

Decision No. _____

Decision No. 4248

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

CITY OF BURLINGAME,
Complainant,

vs.

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORIGINAL

Case No. 869.

John F. Davis, City Attorney, for City of Burlingame.
Pillsbury, Madison and Sutro, and James T. Shaw
for The Pacific Telephone and Telegraph Company.

BERLEN and GORDON, Commissioners.

O P I N I O N.

The City of Burlingame asks the Railroad Commission to make its order directing The Pacific Telephone and Telegraph Company, hereinafter called the Pacific Company, to eliminate its mileage charges in that portion of the City of Burlingame which lies north of Oak Grove Avenue, to the end that all customers of the Pacific Company in the City of Burlingame shall pay the same rates for the same classes of local exchange telephone service. The City also asks the Railroad Commission to make its order directing the Pacific Company to pay reparation to its customers residing north of Oak Grove Avenue to the extent to which they paid mileage charges during the period from July 7, 1915, to June 30, 1916.

The complaint alleges, in effect, that on July 7, 1915, the Board of Trustees of the City of Burlingame adopted a resolution establishing telephone rates to be charged by the Pacific

Company until June 30, 1916, a copy of which resolution is attached to the complaint as Exhibit "A"; that said resolution was adopted for the purpose of making local exchange telephone rates in the City of Burlingame uniform in all parts of the city; that the Pacific Company has failed to comply with said resolution; that the Pacific Company's local exchange telephone rates in the City of Burlingame north of Oak Grove Avenue are in excess of the rates south of Oak Grove Avenue; and that public necessity and convenience require that there be uniformity of rates throughout the City of Burlingame, that ^a telephone exchange be established in the City of Burlingame and that the City of Burlingame have a separate and distinct heading in the Pacific Company's telephone directory. Complainant asks that the Railroad Commission reduce the Pacific Company's local exchange rates in the City of Burlingame north of Oak Grove Avenue so that they shall be the same as the rates south of Oak Grove Avenue; that all rates in the City of Burlingame be uniform and the same as the rates set forth in said resolution of July 7, 1915; that a telephone exchange be established in the City of Burlingame; and that the city receive a separate and distinct heading in the Pacific Company's telephone directory. During the course of the hearings herein, complainant was permitted to amend its complaint so as to ask reparation to the extent to which any of the Pacific Company's customers in the City of Burlingame paid mileage charges during the period from July 7, 1915 to June 30, 1916.

The answer denies the material allegations of the complaint and, as amended during the course of the hearings, denies that any reparation is justly due.

A number of public hearings herein were held in San Francisco. Briefs have been filed by both parties on the issue of reparation and this proceeding is now ready for decision.

Referring first to the telephone situation as it now exists, the cities or towns of San Mateo, Burlingame and Hillsborough, together with adjacent unincorporated territory, are all served out of the Pacific Company's telephone exchange located in the City of San Mateo. The Pacific Company's primary rate area, within which its local exchange base rates apply without the addition of mileage charges, consist of the area which is included within a circle whose center is the Pacific Company's exchange building in the City of San Mateo and whose radius is two miles. This area includes the entire City of San Mateo, a portion of the cities of Burlingame and Hillsborough and certain unincorporated territory. Beyond this primary rate area, mileage charges are added, on the basis of radii increasing one-quarter of a mile at each step, as is usual in the telephone development in this State. The additional mileage charges in connection with the San Mateo primary rate area are principally paid by customers of the Pacific Company living in a portion of the City of Burlingame and a portion of the City of Hillsborough.

The City of Burlingame is a city of the sixth class and adjoins the City of San Mateo on the north. The community of Easton is a part of the City of Burlingame and is located in the northerly portion of the City of Burlingame, north of a street known as Oak Grove Avenue. The Pacific Company's San Mateo primary rate area includes that portion of the City of Burlingame which lies south of Oak Grove Avenue. North of Oak Grove Avenue, mileage charges are applicable, these charges being added to the base rate applicable to the primary rate area.

As shown by the Railroad Commission's Exhibit No. 1, the Pacific Company, in April, 1916, had 584 telephone installations in the City of Burlingame of which number 444 were south of Oak

Grove Avenue and 140 north of Oak Grove Avenue. The telephone development south of Oak Grove Avenue was considerably greater than the development north of Oak Grove Avenue. On January 1, 1917, 876 houses in the City of Burlingame were served with water, of which number 510 were located south of Oak Grove Avenue and 366 north of Oak Grove Avenue. On the basis of four inhabitants to each house served with water, it would appear that on January 1, 1917, approximately 3500 people were living in the City of Burlingame, of whom 2040 were living south of Oak Grove Avenue and 1460 north of Oak Grove Avenue.

For some time, especially following the recent/^{rapid} development, the inhabitants of Easton have been seeking the elimination of the mileage charges, so that their local telephone rates should be the same as the rates prevailing in the City of Burlingame south of Oak Grove Avenue, as well as in San Mateo and that portion of Hillsborough which is located within the primary rate area.

On July 7, 1915, the Board of Trustees of the City of Burlingame passed a resolution providing "that all telephone rates throughout the entire City of Burlingame shall be uniform and on the basis as set forth" in the resolution. The resolution further provided that these rates "shall apply north of Oak Grove Avenue of the City of Burlingame as well as south of Oak Grove Avenue of the City of Burlingame and shall be operative up to June 30, 1916".

The Pacific Company has refused to apply these rates north of Oak Grove Avenue on the ground that the resolution is illegal and has continued to charge the rates theretofore in effect, including additional mileage charges outside of the primary rate area.

This proceeding presents two issues, as follows:

1. The elimination of the differences in local exchange rates in different portions of the City of Burlingame; and,
2. The claim for reparation.

These issues will be separately considered.

I.

BURLINGAME LOCAL EXCHANGE RATES.

The complaint asks that all local exchange rates in the City of Burlingame be reduced to the rates prevailing south of Oak Grove Avenue. This request is based in part on the claim that the rates prevailing north of Oak Grove Avenue have been unreasonably high and in part on the claim that they have been discriminatory.

Referring first to the issue of reasonableness, the complainant introduced no evidence as to the fair value of the Pacific Company's property chargeable to the service here under consideration, nor as to reasonable maintenance and operating expenses nor as to a reasonable depreciation annuity, nor any other evidence from which the Railroad Commission can determine just and reasonable rates to be charged for any local exchange service out of the San Mateo exchange. The complainant made the general assertion that the Pacific Company's local exchange rates north of Oak Grove Avenue are unreasonably high, but presented no competent evidence in support of this allegation.

Referring next to the doctrine of discrimination, the complainant referred to the telephonic conditions prevailing in South San Francisco, San Bruno and Lomita Park as compared with the conditions prevailing in the territory served out of the San Mateo exchange. The evidence submitted is not sufficient to make out a case of discrimination. Even if discrimination had been proved, the only order which the Railroad Commission

could make under this head would be an order to the Pacific Company to remove the discrimination, which order would be just as much ~~applied~~ ^{complicated with} by increasing the rates prevailing in the primary rate area as by decreasing the rates prevailing north of Oak Grove Avenue by eliminating the mileage charges.

We conclude that the evidence introduced by complainant is insufficient to warrant the Railroad Commission in granting the relief requested.

Subsequent to the filing of the complaint herein, the Railroad Commission's Telephone Division, acting under instructions from the presiding Commissioners herein, engaged in a number of conferences with the Pacific Company for the purpose of ascertaining whether a temporary adjustment which would be consistent with the permanent/^{telephone} development of this territory might not be made prior to the decision hereafter to be rendered in Application No. 1870, in which proceeding the Railroad Commission will establish the rates to be charged by the Pacific Company for local exchange service in all its exchanges in the state, including its exchange or exchanges in the territory here under consideration. The situation in both Burlingame and Hillsborough, ~~in which~~ a portion of each ~~of these~~ community ~~is~~ receiving telephone service at the base rates prevailing in the primary rate area while other portions of the same cities must pay additional mileage rates, is not satisfactory. While primary rate areas cannot be extended indefinitely, it is generally not desirable that people living in the same city should pay different rates for the same classes of ~~xxxxxx~~ local exchange telephone service. Another factor obviously necessitating some adjustment in the telephone situation in this territory is the recent rapid increase in population of San Mateo and adjacent territory, resulting in a constantly increasing strain on the San Mateo telephone exchange. It seems clear that the time has come for the establishment either

of a separate exchange for Burlingame and Hillsborough, and adjacent territory, or of a branch exchange feeding out of the San Mateo exchange. The request of the complainant herein that a separate telephone exchange be established for the City of Burlingame would obviously be prejudicial to the people of Burlingame, for the reason that such a proposition would almost necessarily require the payment of a toll charge for messages between Burlingame and the other portions of the territory here under consideration, including the City of San Mateo and the City of Hillsborough. It early became evident that the object which the complainant had in mind could be accomplished far more satisfactorily by the establishment in Burlingame or Hillsborough of a branch exchange feeding into the San Mateo exchange, without the imposition of toll charges.

The Railroad Commission's Telephone Division accordingly conferred with the Pacific Company to see whether a constructive plan could not be formulated along the lines just indicated. The Pacific Company, although at first unwilling to take any action prior to the decision to be rendered in Application No. 1870, thereafter co-operated fully to the attainment of the ends herein set forth. The Pacific Company purchased a lot on Oak Grove Avenue for \$1250.00, graded the same and erected a building at an expense of \$15,000.00, and is engaged in the installation of a switchboard at an expense of \$13,000.00 and in making the necessary changes in outside plant at an expenditure of approximately \$8080.00. The total expenditure in connection with the new branch exchange will be approximately \$37,330.00. The Pacific Company has agreed that this branch exchange will serve the cities of Burlingame and Hillsborough and certain adjacent unincorporated territory, that it will be regarded as a branch exchange of the San Mateo exchange and that no claim will be made for the collec-

tion of a toll charge in connection with messages between the San Mateo exchange and the new branch exchange. The Pacific Company has offered to make effective a new primary rate area to include the cities of San Mateo, Burlingame and Hillsborough and part or all of certain adjacent unincorporated territory. Within this entire area, rates are to be uniform for the same class of service, thus eliminating all mileage charges in Burlingame and Hillsborough and the other portions of the territory to be included within the new primary rate area.

Railroad Commission's Exhibit No. 1 shows that in the year ending December 31, 1915, the sum of \$1443.60 was collected in mileage charges in Burlingame and \$1371.00 in other territory feeding out of the San Mateo exchange, the total mileage charges being \$2814.60 during this period. The plan contemplated by the Pacific Company will result in a loss of this entire revenue.

The Pacific Company offers to make the new arrangement effective when its construction work has been completed, which time it is represented will, presumably be on or before July 7, 1917. The Pacific Company offers to apply within the entire new primary rate area the rates hitherto prevailing in the existing primary rate area, notwithstanding the loss in revenue hereinbefore indicated, pending the decision to be rendered in Application No. 1870.

Subsequent to the filing of the complaint herein, the Pacific Company made a change in its "Bay Counties" telephone directory, so that all its subscribers in the territory herein under consideration appear under the head of "San Mateo, Burlingame, Hillsborough and Easton". Burlingame, Hillsborough and Easton are each name separately, with a reference in each case reading as follows: "For subscribers see San Mateo, Burlingame, Hills-

borough and Easton". This arrangement satisfactorily adjusts the complaint with reference to the listing in the telephone directory.

The Pacific Company offered to stipulate that it would complete the arrangement hereinbefore set forth if the complainant would withdraw its claim for reparation. The complainant thereupon expressed a willingness to accept the completion by the Pacific Company of this plan as satisfaction of that portion of the complaint which deals with the elimination of differences in rates, but was unwilling to enter into any stipulation to dismiss this proceeding unless the Pacific Company should agree to make reparation for the mileage charges collected in Burlingame between July 7, 1915, and June 30, 1916.

The complainant having failed to make out its case, as hereinbefore indicated, is not entitled to an order granting the relief prayed for. Nevertheless, under the plan worked out by the Pacific Company and the Railroad Commission's Telephone Division, which plan has already been largely carried out, the people of Burlingame, Hillsborough and vicinity will secure relief notwithstanding the complainant's failure to present the necessary evidence to make out its case.

II.

REPARATION.

The second issue in this proceeding is whether reparation should be awarded covering the mileage charges paid by the inhabitants of the City of Burlingame during the period from July 7, 1915, to June 30, 1916.

As complainant has failed to introduce evidence on which the Railroad Commission can herein make a finding as to just and reasonable rates, it is evident that the complainant's claim to

reparation must be based exclusively on the proposition that the rates referred to in the resolution of July 7, 1915 were lawful rates during the period from July 7, 1915, to June 30, 1916, and that the mileage rates charged by the Pacific Company to its subscribers north of Oak Grove Avenue were illegally charged and collected.

The Pacific Company urges that the resolution of July 7, 1915, is void for the reason that the Board of Trustees should have acted by ordinance and not by resolution. For the reasons hereinafter appearing, it is not necessary to pass on this contention.

As already indicated, the City of Burlingame is a city of the sixth class. That the Municipal Government Act has conferred upon such city no power to regulate telephone rates is conceded. Complainant urges that the power to establish such rates was delegated to it by Section 11 of Article XI of the Constitution of California providing that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

If it is assumed for the sake of the argument, that this constitutional provision granted to cities of the sixth class the power to establish public utility rates, on which point it is not necessary herein to express an opinion, it must nevertheless be admitted that the power thus granted must be lawfully exercised if it is to be effective. We are satisfied that the City of Burlingame did not exercise its power lawfully even if it is assumed that the city had the power to establish rates for telephone service in certain cases. As already shown, local exchange telephone service in the entire territory here under consideration has been rendered

out of the Pacific Company's exchange located in the City of San Mateo. The Pacific Company has had no exchange in the City of Burlingame. Every telephone conversation between one of the Pacific Company's subscribers in the City of Burlingame and any other subscriber in the territory here under consideration, whether in Burlingame, San Mateo, Hillsborough or elsewhere, has crossed the city limits of Burlingame and been transmitted through the Pacific Company's San Mateo exchange. In no single instance has any such telephone conversation been conducted exclusively within the City of Burlingame. Conceding, for the purpose of the illustration, that the City of Burlingame might have established a primary rate area confined to the City of Burlingame and might have provided rates for telephone conversations which were confined to people conversing with each other in the City of Burlingame without crossing the city's boundaries, it is clear that this action was not taken by the City of Burlingame by the resolution of July 7, 1915. This resolution established no primary rate area and merely undertook to establish the rates to be paid by customers of the Pacific Company living in the City of Burlingame and using the service as offered by the Pacific Company, which service was a service carried on through the San Mateo exchange and, in each instance, in part extra territorial in character.

That a city, unless specially authorized so to do, can not enact ordinances or resolutions having extra territorial force is clear both in logic and on authority. In City of South Pasadena vs. Los Angeles Terminal Railway Company, 109 Cal. 315, it appeared that the City of South Pasadena had granted a franchise to the defendant's predecessor for the operation of a steam railroad along a designated route over and along the streets of South Pasadena. The ordinance provided, in part, that round trip fares between points within the City of South Pasadena and the business center of the City of Los Angeles

should never exceed 30 cents. Thereafter, acting under authority of a resolution adopted by the Board of Railway Commissioners, the defendant railway company increased said round trip fares. The City of South Pasadena thereupon applied to the Superior Court for an injunction to prevent the further operation of the railroad on its streets. The injunction was granted by the Superior Court but this action was reversed by the Supreme Court. As pointed out by the Supreme Court, on page 321, city ordinances "can have no extra territorial force unless by express permission of the sovereign power; in the nature of things this must be so unless intolerable confusion and evil are to result". The court held that the portion of the ordinance which undertook to impose a condition with reference to the amount of the round trip fares between points in the City of South Pasadena and the business center of Los Angeles was void by reason of want of power on the part of the City of South Pasadena to enact such provision.

Likewise, in City of Arcata vs. Green, 156 Cal. 759, the Supreme Court held that the City of Arcata had no power, in granting a franchise for the operation of an electric railroad over its streets, to provide that work on such railroad, which was to be constructed between Arcata and Eureka, should be commenced within nine months and completed within two years. The Supreme Court, speaking through Justice Sloss, held that this condition was void and was "as clearly extra territorial as the provisions in the South Pasadena case".

The complainant refers, as authority for its position, to Home Telephone and Telegraph Company vs. City of Los Angeles, 155 Fed. 554, which case is reported on appeal in 212 U.S. 265. In this case, an ordinance of the City of Los Angeles establishing the rates to be charged for telephone service rendered by Home Telephone and Telegraph Company was sustained. The freeholders'

charter of the City of Los Angeles contains a specific provision giving to the city the power "to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service, and connections." It will be observed that the power of the city was specifically limited to the regulation of telephone service and the use of telephones "within the city". There is nothing in the case reported to show that the City of Los Angeles undertook to establish rates for telephone service rendered in whole or in part outside the City of Los Angeles. If such effort had been made, and attention had been directed thereto, the ordinance would unquestionably ^{have been} held void. Even a freeholders' charter does not authorize a city to exercise extra territorial power unless such effect is clearly contemplated and specifically authorized.

Even if the City of Burlingame had established a primary rate area co-terminus with the city limits, which we expressly find was not done, nevertheless we are satisfied that reparation should not be awarded herein for the reason that as far as the record shows, no subscriber of the Pacific Company asked for service thus limited. As far as the record shows, each subscriber of the Pacific Company in the City of Burlingame was entirely willing to accept the much more extensive service which alone was being accorded by the Pacific Company through its San Mateo exchange.

We recommend that the complaint herein be dismissed and submit the following form of order:

O R D E R .

The above entitled proceeding having been submitted, briefs having been filed and the proceeding being now ready for decision,

IT IS HEREBY ORDERED that this proceeding be and the same is hereby dismissed.

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 16th day of April, 1917.

Max Thelen
H. S. Howard
W. G. Gordon
Edwin O. Edgerton
Stuart R. Dolin

Commissioners.