

Decision No. 55620

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Mercury Television Mfg. Corp., )  
 and Joe Benaron, President, )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 California Water & Telephone Company, )  
 )  
 Defendant. )

Case No. 5896

Charles E. Davies, for complainant.

Bacigalupi, Elkus and Salinger, by Claude N. Rosenberg,  
for defendant.

Arthur T. George and Pillsbury, Madison & Sutro, by  
Dudley A. Zinke, for The Pacific Telephone and  
Telegraph Company, interested party.

OPINION ON MOTIONS TO DISMISS OR TO  
JOIN THE PACIFIC TELEPHONE AND TELE-  
GRAPH COMPANY AS A PARTY DEFENDANT.

On February 4, 1957, Pacific Mercury Television Mfg.  
Corp. filed the above-entitled complaint wherein it alleged in  
substance the following:

That the complainant is a subscriber for telephone  
service furnished by the defendant; that although complainant con-  
tracted with defendant and paid for adequate and satisfactory  
telephone service, it failed to receive such service for the  
period from April 1954 to April 1955; that the service provided  
during that period was inefficient, unsatisfactory, at times im-  
possible, and unduly costly; that numerous and repeated complaints

were made to the proper representatives of the defendant over a period of ten months without any improvement being made; that correction was made only after the matter was referred directly to the president of the defendant; that the poor service caused monetary loss, loss of executive and personnel time and efficiency, worsened business relationships, and in some cases double or triple payments were incurred for extended and long distance toll calls; that after the faulty service had been corrected, complainant requested that an adjustment or reimbursement of a portion of the amount paid should be made; that defendant agreed that a suitable reimbursement would be made provided The Pacific Telephone and Telegraph Company participated in the cost of the reimbursement; that subsequently the defendant refused to make any adjustment because The Pacific Telephone and Telegraph Company refused to participate in the cost; and that the amount of money paid for faulty telephone service during the period involved, exclusive of costs of terminal telephone apparatus such as P.B.X., amounted to \$22,874. The complainant prayed that the Commission direct that suitable reimbursement be made of moneys which the defendant collected of the complainant, and suggested that 50 percent, or \$11,437, would be a proper amount.

The complaint was acknowledged by the complainant's president and by its communications representative on January 29, 1957, and was also signed by each of said parties. It was not verified (Rule 5, Order Revising Rules of Procedure).

On February 8, 1957, a copy of the original complaint was mailed to the defendant, together with a request that

defendant return the copy within five days, together with a statement of any asserted defects therein (Rule 12 of Rules of Procedure).

On February 14, 1957, the defendant returned the complaint, together with a letter wherein, inter alia, it pointed out: (1) that the complaint should be dismissed for lack of jurisdiction in that the complaint shows on its face that the alleged faulty service has been corrected; (2) that the complaint is outside the jurisdiction of the Commission in that it is a complaint for breach of an oral agreement for reimbursement or for damages because of poor service; and (3) that the complaint is not verified.

On February 27, 1957, the Commission notified the complainant of the claimed defects.

On April 8, 1957, the complainant filed an "Amended Complaint" wherein Joe Benaron, President of complainant company, was joined as complainant, and he, in his individual capacity, verified the said amended complaint. No cause of action in favor of said individual is set out therein, and the only change, in addition to the verification, is the addition of paragraph 9 wherein complainant cites Sections 451, 701 and 702 of the Public Utilities Code, and sets forth some argumentative statements and conclusions.

On May 21, 1957, the defendant filed an answer to the amended complaint and a "Notice of Motions" addressed to the complainants and to The Pacific Telephone and Telegraph Company and Pillsbury, Madison & Sutro, its attorneys. The motions noticed were: (1) to dismiss the amended complaint on the ground that all

rates charged complainants for telephone service have at all times been those authorized and formally found to be reasonable by the Commission; (2) to dismiss the amended complaint on the ground that the cause of action therein alleged, and each and every part thereof, is barred by the provisions of Section 735 of the Public Utilities Code; (3) to dismiss the amended complaint on the ground that there is a defect of parties defendant in that The Pacific Telephone and Telegraph Company is a necessary and indispensable party defendant for the reasons stated and alleged in the Third Affirmative Defense of defendant's answer to the said amended complaint; and (4) in the alternative to bring in and join The Pacific Telephone and Telegraph Company as a party defendant in the above case on the ground that it is a necessary and indispensable party without whose presence a complete and equitable determination of issues raised in said amended complaint cannot be had, for the reasons stated and alleged in the Third Affirmative Defense of defendant's answer to said amended complaint;

In the defendant's "Third Affirmative Defense" set forth in its "Answer to Amended Complaint", defendant alleges that the principal telephone services of which complainants complain are foreign exchange and long distance services which are rendered jointly by defendant and The Pacific Telephone and Telegraph Company, the revenues of which are divided between the two companies.

Oral arguments on the motions to dismiss and to join The Pacific Telephone and Telegraph Company as a party defendant

were heard by Commissioner Ray E. Untereiner in Los Angeles on July 30, 1957, and the motions were submitted.

The Verification of the Complaint

As heretofore stated, the complainant filed the original unverified complaint bearing an acknowledgment by the corporation's president on February 4, 1957. Subsequently, on April 8, 1957, it filed an amended complaint verified by Joe Benaron, the complainant's president, in his individual capacity. Joe Benaron was not a party to the original complaint. During the oral argument the defendant moved to strike the original complaint from the file on the ground that it was not verified as required by Rule 5 of the Commission's Rules of Practice and Procedure, and is not, therefore, in substantial compliance with the Commission's rules (see Rule No. 38).

In the interests of substantial justice, the motion to strike the original complaint is denied. There is nothing in the Public Utilities Code which requires that complaints be verified. Section 1701 thereof provides that: "All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission." It is true that Rule 5 of the Commission's Rules of Practice and Procedure requires that complaints be verified but the mere failure of the Commission to observe rules adopted by it relative to

practice and procedure does not render its order one in excess of its jurisdiction. (Ghriest v. Railroad Commission, 170 Cal. 63 1915.)

The motion to dismiss on the ground that all rates charged complainants for telephone service at all times have been those authorized and formally found to be reasonable by the Commission.

This motion was abandoned by the defendant. During the oral argument its counsel stated as follows:

"Now, let me make it very clear, that for the purpose of this motion we are not questioning that the Commission has jurisdiction in a proper case to award a consumer reimbursement or damages or reparations or whatever you want to call it, arising from the fact that it has paid a tariff rate but it has received inadequate service over some period of time.

"I say we concede that and assume it for our purposes here today, so that I am not going to argue the question of jurisdiction.

"We will, as I say, concede that the Commission has jurisdiction to award a complainant reimbursement on account of faulty service, but the question now is, when must a complaint in which such relief is requested be filed."

The motion to dismiss the Amended Complaint on the ground that the cause of action alleged therein is barred by the provisions of Section 735 of the Public Utilities Code.

The defendant's main contention was that the entire relief sought is barred for the reason that the Amended Complaint was filed on April 8, 1957, more than two years after any portion of the services involved were rendered. In the alternative, it

argued that if the complaint were considered as having been filed on February 4, 1957, reparation in connection with services rendered more than two years prior to that date is barred. The complainant, on the other hand, argued that, because of the correspondence between the parties and the making of an "informal complaint" on March 1, 1955, no part of the claim is barred, its contention being that the making of an "informal complaint" tolls the running of the statute.

We have hereinbefore ruled that the action herein was properly commenced by the filing of the original complaint on February 4, 1957. The defendant argued, and we find, that the applicable statute of limitations is two years (Section 735, Public Utilities Code). This was not disputed by the complainant. Complainant did argue that the making of an "informal complaint" by him on March 1, 1955 constituted the commencement of proceedings and that, therefore, the action was filed in time to save to complainant all rights arising out of services during the period for which reimbursement is claimed. The complainant's contention has been specifically overruled by the Supreme Court of California in Los Angeles and Salt Lake R. R. Co. v. Railroad Commission, 207 Cal. 123 (1929), wherein it was held that a complaint must be filed within two years of the time the cause of action accrues, and that the making of an "informal complaint" by letter does not constitute the commencement of an action. The Commission has consistently followed the rule laid down in the above-referred-to Supreme Court decision since 1929 (see California Live Stock Commission Company, et al v. S. P. Ry. Co. et al, 35 C.R.C. 31 at 32). The statute of limitations prescribed in Section 735 bars ✓

not only the remedy but the right, and, insofar as Commission jurisdiction is concerned, cannot be waived by the defendant. A defendant cannot be deemed estopped by conduct on its part from pleading such defense (Palo Alto Gas Company v. Pacific Gas & Electric Co., 15 C.R.C. 618, 626).

As an alternative to dismissing the entire complaint, the defendant moved that such portion of the alleged cause of action as accrued more than two years prior to the filing of the original complaint should be dismissed. Both parties are hereby placed on notice that only those services rendered within two years prior to the filing of the complaint will be considered by the Commission in determining complainant's rights, if any, to reparations.

The motion to dismiss the complaint for the failure to join The Pacific Telephone and Telegraph Company as a necessary party defendant, or, in the alternative, to join said company as a defendant.

The defendant did not seriously urge that the complaint should be dismissed for failure to join The Pacific Telephone and Telegraph Company as a party defendant and cited no authority in support of said motion. The Pacific Telephone and Telegraph Company does not appear to be an indispensable party, and, in any event, to grant the motion would be to act contrary to Section 1703 of the Public Utilities Code.

The motion to join The Pacific Telephone and Telegraph Company as a party defendant will also be denied, as it appears beyond our jurisdiction inasmuch as the applicable statute of limitations in which to commence the action against said party has expired.

"The general rule is well settled that when new parties are brought in by amendment, the statute of limitations continues to run in their favor until thus made parties. The suit cannot be considered as having been commenced against them until they are made parties." (Ingram v. Department of Industrial Relations, 208 Cal. 633 at 643 [1930].)

The two-year statute of limitations can not be waived (Palo Alto Gas Company v. Pacific Gas and Electric Company, supra).

Inasmuch as the statute of limitations can not be waived and The Pacific Telephone and Telegraph Company could not become a party until joined, and for the other reasons above stated, the motion to join The Pacific Telephone and Telegraph Company as a party defendant is denied.

O R D E R

The defendant having made certain motions as above set out, a public hearing having been held thereon, now therefore,

IT IS ORDERED that each of the motions heretofore discussed is denied, and that the complaint be set for hearing on the merits, the parties hereby being placed on notice that only such claims for reparation as are based upon service rendered within two years prior to the filing of the complaint herein will be considered.

IT IS FURTHER ORDERED that the parties hereto shall be given notice of the time and place of the hearing on the complaint.

The effective date of this order shall be ten days after the date hereof.

Dated at San Francisco, California, this 1st day of October, 1957.

[Signature]  
President

[Signature]

[Signature]

[Signature]

[Signature]  
Commissioners