

**ORIGINAL**Decision No. 67492

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THE PACIFIC TELEPHONE AND TELEGRAPH )  
COMPANY, a corporation, )

Complainant, )

v. )

Case No. 7345

CALIFORNIA VALLEY MUTUAL TELEPHONE )  
COMPANY, a corporation, and SAN )  
MIGUEL TELEPHONE COMPANY, a )  
corporation, )

Defendants. )

A. T. George and G. H. Eckhardt, Jr., for The  
Pacific Telephone and Telegraph Company,  
complainant.Allen, Fasman and Wolf, by Albert H. Allen, and  
Leonard S. Wolf, for the California Valley  
Mutual Telephone Co., defendant.Bacigalupi, Elkus & Salinger, by Warren A. Palmer,  
for San Miguel Telephone Company, defendant.O P I N I O N

On January 15, 1964, The Pacific Telephone and Telegraph Company filed Application No. 4610~~4~~ to serve a new exchange area <sup>16</sup> to be called California Valley Exchange. It would include the communities of Simmler and El Chicote in the Carrisa Plains area of San Luis Obispo County.

Having heard that defendant California Valley Mutual Telephone Company (California Valley) was constructing a telephone system at El Chicote, Pacific commenced the instant proceeding, February 20, 1964. The Commission issued its interim cease and desist order against defendants on February 25, 1964, setting hearing thereon for March 5, 1964. On the last-named date the matter was heard before Examiner Power at Paso Robles. The matter

was submitted at that time subject to the filing of written statements of position. These have been received and the matter is ready for decision.

In its complaint Pacific alleges its application for the territory and the fact that it is now serving the area through 29 toll stations, including 6 in El Chicote. It further alleges that California Valley is constructing a telephone system at El Chicote and that employees of San Miguel Telephone Company have been assisting in such construction. It is alleged also that California Valley is operating as a public utility without having first obtained authorization from this Commission and also without filing exchange boundaries or rates.

The defendants filed separate answers. California Valley alleged that it was a nonprofit membership corporation with membership restricted to owners or lessors of property within the California Valley subdivision. It further alleged that certain persons connected with the subdivider had approached complainant requesting it to establish an exchange in the valley. It further alleged that Pacific had replied that it would do so in two or three years if the territory were assigned to it by this Commission.

San Miguel's answer denied that it had agreed to provide toll service but averred that it was ready, willing and able to do so. It further denied that it was participating in the construction.

Although consumer-owned nonprofit telephone companies enjoy no express statutory exemption from regulation,<sup>1/</sup> California Valley contends that such a company is not a public utility and is not subject to Commission jurisdiction. We find it unnecessary to decide this jurisdictional question, for the facts established on this record show that California Valley is not operating as the "mutual" company it claims to be.

The Articles of Incorporation and Bylaws of California Valley are in evidence (Exhibits 2 and 9). Certain quotations from them are pertinent to this discussion, and they are set out below:

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<sup>1/</sup> In contrast, mutual water companies are expressly exempted. Pub. Util. Code §2705.

(From the Articles of Incorporation):

"II.

"The purposes for which this corporation is formed, the specific and primary purpose for which it is formed being set forth in paragraph (a) below, are:

- (a) To provide local and long distance telephone services and provide electrical power solely and exclusively for the members of this corporation in, or in the vicinity of a subdivision generally known as California Valley, in the County of San Luis Obispo, State of California.

\* \* \*

"VII.

"The authorized number and qualification of the members, the different classes of membership, the property voting and other rights and privileges of each class of membership and the liability of each class of membership to dues or assessments and the method of collection thereof shall be established by the By-Laws of the corporation, which shall not provide for the issuance of more than one membership to any member."

(From the Bylaws):

"Article II.

"MEMBERS

"Section 1. Classification of members:

There shall be one class of members of this corporation. No more than one membership shall be issued to any person.

"Section 2. Eligibility of members:

Only persons who are owners or lessees of real property within a subdivision commonly known as California Valley, County of San Luis Obispo, State of California shall be eligible to apply for membership in this corporation, provided they are qualified to be a member in a non-profit corporation within the meaning of the general non-profit corporation law of California. Application for membership shall be in such form as shall be prescribed by the Board of Directors.

Until such time as these By-Laws are amended to provide otherwise, the members of this corporation shall consist of directors and/or incorporators of this corporation and such additional members who shall qualify and be admitted by the Board of Directors of the corporation by a majority vote at any regular or special meeting of the Board of Directors."

The most pertinent testimony on the question of mutuality was given by the president of California Valley:

At page 66 of the transcript he testified that service applications were obtained before membership applications and that the form for membership applications was not then available. At the time of the hearing there were twenty-one stations getting service. These included two incorporators, the witness and California Valley itself.

At page 68 he conceded that rates had been established and that the membership fee and installation charge had not been determined. It had not yet been determined whether the installation charge could or would be combined with the membership fee.

At pages 69-70 he stated that the board of directors had not yet met to act on applications for membership.

Again, at page 70 it appears that the persons receiving service other than El Chicote Ranch Properties had contributed no money, labor or property to California Valley.

Thus, at the time of hearing California Valley was a functioning telephone system with a central office, pole lines, a directory and subscribers. Yet, the terms and conditions of membership had not been decided. Service applications had been solicited and received. Twenty customers were being served and nineteen more would have been connected if the interim order herein had not prevented this.

The facts of this case bring it squarely within the rule of Yucaipa Water Company No. 1 v. Public Utilities Commission, (1960) 54 Cal.2d, 823.

The following quotation from that case is highly pertinent:

"In the present case, however, [Yucaipa Water Company] No. 1 was not obligated to deliver water to lessees of shares, for it could have insisted, in accord with

its declared corporate purpose, on delivering water only to shareholders. Instead, however, it actively expedited the leasing of shares to those who wished water service, and such activity coupled with its other activities set forth above clearly supported the commission's finding that it had dedicated its property to public use." (p. 832.)

See also California etc. Co. v. Mesa Electric Cooperative, 47 Cal. P.U.C., 118 (1947) and Plumas Sierra Rural Electric Cooperative, Inc., 50 Cal. P.U.C. 301 (1950). These two Commission cases were cited with approval by the court in the Yucaipa No. 1 case, supra.

Pacific does not specifically contend that California Valley must have a certificate of public convenience and necessity; rather Pacific objects that California Valley does not have the "authorization" of this Commission. We need not speculate on the type of authorization Pacific has in mind, for the applicable statute clearly requires a certificate. Public Utilities Code Section 1001 provides:

"No . . . telephone corporation . . . shall begin construction . . . of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. . . ."

In Postal Telegraph-Cable Company v. Railroad Commission, 200 Cal. 463, 472-473, the California Supreme Court considered the somewhat similar certificate requirement in Public Utilities Code Section 1002 (then Section 50(b) of the Public Utilities Act).<sup>2/</sup> It was held that, notwithstanding Section 1002, the telegraph corporation there involved was not required to obtain a certificate of public convenience and necessity from this Commission. The Court emphasized, however, that that particular company had commenced construction in California prior to the enactment of the Public

<sup>2/</sup> Because of the interstate character of Postal-Telegraph, the Court did not pass on Section 1001 (then Section 50(a) of the Public Utilities Act). See 200 Cal. at 466-467.

Utilities Act and in reliance on the "offer" contained in Section 536 of the Civil Code (now Section 7901 of the Public Utilities Code). The Court did not hold that the certificate requirements of the Public Utilities Act are inapplicable to telephone or telegraph companies, but only that no certificate under Section 1002 was required of a telephone or telegraph company which, before enactment of the Public Utilities Act, had already commenced operations in this State. California Valley is not such a company; neither its construction activities nor its operations were commenced until many years after enactment of Section 1001.

We hold that the certificate requirement of Section 1001 is applicable here.

The Commission finds that:

1. California Valley Mutual Telephone Company solicited and accepted applications for service from persons or firms not accepted as members in accordance with its Articles of Incorporation and its Bylaws.
2. California Valley Mutual Telephone Company has dedicated its property to public use.
3. California Valley Mutual Telephone Company has not been issued a certificate of public convenience and necessity to construct or operate a public utility telephone system in the area it purports to serve.
4. Equipment of San Miguel Telephone Company used by California Valley Mutual Telephone Company in construction work was leased by California Valley from San Miguel Telephone Company.
5. California Valley Mutual Telephone Company is a telephone corporation as defined by Section 234 of the Public Utilities Code.
6. California Valley Mutual Telephone Company is a public utility as defined by Section 216(a) of the Public Utilities Code.
7. Defendant San Miguel Telephone Company has not been shown to have participated in the construction of California Valley Mutual Telephone Company.

The Commission concludes that:

1. California Valley Mutual Telephone Company has violated Section 1001 of the Public Utilities Code.
2. California Valley Mutual Telephone Company should be permanently enjoined and restrained from engaging in the construction of a telephone line or the operation of a telephone corporation until it shall have obtained a certificate of public convenience and necessity permitting it so to do.
3. Because of the special circumstances of this case, the public interest requires that the operative effect of this decision be suspended until further order of the Commission to enable the defendant, California Valley Mutual Telephone Company, to apply to this Commission by appropriate application for a certificate of public convenience and necessity.

O R D E R

IT IS ORDERED that:

1. California Valley Mutual Telephone Company cease and desist and it is hereby permanently restrained and enjoined from constructing, operating or extending any telephone line, as defined in Section 233 of the Public Utilities Code, or operating a telephone corporation, as defined in Section 234 of the Public Utilities Code, unless and until it shall have obtained a certificate of public convenience and necessity from this Commission authorizing such construction, operation or extension; provided, however, that the operative effect of this decision is hereby stayed until further order of the Commission for the reasons and the purposes specified in the foregoing opinion.

2. Case No. 7845 be, and it is, dismissed as to defendant San Miguel Telephone Company.

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

Dated at San Francisco, California, this 7<sup>th</sup> day of JULY, 1964.

Frederick B. Holdehoff  
President

Everett A. Kase  
George H. Traver

Commissioners


Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.



COMMISSIONER PETER E. MITCHELL DISSENTING:

The decision finds "because of the special circumstances of this case" the public interest requires that California Valley Mutual Telephone Company continue to operate illegally and is free to further extend their unlawful telephone operations. However, I find no "special circumstances" enumerated anywhere in this decision which justify the suspension of the operative effect of the decision.<sup>1/</sup>

Further, Application No. 46104, filed January 15, 1964, by Pacific, requested authority to serve the exchange in question. The application should have been consolidated with Case No. 7845 and an early decision rendered.



Peter E. Mitchell, Commissioner

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<sup>1/</sup> See Redwood Empire Telephone System v. Pacific Telephone and Telegraph Company - Decision No. 66143, Case No. 7716, wherein the Commission continued a cease and desist order under similar circumstances.