

ORIGINAL

Decision No. 67334

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of THE PACIFIC TELEPHONE)
 AND TELEGRAPH COMPANY, a corporation,)
 for authority to carry out the terms) Application No. 46193
 of a contract for the furnishing of)
 channels and related facilities to)
 SUBSCRIPTION TELEVISION, INCORPORATED.)

Pillsbury, Madison & Sutro, Arthur T. George,
George A. Sears and John A. Sutro, Jr., by
George A. Sears and John A. Sutro, Jr., for
 applicant.

William K. Coblenz and Bautzer, Irwin,
Schutzbank & Schwab, by Woodrow M. Irwin,
 for Subscription Television, Incorporated,
 intervenor.

Frederick C. Dockweiler, for Committee for
 Free Television, protestant.

R. W. Russell, by K. D. Walpert, for the
 City of Los Angeles, interested party.

Roy M. Rick, Frank M. Winckler and Jerome
Joseph, interested parties, appearing in
 propria personae.

Elmer Sjostrom and James G. Shields, for the
 Commission staff.

O P I N I O N

The Pacific Telephone and Telegraph Company requests authority to carry out the terms and conditions of an agreement entered into with Subscription Television, Incorporated, (STV) for the purpose of furnishing channels and related facilities for transmission of television and audio program material within a designated area of Los Angeles, California, consisting of approximately 10,766 living units.

Public hearings were held in Los Angeles on March 25, 1964, and in San Francisco on April 1, 1964, before Commissioner Bennett and Examiner Daly. The matter was submitted upon receipt of briefs since filed and considered.

Under the terms of the agreement, dated February 10, 1964, applicant would furnish communication channels to STV for transmission of video, audio and interrogation and response signals between STV's studio and the premises of the subscribers of STV. These channels would be provided by cable from the STV studio to applicant's central office, and then by a cable distribution network from the central office to the buildings occupied by the subscribers of STV. Connection within the building for each subscriber would be made by service drops. Each drop would terminate on a connecting block. Applicant would also provide channels from the premises of STV subscribers to the STV studio so as to transmit billing response signals. When an interrogation signal from STV's studio is received at the STV station selector in one of its subscriber's premises, an audio frequency response signal is returned indicating which STV program is being watched.

Service under the agreement would require the installation of 19.76 cable miles of feeder channels and 56.15 cable miles of distribution channels. The estimated costs and the agreed charges for the services to be provided were broken down into the following major classifications: (1) feeder cable, (2) distribution cable, (3) head end equipment, and (4) drops.

According to Exhibit 4 the costs and charges, based upon an allocation of estimated annual revenues, would be as follows:

	<u>Investment Cost</u>	<u>Nonrecoverable Cost*</u>	<u>Annual Charge</u>
Feeder	\$184,664	\$188,482	\$ 85,305
Distribution	403,983	427,949	153,151
Head End	82,213	62,986	34,857
Total	670,860	679,417	273,313

* Includes nonreusable material, labor and engineering, plus cost of removal, less salvage.

Applicant contends that the proposed rates and charges are fair and reasonable and would be compensatory without burdening

other ratepayers. The agreement requires STV to deposit with applicant moneys equal to the nonrecoverable costs of \$679,400 to protect applicant against financial loss in the event of any early discontinuance of channel facilities provided. Applicant would make no charge to the subscribers of STV, would have no responsibility for the selection of the program material and would make no connections to television sets.

Statements in support of the proposed agreement were made by representatives of the Screen Actors Guild, The Fair Trial for Pay TV Committee, the Screen Photographers, Local 659, I.A.T.S.E., and several individuals speaking in their own behalf. Statements in opposition to the proposed agreement were made by representatives of the California Federation of Women's Clubs, the Motion Picture Projection Local, I.A.T.S.A., the National Council of Senior Citizens, the Stockton Rental Property Association, 50 merchants in the Sacramento area and by several individuals speaking in their own behalf.

The statements were primarily directed to the advantages and disadvantages of pay TV as opposed to free TV. Several requested that the Commission defer decision on the application pending action by the public electorate on a proposed initiative measure that may be placed on the ballot for the general election in November of this year.

Prior to submission the presiding Commissioner requested briefs on three issues:

1. Whether or not the proposed service is a public utility operation subject to the jurisdiction of the Commission?
2. Would the proposed service under the contract constitute a burden upon applicant's ability to provide public utility telephone service?
3. Does the Commission have the authority to delay its decision until November 1964 pending the outcome of the initiative measure?

Jurisdiction

The leading California case and the one cited by all parties was Television Transmission v. Public Utilities Commission (47 Cal.2d 82). The petitioners therein operated a "community television antenna", furnishing coaxial television antenna service to approximately 950 television sets within an area in Contra Costa County. The antenna was placed at a point of high elevation and amplified television signals were transmitted through a coaxial cable, which was owned, operated and maintained by petitioner, to the homes of petitioner's subscribers. Pursuant to an agreement, the cable was attached to the poles of The Pacific Telephone and Telegraph Company, for which petitioner paid a fixed charge per pole per year. A complaint was filed with this Commission alleging deficiencies in service. Following hearing, this Commission found that petitioner was operating as a telephone corporation.

Upon review the Supreme Court held that a community television service did not fall within the definition of a "telephone corporation" because its transmission of television signals by the use of poles and wires was not in connection with or to facilitate communication by telephone. The Court therefore held that the operations performed by petitioner were not those of a "telephone corporation" within the meaning of Sections 216(a) and 233⁽¹⁾ of the Public

(1) "216(a) 'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof."

"233 'Telephone line' includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

Utilities Code and not subject to the jurisdiction of this Commission.

In the instant case, however, the agreement provides that applicant is to furnish STV channels for one-way transmission of television (video and audio) and audio program material, channels for interrogation and response signals for billing purposes, as well as drops and related facilities. All equipment and facilities furnished by applicant would be installed and maintained by applicant and would remain the property of applicant. Ownership and control of the facilities involved would remain with applicant. The agreement further provides that, in the event applicant files a tariff with the Commission, the contract would terminate and all service provided thereafter would be provided pursuant to the tariff. The agreement is specifically made subject to all changes or modifications which this Commission may direct in the exercise of its jurisdiction.

To provide the proposed service, applicant would be utilizing public utility facilities that have been wholly dedicated to the public use for the purpose of transmitting the commodity of STV (television entertainment) to the subscribers of STV. As stated in Television Transmission v. Public Utilities Commission (supra) at page 87:

"* * * Pacific Telephone and Telegraph Company was unquestionably a telephone corporation, and it remains a telephone corporation and its lines remain telephone lines, even though they were incidentally used to transmit other forms of communication."

It naturally follows that, when providing the proposed service to STV, applicant will remain a "telephone corporation" within the meaning of Sections 216(a) and 233 of the Public Utilities Code and as such, is subject to the jurisdiction of this Commission.

Ability of Applicant to Perform

If the proposed service is financially self-sustaining it would enable applicant to make better use of its facilities and conceivably could result in lower telephone rates. It must not, however, place a burden upon applicant's other customers.

The proposed service is original in nature and therefore the costs are based upon estimates. As a result, applicant does not intend to file a tariff until such time as the validity of the estimate can be tested. Although the proposed rates and charges appear to be reasonable and compensatory, it would be in the public interest if applicant were required to file a financial breakdown of the operation and if it were also required to eventually file an appropriate tariff.

During the formative stages, applicant would be protected against possible loss resulting from early discontinuance of service by the deposit of \$679,400, which would equal the amount of applicant's estimated nonrecoverable costs.

Delay of Decision

The time within which the Commission renders a decision in a proceeding before it is a matter of discretion. In the absence of an abuse of that discretion, there is no limitation upon the time.

The Commission is not here determining the relative merits of pay TV as opposed to free TV. The question of whether the people of California should have pay TV is not for the Commission to decide provided the transmission of pay TV does not impair the ability of the public utility to provide service to its other customers.

The plan of operation submitted by Subscription Television, Incorporated, clearly shows an intention to enter into the "subscription television business" as defined in Section 35001 of the Revenue and Taxation Code. The right of STV to enter into such a business is specifically permitted by Section 35002 of the Code. In view of the recent expression of the California Legislature authorizing STV to enter into business in the manner proposed (Ch.5, Stats. 1st Ex. Sess.1963), to defer decision in this matter pending possible electorate action in November of this year, resulting in a de facto repeal of an enactment of the California Legislature, would, in the opinion of this Commission, constitute an abuse of discretion.

Findings and Conclusions

1. Applicant is a public utility subject to the jurisdiction of this Commission.
2. Under the proposed service applicant would furnish communication services to STV through certain channels and related facilities for transmission of television and audio program material. Said channels and related facilities would remain the property of applicant subject to its ownership and control.
3. The performance of the proposed service by applicant for STV would not change the status of applicant as a "telephone corporation" subject to the jurisdiction of this Commission.
4. The proposed rates and charges as set forth in the agreement appear to be reasonable and compensatory. The deposit of \$679,400 appears sufficient to protect applicant against possible loss in the event of early termination of service.
5. Applicant should be required to file periodic reports covering the results of operating the proposed service.

6. The agreement as set forth in the application does not appear to be adverse to the public interest; however, applicant should be required to file an appropriate tariff as soon as practicable and should be required to perform said service pursuant to its tariff rather than the agreement.

7. To defer decision in this matter until November of this year pending the outcome of a possible initiative measure would constitute an abuse of discretion.

O R D E R

IT IS ORDERED that:

1. The Pacific Telephone and Telegraph Company is authorized to carry out the terms of the contract attached to the application and marked Exhibit A, with Subscription Television, Incorporated, dated February 10, 1964, including Schedules A-1 and A-2 attached thereto.
2. After the applicant has experienced a full calendar year's operation thereunder, it shall, within ninety days thereafter, submit a results of operation report for such first calendar year to the Commission. Such report shall include supplemental information concerning the amount of deposit refunded, if any, detail of non-recurring charges and the end-of-period number of drops being provided under the contract.
3. After the applicant has had two full calendar years' operating experience under this contract, it shall submit, within ninety days thereafter, a report setting forth the advisability of providing this service on a tariff schedule basis and, if advisable, a proposed tariff schedule in definitive form.

4. Applicant shall notify the Commission when operations under this authority have begun and service is being rendered to subscribers as contemplated in the contract.

5. The authority granted herein will lapse if not exercised within two years.

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

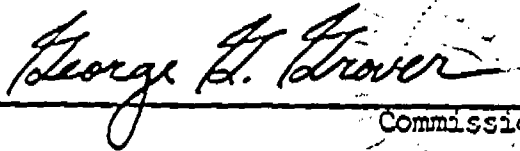
Dated at San Francisco, California, this 3rd day of JUNE, 1964.

William A. ...
President
...
...
Fredrick B. Holcliff
Commissioners

I dissent.

The issue of whether Subscription Television is a public utility was raised at the hearings and, by specific direction of the presiding commissioner, was briefed by the parties. That issue should have been decided.

In my view, Subscription Television is a public utility.


Commissioner