissioners.

I dissent from the action taken by my associate Commissioners in granting this application.

It is admitted that the majority of the Supervisors who granted this franchise in 1906 were bribed to take favorable action thereon. In fact, a majority of the Supervisors confessed before the Grand Jury to the acceptance of such bribe for such purpose.

Applicants urge that no consideration should be given by this Commission to corruption in the granting of this franchise because it has been held by our highest courts that a franchise is not invalidated by reason of the bribing of public officials to make the grant.

I readily concede that this is the position of our courts and that, therefore, this franchise may, for the purpose of this proceeding, be determined to be valid. It is true that in view of the decision of the courts the city would be bound to recognize this

franchise, even though it was obtained through bribery. I do not concede, however, that the function of this Commission in passing upon franchises is the determination of their legality.

The Public Utilities Act, Section 50 (b), provides:

"No public utility of a class specified in subsection (a) hereof shall henceforth exercise any right or privilege under any franchise or permit hereafter granted, or under any franchise or permit heretofore granted but not heretofore actually exercised, or the exercise of which has been suspended for more than one year, without first having obtained from the Commission a certificate that public convenience and necessity require the exercise of such right or privilege."

Also it is provided in Section 51 (a):

"No ... telephone corporation ... shall henceforth sell, lease, assign, mortgage or otherwise dispose of... any franchise or permit or any right thereunder ... without having first secured from the commission an order authorizing it so to do ... "

It will be noted that under the section of the Public Utilities Act first quoted public convenience and necessity / is made the sole basis of the Commission's judgment as to the issuance of an order authorizing the exercise of rights and privileges under a franchise and that under the portion of the last section just above quoted, no basis at all is laid down upon which the Commission should issue an order authorizing the transfer of a franchise belonging to a public utility corporation.

It is clear that it was the intention of the Legislature to empower the Commission to consider matters beyond and above the mere legality of a franchise, for the courts have been and now are the tribunals to determine this matter, and if the Commission gave an opinion or an order attempting to determine the validity of a franchise its conclusion would not be final or binding as against the conclusion of the courts.

Obviously, therefore, upon an application of this kind the Commission is called upon to take the broadest possible view of the matter and determine whether, everything considered, public

convenience will be best served by permitting the exercise of rights and privileges under a franchise. Therefore, this Commission if it authorizes the transfer of this franchise and the exercise of rights conferred therein, must declare that public convenience and necessity will be best served by the exercise of rights under a franchise which was fraudulently granted by the official representatives of the very public whose needs we are considering.

I hold that it is against public interest to sanction a franchise which is tainted in its inception with official corruption.

The history of franchise grants in America has been black enough. It has happened repeatedly that corporations obtaining franchise privileges through bribery and fraud have been sustained in their possession. They have been allowed to retain the benefit of their own wrongdoing.

I firmly believe that the main value of the provision, of the Public Utilities Act which gives this Commission the power to grant or withhold certificates of public convenience and necessity lies in the check which it gives the state upon municipal franchise grants. I do not urge that by denial of this application official corruption would be prevented but I do insist that it would, at least, largely do away with the incentive for corruption.

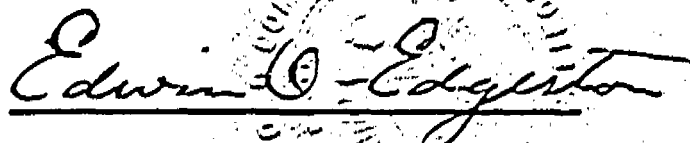
And I further believe that the State should take this, its first opportunity, to declare its unwillingness to place the stamp of approval upon a franchise known to have been obtained through bribery.

It is true, as urged by applicants, that the City of San Francisco would obtain a considerable sum of money in the aggregate if this application were granted because of the pro-



vision that it shall receive two per cent of the gross income of The Pacific Telephone and Telegraph Company obtained in San Francisco but it must be remembered that every dollar represented by this two per cent must come from the pockets of the patrons of the telephone company because any rate fixing body must allow this two per cent as an operating expense of the company. Hence this two per cent would not come from the corporation, finally, but from the people. Nor are we here confronted with a condition where the telephone service in San Francisco will be affected by a decision in this matter. The Home Company has long ceased doing business and The Pacific Company is now operating in San Francisco and will continue to operate if this application were not granted.

Dated at San Francisco, California, this 7th day of  
June, 1915.

  
Commissioner.

