

Decision No. 68630

ORIGINAL

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 of an agreement covering leasing of channels and drops to EICHLER HOMES, INC.

Application No. 46013
(Filed December 6, 1963)

Arthur T. George and Richard W. Odgers, by Richard W. Odgers, for The Pacific Telephone and Telegraph Company, applicant.
Albert Weber, Clark A. Davis, Robert S. Karp, for Geneva Terrace Greens Association, protestant.
Jacobs, Sills & Goblentz, by Donald M. Cahen, for Eichler Homes, Inc., interested party.
Elmer Sjostrom and John E. Brown, for the Commission staff.

O P I N I O N

This application was heard before Examiner Coffey at San Francisco on April 8, 1964, and was submitted on May 5, 1964, upon receipt of the transcript. Notice of hearing was served in accordance with the Commission's procedural rules.

Applicant requests this Commission to make an order, pursuant to Part X-A of General Order No. 96-A, authorizing applicant to carry out the terms of an agreement with Eichler Homes, Inc. (Eichler) dated October 29, 1963, Exhibit A attached to the application.

Applicant is a public utility telephone and telegraph corporation in the State of California and elsewhere. Eichler is a subdivider and seller of a private residential real estate development known as Geneva Terrace situated in the City and County of San Francisco and the County of San Mateo. Eichler plans to provide community television service to its subscribers located within the area of said tract.

Applicant presented testimony by 2 witnesses and 3 exhibits relative to the facilities to be installed, the costs of installation and maintenance of the facilities and the basis of charges for the service.

The agreement provides that applicant is to furnish for an indefinite term the channels and drops which Eichler shall use to distribute to its subscribers television signals received on its own antenna system from television broadcasting stations. Eichler may also make incidental use of the channels for distribution to its subscribers of FM music (studio originated or off-the-air) or for occasional transmission of other television signals for educational or entertainment purposes.

The agreement provides that applicant is to supply 10 quarter route miles of channels capable of transmitting television channels 2, 4, 5, 7, and 9, and FM broadcast signals, prior to the construction of which Eichler is to deposit \$8,577 as security for the performance of all its obligations under the agreement. This deposit, designated "termination charge," is to bear interest at the rate of 6 percent a year. The deposit and accrued interest, less any amount applied by applicant to the payment of any charge or obligation under the agreement, is to be returned to Eichler at the rate of one one-hundred-twentieth (1/120) of the deposit per month, applied as a credit to current monthly charges. The deposit may be refunded by applicant at its discretion in whole or in part at any time. Additional deposits may be required by applicant for the furnishing of additional channels. The monthly charge for the initial distribution systems is to be \$262 and for each service drop \$0.65. The installation charge for each drop is to be \$11.00.

Applicant estimated that the gross construction cost would be \$8,542 for the amplifying and the cable portion of the distribution system. The construction cost of each drop was estimated to be \$22.28. Existing conduit would be provided by Eichler.

The agreement includes provisions concerning the technical features of the service, the maintenance of facilities, and the liability of the respective parties. The agreement may be terminated by Eichler upon thirty days' notice in writing. The agreement may be terminated by applicant if it files a tariff covering the furnishing of channels for the purpose for which channels are furnished to Eichler or if any governmental authority determines that a statute, ordinance, regulation or order prohibits the furnishing of a community antenna television system, or of channels therefor, by applicant. Eichler may not, without consent of applicant, assign the agreement or permit third party use of the channels. The agreement includes the jurisdictional provisions required by Paragraph X-A of General Order No. 96-A.

A public hearing on this application was requested by the Geneva Terrace Greens Association (Association), a voluntary, nonprofit organization of the owner-occupants of approximately 63 homes located in said Geneva Terrace subdivision. When completed Geneva Terrace will consist of 221 one-family homes of which approximately 80 were owner-occupied as of April 8, 1964. Association presented 2 witnesses and 4 exhibits in support of its position.

Homes in Geneva Terrace were sold subject to restrictions set forth in a Declaration of Restrictions by Eichler, Exhibit 4, which includes the following provisions:

"C-4 All residents, and/or property owners, shall utilize the common television and F.M. radio antenna, amplification facilities and underground signal distribution system, as installed and constructed by Declarant, serving each lot, and shall not permit the installation or maintenance of individual television, radio or other antennas, upon any of said lots or residences, without the approval of the Architectural Control Committee."

The Declaration further provides that the individual homeowners shall share a considerable amount of common property to be installed by Eichler. After 51 percent of the lots are sold and occupied by bona fide owners, the control, care, maintenance, utilization and responsibility for costs of maintenance shall pass from Eichler to a nonprofit corporate association of the homeowners. Said association has been incorporated as the Geneva Terrace Property Owners Association, Inc. (Geneva).

Among other objections to the proposed agreement, Association alleged that the agreement and proposed rates are in conflict with Eichler's representations that an antenna system would be installed and constructed by Eichler to serve each lot; that if the agreement is approved, Eichler will, in effect, be forcing the homeowners to purchase a common antenna system over and above the original sale price of their homes; that Eichler intends to assign the agreement to Geneva before control of Geneva passes to the homeowners and that applicant and Eichler will contend that Geneva is bound by the agreement after control of Geneva has passed to the homeowners.

Association's position is that the agreement and the rates should not be authorized since they would be detrimental and injurious to a third party, the Association, which was not a participant in the agreement, was not advised as to the effect of the agreement, will have no opportunity to abrogate the agreement and yet will be responsible for the agreement.

Applicant alleged that the proposed agreement is in the public interest in that the result of the agreement will be the availability of improved television reception to members of the public. Applicant presented evidence to show that the system proposed to be provided would be well-engineered and well-designed and would provide optimum reception and that the system would be provided to Eichler at the lowest charges consistent with avoiding the creation of a burden on applicant's other subscribers.

Applicant and Eichler argued that it is not within the jurisdiction of this Commission to regulate disputes between antenna companies and their subscribers or to decide a dispute between Eichler and the homeowners with regard to the interpretation of the Declaration of Restrictions.

The Commission staff recommended that, if the agreement is authorized, applicant should not be allowed to refund the deposit at applicant's discretion since to do so might create a burden on applicant's other subscribers.

The issues in this proceeding are:

1. Will the service to be provided under the proposed agreement create any burden on any public utility service under the jurisdiction of this Commission?
2. Will the service to be provided under the proposed agreement create any burden on applicant's other subscribers?
3. Is the service to be provided under the proposed agreement a public utility service under the jurisdiction of this Commission?
4. Are the terms of the agreement, including rates, reasonable?

Not all charges for services assessed by a public utility are subject to supervision and regulation by this Commission. Applicant has not made an offer to provide the proposed service to the general public by the filing of tariffs for the service. It cannot be said that applicant will be performing a public utility service to Eichler as defined in Sections 233 and 234 of the Public Utilities Code.^{1/} The facilities to be installed by applicant to serve Eichler would not be used in connection with any of applicant's plant dedicated to or utilized for public utility service, nor do said facilities facilitate communication by telephone, nor is the proposed service incidental to the furnishing by applicant of common carrier communication service.

This Commission recently has authorized applicant and General Telephone Company of California to furnish channels and related facilities for the transmission of television and audio program material within designated areas.^{2/} In each of these

^{1/} Section 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."
Section 234: "'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State."

^{2/} Dec. No. 67334, June 3, 1964, Application No. 46193;
Dec. No. 67861, Sept. 22, 1964, Application No. 46852;
Dec. No. 67931, Sept. 30, 1964, Application No. 45957.

previous authorizations the installations by the public utility were attached to poles of the public utility and were otherwise associated with public utility telephone lines as defined by Section 233 of the Public Utilities Code. In this proceeding, on the other hand, the facilities will be installed in conduits and space provided by Eichler and the homeowners.

Further it cannot be said that applicant is performing a service which is of such specialized nature that the use of its trained personnel and unique equipment are regularly required to provide the service to members of the public. Eichler advised the representatives of Association by letter dated April 6, 1964, Exhibit 6, that Eichler was arranging with L & M Television Company for a test installation connecting Eichler's master antenna to individual units for the purpose of determining the feasibility of the L & M Television Company plan. It appears that the installation and service proposed by applicant is of such routine and common nature as to be readily available from many competent sources other than applicant.

The circumstance that a public utility may carry on a business which is not of a public utility character (see Commercial Communication v. P.U.C., 50 Cal.2d 512) does not preclude the Commission from requiring public utilities to maintain special accounts for, and to make special reports on, nonutility service in order that the Commission may protect utility ratepayers from any burdensome contracts for nonutility service.

The Commission finds:

1. The service to be provided to Eichler under the proposed agreement will not create any burden on any public utility service under the jurisdiction of this Commission. Exhibit 1 demonstrates that the facilities to be installed would not be associated with or connected to or operated with any of applicant's plant dedicated to or utilized for public utility service. The proposed facilities would not facilitate communication by telephone.

2. The service to be provided to Eichler under the proposed agreement would not create any burden on applicant's other subscribers provided applicant maintains separate and readily identifiable accounts for the revenues, expenses and plant associated with said service so that the Commission may deduct such items in fixing utility rates. The proposed rates and deposit are of necessity based on estimates of revenues, expenses and construction costs inasmuch as applicant, as of the day of hearing, had not actually installed a community antenna television system.

3. Eichler is a corporation which develops and sells real estate to homeowners subject to the conditions set forth in the Declaration of Restrictions, Exhibit 4, and which proposes to provide community antenna television service to subscribers. The development and sale of real estate and community antenna television service are not public utility services by Eichler within the meaning of the Public Utilities Act and are not subject to supervision.

and regulation by this Commission. No property being sold by Eichler appears to have been property dedicated to public utility service.^{3/}

4. The service to be provided by applicant to Eichler under the proposed agreement is not a public utility service within the meaning of the Public Utilities Act and is not subject to the supervision and regulation of this Commission.

The preceding findings obviate the necessity of findings relative to the reasonableness of the terms and rates of the proposed agreement.

We conclude that the request of applicant for authorization to carry out the terms of the agreement with Eichler should be denied; that applicant should be required to file with this Commission copies of said agreement if applicant carries out the terms of the agreement; that applicant should maintain separate and readily identifiable accounts related to the agreement; and that applicant should file with this Commission a report of all expenses incurred relative to the proposed service to Eichler.

^{3/} Section 216(c) of the Public Utilities Code is not applicable: "When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality or other political subdivision of the State, which in turn either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof, such person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part." The transmission of television broadcasts by a community television antenna system has been held by the California Supreme Court not to be two-way communication. (Television Transmission Co. v. P.U.C., 47 Cal.2d 82.) It follows that the transmission of FM signals by Eichler cannot be considered to be a public utility service.

O R D E R

IT IS ORDERED that:

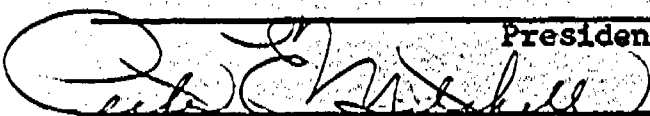
1. Application No. 46013 of The Pacific Telephone and Telegraph Company is denied.
2. If applicant carries out the terms of the agreement with Eichler, Exhibit A attached to this application, applicant shall file two copies of the agreement within thirty days after service to Eichler is first rendered.
3. Applicant shall notify the Commission promptly of the termination date upon the termination of service under the agreement.
4. Applicant shall, within sixty days after the effective date of this order, report in writing to this Commission all expenses incurred by applicant, as of the effective date of this

order, reasonably estimated if not known, in negotiating, engineering, requesting authorization of, or otherwise related to said proposed service to Eichler. The method and basis, and the reasonableness thereof, of any estimates shall be included in said report.

5. Applicant shall, within sixty days after the effective date of this order, set up and maintain separate and readily identifiable accounts in which it shall record the revenues, expenses and plant related to said service to Eichler, including those amounts developed in accordance with paragraph 4 of this order. Applicant shall advise this Commission in writing of the numbers and titles of said accounts within seventy days after the effective date of this order.

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

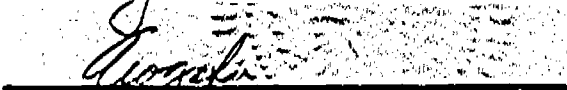
Dated at San Francisco, California, this 16th day of FEBRUARY, 1965.




President



George F. Hoover



George F. Hoover



Commissioners

Commissioner Frederick B. Holoboff, being necessarily absent, did not participate in the disposition of this proceeding.