ORIGINAL

Decision No. 67499

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 STAYING OPERATIVE EFFECT OF DECISION NO. 67369

The Pacific Telephone and Telegraph Company, respondent herein, by its petition filed on June 19, 1964 seeks a stay of the operative effect of Decision No. 67369 in the above-entitled proceeding in the event the Commission denies rehearing. The specific request for such stay follows:

> "In the event of denial of its petition for rehearing herein, it is respondent's intention to take proper proceedings for the judicial review of the decision and order herein. For that purpose and for the full and orderly opportunity of a full and fair review, respondent needs and hereby prays that, in the event of such denial, the Commission concurrently order that the operative effect of said decision and order be stayed pending said proceedings for review."

Timely filing of petitions for rehearing by respondent and another party had the effect of automatically staying the operative effect of said Decision No. 67369 until Commission action thereon. By Decision No. 67498 issued today, rehearing has been denied and Decision No. 67369 shall become effective as provided in said order denying rehearing, subject to the stay granted in the following order. Respondent having indicated it will seek review, we find that the operative effect of Decision No. 67369 should be stayed subject to the specific conditions hereinafter set forth.

IT IS ORDERED THAT:

1. The operative effect of Decision No. 67369 is stayed subject to the conditions hereinafter set forth.

2. The conditions attached to the granting of said stay are as follows:

a. Respondent shall set aside in a separate fund each month or fraction thereof starting on the date the stay order herein becomes effective, and continuing during the entire period of the stay, 4.7 per cent of all moneys collected from customers attributable to intrastate service revenues together with interest thereon at the rate of 6 per cent per annum. Monthly reports showing the balance in the fund shall be filed with this Commission until further order.

b. Respondent shall maintain during the period of the stay all necessary records which will permit it to make appropriate refunds individually to customers of amounts collected in excess of the rates prescribed by said Decision No. 67369. The additional costs associated with maintaining such records and making such refunds shall be accumulated separately, reported in writing to the Commission monthly, and shall be borne by respondent and not charged to operating expenses.

c. Within twenty days after the effective date of this order, respondent shall file with this Commission a refund plan for the eventual disposition of any amounts collected and

set aside in the fund described in condition "a" above or ordered refunded as a result of the judicial review and subsequent orders herein. No refunds, however, shall be made until the Commission approves said refund plan or a modification thereof.

d. The refund period specified in ordering paragraph 2 of Decision No. 67369 shall be from July 26, 1962 to July 20, 1964, and the refund plan required by said paragraph shall cover said period.

e. Respondent shall file with this Commission on or before July 20, 1964 a certified copy of a resolution by the Board of Directors of The Pacific Telephone and Telegraph Company accepting the foregoing conditions.

The effective date of this order shall be the date on which the certified copy of the resolution by the Board of Directors of The Pacific Telephone and Telegraph Company as outlined above shall have been filed with this Commission.

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

Frederick B. Holoboff
President

Peter E. Mitchell

George G. Grover

Commissioners

I dissent
Peter E. Mitchell
My opinion in opposition to the action about to be taken will be set forth separately.
William M. Bennett

at

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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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.

/s/ WILLIAM M. BENNETT
WILLIAM M. BENNETT
Commissioner

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