ORIGINAL

Decision No. 67498

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, practices, contracts, service and facilities of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY.	)	Case No. 7409

ORDER DENYING PETITIONS FOR REHEARING

The Commission has considered the following-listed petitions for rehearing of Decision No. 67369, dated June 11, 1964, in the above-entitled proceeding:

1. Petition filed on June 19, 1964 by The Pacific Telephone and Telegraph Company.

2. Petition filed on June 19, 1964 by California Interstate Telephone Company.

3. Petition filed on June 29, 1964 by California Independent Telephone Association, California-Pacific Utilities Company, Central California Telephone Company, Citizens Utilities Company of California, Kern Mutual Telephone Company, Colorado River Telephone Company, Western Telephone Company, and Gilroy Telephone Company.

4. Petition filed on July 1, 1964 by Edward L. Blincoe.

We find that said petitions for rehearing should be denied.

IT IS ORDERED that the above-listed petitions for rehearing of Decision

No. 67369 are denied, and the effective date of said Decision shall be July 20, 1964.

Dated at San Francisco, California, this 10th day of July, 1964.

I concurring Opinion attached ~~hereto~~
Everett C. Bragg

Frederick B. Holoboff
President

I dissent.
Peter E. Mitchell

George G. Grover

I dissent and shall file a separate opinion herein.
William Bennett

Commissioners

McKEAGE, Commissioner, concurring in order denying respondent's petition for rehearing:

I concur in the order denying respondent's petition for rehearing and, in this connection, desire to make it abundantly clear why I am prompted to take such action.

Respondent has included in its petition for rehearing manifold specifications of alleged error. No useful purpose could be served by discussing all these specifications of alleged error for the reason that the decision of the Commission, concerning which rehearing is prayed, fully answers those claimed errors. It will be sufficient to discuss respondent's basic specifications of error.

Preliminarily, I desire to point out that the filing by respondent of its rate increase application, long after the institution by the Commission of its herein order of investigation, was but an afterthought and constituted the building of a backfire against a possible rate reduction which the Commission might order.

The contention is made by respondent that the partial submission of this case constituted error. I disagree.

Unless the Public Utilities Act commands the Commission to follow a specified procedure, as applied to a public utility, the only restraint imposed upon it, so far as procedure may be concerned, is the federal Constitution. (Sale v. Railroad Commission, 15 Cal. (2d) 612, 617-618.) Also, if the Commission has kept within the ambit of that Act, no provision of the Constitution of California has any application because of the contents of Sections 22 and 23 of Article XII of that Constitution. (Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 650, 655-656, 658, 689; Sexton v. A.T. & S.F. Ry. Co., 173 Cal. 760, 762; San Jose v. Railroad Commission, 175 Cal. 284, 288; Clemmons v. Railroad Commission, 173 Cal. 254, 256-257; Miller v. Railroad Commission, 9 Cal. (2d) 190, 195; Southern Pacific Co. v. Public Utilities Commission, 41 Cal. (2d) 354, 359-361; Pickens v. Johnson, 42 Cal. (2d) 399, 404.) The provisions of Section 1757 of the Public Utilities Code (formerly Section 67 of the Public

Utilities Act) require no different rule. (Pacific Tel. & Tel. Co. v. Eshleman, supra; Southern California Edison Co. v. Railroad Commission, 6 Cal. (2d) 737, 746-749.)

There is nothing in the statute which negatives, either by specification or implication, the procedure here adopted by the Commission in making the partial submission. To the contrary, the statute delegates to the Commission the broadest of authority in this field. Section 701 of the Public Utilities Code is significant:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Also Section 1701 of that Code reinforces the provisions of Section 701:

> "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."

The Supreme Court of the United States has spoken eloquently on this issue and has held that procedure of the nature here adopted by the Commission is perfectly lawful. (F.P.C. v. Tenn. Gas Transmission Co., 371 U.S. 145, 150-155.)

Respondent asserts that it was error for the Commission to reduce its rate of return, implying that such action is inconsistent.

The reducing of respondent's rate of return could not be said to be inconsistent because a rate of return is not like the laws of the Medes and the Persians, that is, never to be changed; neither is a rate of return sacred. A Commission is free to change a rate of return--down or up--within the zone of reasonableness at any time. If this were not true, there would be very little use of having a regulatory body or regulation at all. Surely, respondent cannot be serious in its position.

But conceding for sake of argument, and for that purpose only, that there be any inconsistency in the Commission's action, such is no lawful ground for complaint. A regulatory body may be inconsistent, provided it does not violate constitutional rights. If this were not true, there could be no change of conditions; no progress. What the Commission does today must be honored by the Commission tomorrow, if the rule for which respondent pleads is valid. This is not the law.

The lawful rule on the issue here presented is well stated by the Supreme Court of the United States. (Wilbur v. United States, 281 U.S. 206, 216-217; Georgia Public Service Commission v. United States, 283 U.S. 765, 774-775.) See to the same effect Postal Tel. and Cable Co. v. Railroad Commission, 197 Cal. 426, 436-437. A zone of reasonableness is recognized, within which a rate of return may be set, which a court has no authority to overturn even though the court might think such return too high or too low. (Montana-Dakota Utilities Co. v. N.W. Public Service Co., 341 U.S. 246, 251-252.) Below this zone constitutes confiscation of the utility's property and above said zone constitutes a violation of the statutory right of the ratepayer to receive service at reasonable rates. A rate of return may be excessive as a matter of fact and yet be within the zone of reasonableness and beyond judicial interference. But that does not imply that the proper duty of a regulatory body has been performed when it fixes a rate of return that will not be stricken downby a court as excessive as a matter of law. Courts may interfere with a rate of return fixed by a regulatory body only when it can be said that the action of such body is invalid as a matter of law.

On many occasions, this Commission, as has other regulatory bodies, changed rates of return both up and down, depending upon the special circumstances existing.

The stubborn and elementary fact is that the rate of return of

6.75 percent which was fixed for the respondent by this Commission in 1958, six years ago, was excessive as a matter of fact. Such return should not have been fixed at the generous figure of 6.75 percent. For nearly six years, respondent has enjoyed this generosity to which it was never entitled in the first place and now complains because a portion of that to which it was not entitled is being denied it. It is the ratepayers of this utility who have a kick coming; not the utility. It certainly was high time that the interest of the ratepayer was recognized. What the Commission has done is to redress an injustice to the customers of the respondent utility, by reducing its rate of return to what it should have received in 1958. The members of a regulatory body are charged with the duty of doing justice; not rubber-stamping prior improvident action.

The contention of respondent that the Commission acted unlawfully in reducing its rates, commencing with the date of the instituting by the Commission of its investigatory order, herein, is without merit.

The order instituting the herein investigation of respondent's rates was issued July 26, 1962. This form of order has been upheld by both the Supreme Court of this state and the Supreme Court of the United States as affording due process of law. (Market St. Ry. Co. v. Railroad Commission, 24 Cal. (2d) 378, 381-383; aff'md. 324 U.S. 548, 558; American Toll Bridge Co. v. Railroad Commission, 307 U.S. 486, 492.)

When the Commission's investigatory order was issued, the reasonableness of respondent's rates was set at large and, in law, respondent was placed on notice that its rates might be reduced. (Market St. Ry. Co., supra, p. 558.)

It is a general rule that a judgment speaks as of the date of the filing the initiatory pleading in a case.

It is an established rule of law that a regulatory body may increase or reduce the rates of a public utility commencing with the date of the filing by the utility of its application for such increase or the date of the issuance of the investigatory order seeking to reduce the utility's rates; provided, of course, that the evidence warrants such action. This Commission recognized such rule in the case of Citizens Utilities Co. (Decision No. 48778, in denying petition for rehearing, 52 Cal.P.U.C. 637, 639.) The Supreme Court of the United States, likewise, has recognized this rule. (Transcontinental & W. Air v. Civil Aeronautics Board, 336 U.S. 601, 605; United States v. N.Y.C. R. Co., 279 U.S. 73, 78-79.)

While a regulatory body may take the action adverted to, it is not required to do so. Each case must be judged upon its special facts and circumstances. It was and is the view of the Commission that the special facts and circumstances involved in this case fully justified its action in reducing respondent's rates, commencing with the date of issuing its investigatory order against respondent. Respondent has no constitutional right to have its rates reduced only prospectively; neither does it have a statutory right in this regard. What the Commission has done in this context does not constitute retroactive ratefixing. Retroactive ratefixing means, in law, reducing or increasing rates during a period anterior to the initiation of a rate proceeding.

Section 728 of the Public Utilities Code must be deemed to have been enacted in harmony with the general rule of law that the findings and judgment speak as of the date of the initiation of the action or proceeding. The language in said section reads in part as follows:

> "Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force."

The word "thereafter," in light of the general rule, must be interpreted to mean after the date of the issuance of the investigatory order, although the Commission has the authority to specify a later date. It is important in this regard to bear in mind that a construction of the statute to mean that only prospective rate reductions may be ordered, that is, after the date of issuance of the rate reduction order, would place a most valuable premium upon the utility's ability to frustrate and delay a final decision in a rate reduction proceeding. The longer the delay in reaching a decision, the more the utility profits.

We must not lose sight of the fact that the test year upon which the rate of return was based (October 1, 1961 to September 30, 1962) included July 26, 1962, the date of the issuance of the Commission's investigatory order. Therefore, there can be no possible contention that the predicate upon which the rates of respondent were reduced did not include the date from which the Commission reduced said rates. The reasonableness of respondent's rates during the test year period was an issue directly in controversy, of which respondent and all parties to the proceeding were deemed in law to have notice and by which they were bound.

The Supreme Court of the United States has very pertinently observed that the rendition by a regulatory body of an unexpected or surprising decision, that is, surprising to the utility, does not constitute lack of due process. (Market St. Ry. Co. v. Railroad Commission, supra, p. 558.)

Upon both authority and reason, the action of the Commission in reducing the rates of respondent, as of the date of issuing its investigatory order, must be held to be permissible.

The author of this opinion pointed out in his concurring opinion in support of the herein assailed decision that a public utility performs a function of the state, occupies a trustee and privileged position and is not surrounded by the same constitutional safeguards

as are individuals. Holding respondent to such standards offends neither its constitutional nor statutory rights.

The petitions for rehearing filed herein by parties other than respondent raise no substantial issue not comprehended by respondent's petition for rehearing or which was not fully considered and disposed of by the decision herein assailed. Those petitions for rehearing, also, should be denied.

McKEAGE
Commissioner

Dated: July 10, 1964.

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ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, practices, contracts, service and facilities of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY.	Case No. 7409

BENNETT, William M., Commissioner, Dissenting Opinion:

I dissent to the action of the majority and its failure to rectify a grievous error. As I have already stated, the law does not permit us to impose a refund obligation.

As to the Order Staying the Operative Effect of Decision No. 67369, I consider it not only unnecessary but indeed harmful to require The Pacific Telephone and Telegraph Company (Pacific) to set aside dollars in a separate fund each month. This will be sterile capital benefiting neither Pacific nor its ratepayers. The latter will continue to pay these moneys each month. The nature of the business of Pacific in California and its lawful obligation to continue to do business here demonstrates clearly how unnecessary the creation of a fund is.

As to the requirement of record keeping there is nothing before us which gives us any evidence of the cost of maintaining such records and I suspect it may be substantial. I also am aware of the fact that Pacific already maintains records with reference to its customers. The requirement of additional and separate record keeping is again unnecessary, costly and without any demonstrable benefit to Pacific or to the customers of Pacific.

THE REASONS OF THE MAJORITY ANALYZED.

The reasons of the majority denying rehearing are set forth in a concurring opinion. The cases there cited show a

misunderstanding of the law under which we operate. The reliance of the majority on cases dealing with the Federal Power Commission, the Civil Aeronautics Board and the Interstate Commerce Commission is entirely misplaced. There is significantly absent any cases dealing with the Public Utilities Act of the State of California. It is further significant that the cases offered as window dressing are not quoted in any respects. Most of the cases, indeed, are irrelevant to this controversy.

THE HISTORY OF THE 6.75 PERCENT RATE OF RETURN AND RETROACTIVITY.

This return was fixed in 1958. The City of Los Angeles in those proceedings entitled City of Los Angeles, et al. v. Public Utilities Commission, S.F. Number 19900, and City of Los Angeles, et al., v. Public Utilities Commission, S.F. Number 20007, challenged the 6.75 percent return as being excessive. Incidentally, the writer, on behalf of the then Attorney General of the State of California, likewise challenged the return as being excessive. The Public Utilities Commission of the State of California in its Answer filed with the California Supreme Court, stated at page 32 in said Answer:

> "As to the return of 6.75 percent, which the utility was allowed as reasonable on its total California intrastate operations, there could hardly be any lawful claim that such return is outside the zone of reasonableness."

The Answer concluded with the usual statement that the findings of the Commission were abundantly supported by evidence that same representation was implicit after review was denied by the California Supreme Court when this Commission moved to dismiss an appeal to the United States Supreme Court from the action of the California Court in denying review. (Supreme Court of the United States, City of Los Angeles v. Public Utilities Commission, No. 656, October Term, 1958.)

By virtue of failure of the California Supreme Court and then the Supreme Court of the United States to set aside the judgment of the Commission as to the lawful rate of return, that return became the only lawful return.

The meaning of that denial is quite clear. In the case of People v. Western Air Lines, 42 Cal. (2d) 621, at pages 630-631, this Court stated the rule with regard to this subject in unmistakable language as follows:

> " . . . It is established, however, that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. (Southern Calif. Edison Co. v. Railroad Com., 6 Cal. 2d 737, 747 [59 p. 2d 808].) This is so even though the order of this court is without opinion. (Napa Valley Elec. Co. v. Railroad Com., 251 U.S. 366 [40 S.Ct. 174, 64 L.Ed. 310].)"

It is mystifying then and indeed disturbing to find that after the statements made by this Commission to the Supreme Court of the State of California and to the Supreme Court of the United States of America, that the majority now impeaches that same rate and throws into discard all of the representations and commitments made to the Court in asking that the return of 6.75 percent be affirmed.

As recently as June 12, 1964, in Decision No. 67371, Tanner Motor Tours, Ltd., Application No. 44957, this Commission unanimously refused to permit the applicant to increase its rates as of November 21, 1962, the date on which the application was filed, because such would have been retroactive ratemaking.

And the majority is doing this as a matter of power, admitting that no court would be permitted to do the same thing!

And one might ask, What are the standards? What are the criteria upon which, six years after the fact, the majority

of this Commission reaches the conclusion that the last authorized return of Pacific "was excessive as a matter of fact" as of July 26, 1962?

THE OBLIGATION OF THIS COMMISSION TO ITSELF.

The majority quite boldly states that even though a return is upheld on appeal as a matter of law that this Commission may set aside such return in mid-stream without notice and due process and with no support in the record simply because three members have arrived at the opinion that the previous rate is "excessive as a matter of fact." And then whether it be called retroactivity or whatever, the Commission for the first time in its long history in administering and interpreting the Public Utilities Act makes its order effective not just as to the future but back to July 26, 1962. And this by reliance upon cases and decisions dealing with Federal administrative agencies. Such a procedure can only be justified if, as the majority holds, we need not be consistent. On the other hand, there must be some limits to our discretion even if only coming from the Fourteenth Amendment to the Federal Constitution.

Further, there must be some limit to inconsistency and I suggest that this Commission cannot take one posture before the Court in one case and an opposite posture in another where the basic same issue is involved. And further, I do not think the majority can save itself from the prohibition against retroactive ratemaking by calling what has been done here, something else.

It is interesting that as recently as 1963 this Commission affirmed its position against retroactive ratemaking. (See page 9, Answer of Respondent to Petitions for Writ of Review in the Supreme Court of the State of California, Temescal Water

Company, et al., v. Public Utilities Commission of the State of California, S.F. Nos. 21396 and 21397.

In the same proceeding before the Supreme Court of the United States, Temescal Water Company, et al., v. The Public Utilities Commission of the State of California, No. 624, October Term, 1963, this Commission spoke as follows at page 5 of its brief filed therein:

> ". . . That provision constitutes, in effect, not only retroactive ratemaking, but retroactive ratemaking by the utility itself and not with prior approval of the Commission charged by the statutes with the responsibility of fixing rates. Retroactive ratemaking is generally considered to be invalid unless authorized by statutes. (1 Davis, Admin. Law Treatise, § 5.08 (1958) pp. 340-1); Public Util. Com. v. United Fuel Gas Co., 317 U.S. 456, 460-463, (19430; Transcontinental & W. Air v. Civil Aero. Board, 336 U.S. 601, (1949). No such authority can be found in the California Public Utilities Code. Section 454 thereof does state in part as follows in so far as rate increases are concerned:
>
> 'No public utility shall raise any rate, or so alter any classification, contract, practice, or rule as to result in any increase in any rate except upon a showing before the commission and a finding by the commission that such increase is justified.'
>
> "This Commission has held unequivocally (Re Pacific Tel. & Tel. Co., Decision No. 43145, 48 CPUC 823, 836 (1949) that rates may not be fixed retroactively by the Commission itself, to say nothing of unilateral action of this nature by the public utility."

It is noteworthy that in support of the proposition that retroactivity is not permitted, this Commission relied upon Transcontinental & W. Air v. Civil Aeronautics Board, 336 U.S. 601, 605; United States v. N.Y.C. R. Co., 279 U.S. 73, 78-79, which the majority is now using in support of the opposite conclusion.

It takes a distorted notion of the Fourteenth Amendment and an ability to ignore our past precedents in order to justify the refund which has been imposed here.

THE PAST AND THE FUTURE.

Going to the past, even the majority opinion by its lack of worthy citations, makes it evident that this Commission has never made its orders effective as of the date it opened an investigation. The Citizens Utilities Co., (Decision No. 48778, 52 Cal. P.U.C. 637, 639) which is cited as authority is but dicta and interestingly enough the Commission asserted such authority again without precedent or statutory reference but importantly did not utilize it in that case. It can be seen then that as to the past this power has never been employed.

WHAT OF THE FUTURE?

The majority has taken upon itself, whether knowingly or not, the obligation to treat all other public utilities in similar fashion. Surely this authority is not to be applied as to Pacific alone unless this be a type of special treatment. If this power not having been used in the past is not utilized in the future, then certainly this is a unique type of treatment and one suspect thereby. In searching for the situations in which this power is to be employed the majority furnishes the guideline "that the special facts and circumstances involved in this case fully justified its action in reducing respondent's rates, commencing with the date of issuing its investigatory order against respondent." What the special facts and circumstances are is unstated and further having a great familiarity with the record herein, I am unaware of what they are. It is a makeweight argument to utilize this weapon upon the premise that delay by a public utility could frustrate effective regulation. We are deciding this case involving the Commission,

Pacific and its ratepayers and the hard fact is that any delay herein was not occasioned by Pacific.

CONCLUSION.

I repeat again that which I stated in my original dissent--that the action of the majority herein in going to this clearly arbitrary and unlawful refund procedure has jeopardized all of the work of the staff of this Commission and the parties participating therein in what would otherwise have been a rate decision which could have given some benefits to the users of Pacific in the State of California. As it is the entire result is placed in jeopardy.

WILLIAM M. BENNETT
Commissioner

Dated at San Francisco, California,
this 21st day of July, 1964.