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ORIGINAL

Decision No. 71559

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

INTERNATIONAL CABLE T. V. CORPORATION, a California corporation, Complainant, vs. ALL METAL FABRICATORS, INC., a California corporation, and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California corporation, Defendants.	Case No. 8499

Harold R. Farrow, for Complainant.
Edward Sumner, for All Metal Fabricators, Inc. and A. T. George, Pillsbury, Madison & Sutro, by G. H. Eckhardt and R. W. Odgers, for The Pacific Telephone and Telegraph Company, Defendants.

O P I N I O N

International Cable T. V. Corporation (International), in a complaint filed August 15, 1966, alleges in substance that defendants, The Pacific Telephone and Telegraph Company (Pacific) and All Metal Fabricators, Inc. (All Metal) conspired to evade the so-called "1956 Consent Decree" [1] and to delay complainant's entry into the community antenna television (CATV) business in portions of the unincorporated area of Altadena and La Canada, Los Angeles County, under a pole contact agreement with Pacific, dated March 28, 1966, by a "crash" program of building channel facilities for All

1/ That decree, among other matters, enjoined the American Telephone and Telegraph Company and its subsidiary operating companies from engaging in any business other than the furnishing of "common carrier communications services". (U.S. v. Western Electric Co. and American Tel. and Tel. Co. (1956) U. S. Dist. Ct., N.J., Civil Action No. 17-49.)

Metal in the same area, under a "Memorandum of Agreement", dated May 19, 1966 and a "Contract For Community Antenna Television Channels", dated June 13, 1966. (The pole contact and channel agreements were submitted by Pacific to the Commission for authorization on April 28, 1966 and June 13, 1966, respectively.)

Complainant alleges that defendants' activities not only prevented it from obtaining the normally "perfunctory" Commission authorization for its prior pole contact agreement, but also operated to burden Pacific's rate-paying customers by construction of channel facilities for All Metal at less than cost, and to mislead the Commission by the device of having All Metal file a sham complaint against Pacific, speciously alleging unjust discrimination and asking for denial of authorization for International's pole contact agreement, without naming International as a party. (All Metal Fabricators, Inc. v. Pacific Tel. and Tel. Co., Case No. 8421, filed May 23, 1966 and now at issue. Complainant here requests consolidation of Case No. 8421 with the instant proceeding.)

Complainant asks, in substance, that the Commission order defendants to cease and desist from building, selling, leasing or using, or attempting to do so, the channel facilities described in the complaint, for transmission or distribution of broadcast signals within the described areas of Altadena or La Canada, or any other area within Los Angeles County; that defendants be ordered to dismantle and take down the CATV facilities and appurtenances thus far constructed, other than telephone plant per se; that complainant's pole attachment agreement with Pacific be immediately approved and Pacific be ordered to co-operate in the construction of complainant's system within the area described in its agreement; that complainant "be made whole on account of the damages suffered as aforesaid."

The Commission, on consideration of the allegations of the complaint and in order to preserve the status quo, on August 16, 1966 issued and served on defendants a temporary restraining order, together with a copy of the complaint, directing, until further order of the Commission, immediate cessation of Pacific's channel facilities construction for All Metal and use of such facilities by All Metal for CATV business in the Altadena areas in question, ordered a hearing to be held on August 19, 1966 and directed defendants to file answers to the complaint on or before the date of hearing, or at such time as might be designated by the Presiding Officer.

The hearing prescribed by the temporary restraining order was held before Examiner Gregory, evidence and argument were received, defendants were directed to file answers, and the parties to file memoranda of points and authorities, on or before August 31, 1966, and the temporary restraining order was ordered to remain in effect until further order of the Commission. The answers and memoranda have been filed and considered, along with the complaint, Pacific's "Offer of Proof" (filed prior to the hearing) and the evidence and argument adduced at the hearing.

Pacific's answer denies any conspiracy by co-defendants and in substance avers that: jurisdiction over this controversy lies only in the Federal Communications Commission or this Commission and that the 1956 Consent Decree is irrelevant here; Pacific has observed its duties to provide adequate and nondiscriminatory services as set forth in Public Utilities Code sections 453 and 761 and sections 201 and 202 of the Communications Act of 1934, as amended; Pacific has a statewide franchise under section 7901, Public Utilities Code, to construct telephone lines upon any public road or highway in Los Angeles County and throughout California, including private lines for transmission of television and related signals

for CATV systems; Pacific's pole attachment policy, developed and consistently adhered to with the object of conserving available pole space, has been to permit, on its own poles or those jointly owned with other utilities, only one CATV pole attachment per pole on a "first-come-first-served" basis, and that such policy, averred to have been carried out on a non-discriminatory basis, has proved workable and in accord with the generally accepted economics of the CATV industry, i.e., that any given area will only support one CATV system; that Pacific presently has some 120 pole attachment agreements in effect, and that such agreements provide that they are subject to this Commission's approval first obtained, and to such modification or change as the Commission may order, and also provide:

> "The Company declares that the filing of the contract herein with the Public Utilities Commission pursuant to the procedural requirements of General Order No. 96-A is not to be construed as a public offering by the Company of the services or facilities hereinabove referred to."

Pacific's answer continues with averments that it has made a public offering of channel facilities for use in CATV local distribution systems, available to any and all CATV operators desiring such service, by filing with this Commission, on November 3, 1965, an intrastate tariff offering such service; that such tariff was suspended by the Commission by its order of suspension and investigation in Case No. 8305, filed November 23, 1965, as amended by the Commission's order of January 18, 1966; that the Federal Communications Commission, by public notice dated April 7, 1966, asserted jurisdiction over such service as "incidental to radio

communication" and has ordered Pacific to file interstate tariffs for this service; that the FCC order became non-appealable sixty days after its effective date.[2/]

Pacific avers that its channel facilities publicly offered for CATV use are no different in nature from the facilities it uses to provide other private line services such as telephoto services and facilities for the transmission of television signals for broadcast stations; denies the allegations of paragraphs XII and XIII of the complaint and avers that the chronology of events referred to therein (negotiations with Pacific for complainant's pole attachment agreement) was as set forth at pages 6-9 of Pacific's Offer of Proof; admits that it executed a pole attachment agreement with complainant on March 28, 1966 and avers that it required and received nothing from complainant other than the insurance and bond documents called for by the agreement, complainant's designation of the area for which pole attachments were desired, and three copies of complainant's franchise from Los Angeles County; that Pacific explained to complainant the procedures for filing and "approval" of the contract by the Commission, after necessary processing by Pacific, and that Pacific would-and did-file the agreement.

2/ Attached to Pacific's answer are: a copy of its Offer of Proof, filed herein August 18, 1966, to which are attached copies of the FCC's public notice of April 7 and its Memorandum Opinion and Order of June 22, 1966, refusing reconsideration of its direction to file interstate channel facility tariffs; a copy of its answer, filed June 13, 1966, to All Metal's complaint in Case No. 8421, to which are attached copies of certain correspondence and the agreements (including area maps) with International and All Metal, referred to herein, together with a copy of a Commission letter, dated April 5, 1966 (File No. 508), to Pacific stating that a channel facility agreement between Pacific and Warner Bros. T.V. Services, Inc. (filed by Pacific for authorization) would not be authorized during the pendency of Case No. 8305. (That contract was later authorized conditionally.) Case No. 8305 has been discontinued, following withdrawal by Pacific of its intrastate channel facility tariff filed with this Commission on November 3, 1965 (Decision No. 71334, dated September 27, 1966).

Other denials and averments by Pacific relate to complainant's allegations concerning: Pacific's conspiracy with All Metal and the former's attempt to secure a monopoly of CATV business; Pacific's delay in securing Commission authorization for complainant's pole attachment agreement; Pacific's collusion with All Metal in having All Metal file a complaint against Pacific (Case No. 8421), as to which Pacific avers, referring to its answer in that case (Appendix B to its answer herein), that All Metal, in Case No. 8421, sought no relief from Pacific but only simultaneous "approval" by the Commission of All Metal's channel contract and International's pole attachment agreement, and that the relief requested by Pacific in its answer to that complaint was a matter for regulatory determination.

Pacific's answer avers, further, that construction of channel facilities for All Metal commenced during the week of July 25, 1966 and was pursued expeditiously and economically until issuance of the temporary restraining order herein; that about 40 per cent of the channel facilities are "double lashed" to existing telephone plant and that four new poles and related equipment were erected in the construction of those facilities; that double lashings are now and for many years have been used by Pacific and other telephone utilities within California, with knowledge of this Commission's staff, and that double lashings are an economical use of plant and do not have a detrimental effect on telephone service.

Pacific denies the allegations of paragraph XXX of the complaint, which assert that unless the emergency relief prayed for is granted defendants' acts "will have effectively eliminated any competition for the supply of community antenna television services

in the Altadena area, whether said competition be from complainant or from any other person, firm or corporation." Pacific further denies, for lack of information or belief, the allegations of paragraphs XXIX and XXXI of the complaint, which refer to complainant having learned, during the early part of the week of August 8, 1966, of the commencement of a portion of the construction of channel facilities for All Metal, and on August 11, 1966 having learned that the construction had not only been commenced but substantially completed and was scheduled for completion on August 13, 1966. We here note that the concluding paragraph of Pacific's "Memorandum of Agreement" with All Metal, dated May 19, 1966 (Appendix C of Pacific's Offer of Proof and referred to in the "Contract For Community Antenna Television Channels", dated June 13, 1966) states that "Telephone Company shall make diligent effort to have said channel services available for All Metal's use on or about September 15, 1966", subject to certain provisos, including one stating that "Telephone Company shall in no event furnish said channel services in the advance of the effective date of said tariff (Pacific's suspended intrastate channel tariff) or contract, as the case may be".

Pacific, as its separate and affirmative defense, has incorporated in its answer pages 1 to 9 of its Offer of Proof, filed herein August 18, 1966 (excluding only the submissions of counsel set forth below the line appearing on page 9 and through page 11). The incorporated matter that Pacific has offered to prove, without challenge to or concession of this Commission's jurisdiction to grant all or any part of the relief requested by complainant herein and within reasonable time limitations, alleges

facts concerning Pacific's development of its policy of accommodating, in the public interest, CATV installations on its poles, or on poles jointly owned with other public utilities, noting that Government Code section 53066, enacted in 1963, provides that cities and counties may enfranchise or license the construction of a CATV system and may authorize the grantee to place "wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever".

Pacific then alleges that local governments, under this section, in some instances have asserted the authority to choose among applicants for franchises or to designate specific areas to be served. Other local governments, it is alleged, have issued nonexclusive, broad franchises and in effect have left the CATV operators so franchised to struggle among themselves for economic survival. (The Los Angeles County franchises held by International and All Metal which are pertinent here appear to be nonexclusive.)

With respect to channel agreements, Pacific, in the incorporated matter from its Offer of Proof, alleges that: in the late 1940's and early 1950's, when CATV companies began to develop the business of providing good quality television reception principally in areas remote from television broadcasting stations, Pacific faced a serious "held order" situation for basic telephone services, due to postwar population and business growth in

California, and was not able to devote channel equipment to CATV use; later, with alleviation of the held order problem it was able to provide such facilities; in 1956 the California Supreme Court (Television Transmission v. Public Util. Com., 47 Cal. 2d 82) held that CATV's were not public utilities (i.e., telephone corporations) and, therefore, not subject to the jurisdiction of this Commission; in 1964, Pacific secured this Commission's authorization for the first agreement in California offering channels for local distribution by a CATV company, over objection by several CATV operators and a city, the latter on the ground that no franchise had been obtained from the city for the proposed service (P.T. & T. Co. - Omni-Video, Inc. (1964), 63 Cal. P.U.C. 388, at p. 391); that the Commission concluded, in the cited case, that since it had no jurisdiction over CATV's -

> "The matter of whether or not a city franchise has been obtained, or is even required, by Omni-Video is likewise not controlling here. The protests of CATV operators (directed at the franchise situation and also at service and rates) are therefore irrelevant to our determination....
>
> "The sole issue before us is whether or not the items of the contracts are reasonable and specifically whether they might cast a burden upon Pacific's customers. The only questions in this regard were those raised by the staff concerning return of the deposits. We find that both contracts should be modified by elimination of the provisions permitting early refund of the deposits so that said deposits cannot be refunded in full in less than 10 years. Such modifications will provide ample protection to Pacific against possible losses in the event of early termination of service without the necessity of adjusting the rate of refund.
>
> "Since this is a new type of service being offered costs have been based on estimates. After Pacific has had a reasonable amount of experience in providing the new service it will be expected to regularize the charges by filing a tariff".

Pacific alleges that, in harmony with the last paragraph quoted above, it filed a tariff on November 3, 1965, setting forth its public offering of channels for local CATV distribution systems.

Other allegations in the incorporated matter from Pacific's Offer of Proof are, in substance, that: in the interval between a prehearing conference (March 17, 1966) in this Commission's tariff suspension proceeding (Case No. 8305) and the scheduled hearing days (commencing May 9, 1966), the FCC, referring to prior correspondence with The American Telephone and Telegraph Company, asserted jurisdiction over channel offerings for local CATV distribution systems by its public notice of April 7, 1966, in which it declared: "The furnishing of such facilities by a common carrier is 'incidental to radio communication'"; also, "CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry and, hence, are engaged in 'interstate communication by wire' to which the provisions of The Act apply"; that Pacific and the other operating companies were ordered to file tariffs for this service with the FCC; that on May 3, 1966, the American Company transmitted to the FCC for filing, under protest, copies of the tariffs and the two Pacific contracts which were then in effect, namely, the Omni-Video contract, previously referred to, and an agreement with Warner Bros., Inc. for the Mission Viejo development in Orange County; that American's petition for reconsideration (and that of the General Telephone System as well) was denied on June 22, 1966, and that such denial stands as a final order of the FCC.

The balance of the incorporated matter consists of factual allegations by Pacific concerning its preliminary negotiations with complainant and All Metal leading to execution of the

agreements herein with the two CATV operators, and allegations concerning the pleadings in Case No. 8421. Pacific asks that the complaint herein be dismissed.

Extended reference has been made to Pacific's answer not only to indicate the broad context in which this controversy arises, but also because, unlike the answer filed by All Metal, it meets complainant's allegations squarely and thus, together with the complaint, forms a well-defined frame within which to consider the mixed questions of law and fact disclosed by the pleadings.

All Metal has incorporated its answer, filed September 1, 1966, in its "Brief" filed the same day. Since the answer is largely argumentative its incorporation in All Metal's "Brief" justifies us in considering it chiefly as an extension of All Metal's argument; however, to the extent that it contains any denials, averments or other defensive responses that can be identified with specific allegations of the complaint, we will consider those responses as having been directed to such allegations.

All Metal, in addition to requesting general relief, in substance asks that:

1. The complaint be stricken as "fraudulent, false and sham pleading" and that, in any event, it be dismissed as to All Metal.

2. Case No. 8421 be retained as a separate matter from the instant case.

3. The temporary restraining order be dissolved.

4. Pacific be directed "to proceed forthwith with the prompt processing of the June 13, 1966, agreement for approval by the Public Utilities Commission". (That agreement, filed June 13, 1966, is now before the Commission in this proceeding, as well as in Case No. 8421.)

5. In the event the Commission "somehow" concludes that it has jurisdiction of any controversy existing between All Metal and International, regarding damage done by either to the other, that All Metal be allowed to file a cross-complaint against International "for the substantial damages which will accrue and have accrued to All Metal as the result of the filing of the false and fraudulent complaint herein". (Ans., pp. 13-14.)

All Metal, in its response, asserts that no evidence was received at the August 19 hearing herein to support either the issuance of the restraining order or the factual basis upon which the complaint is predicated. (The only factual evidence, other than two area maps, received at that hearing consisted of testimony by Clarence Unnevehr, an engineer and former employee of this Commission and presently a consultant for the CATV Association, with broad experience in public utility regulation. The witness testified concerning a field inspection he had made, shortly before the hearing, of Pacific's channel construction for All Metal in Altadena, and gave his opinion on certain economic advantages and disadvantages to the CATV operators and Pacific he considered would result from distribution of signals by channel facilities as compared with pole attachments.) All Metal asserts that it will suffer "irreparable injury" if the restraining order is not dissolved forthwith; that concurrently with the filing of the instant complaint International commenced active solicitation of customers in the Altadena area although it has no plant there, and that its complaint should be recognized simply as an attempt to use this Commission "to give International Cable a business advantage which it cannot otherwise lawfully obtain" (Brief, p. 2).

All Metal, in its answer, after asserting it is not a public utility and is not subject to the jurisdiction of this Commission, and did not, merely by filing a complaint against

Pacific (Case No. 8421), submit to this Commission's jurisdiction in connection with any dispute between All Metal and any other non-utility organization, refers to the chronology of its negotiations, allegedly commencing about the first week in December, 1965, for a pole attachment agreement with Pacific in the Altadena area and avers that, having been advised by Pacific that a pole attachment in that area was available, it obtained a franchise from the Board of Supervisors of Los Angeles County by ordinance adopted March 8, 1966; that, shortly after All Metal was advised by Pacific that a pole attachment was available, one of All Metal's employees advised the then president of International that All Metal "was going into the Altadena area, and shortly thereafter the then president of International Cable laughingly advised said employee of All Metal that International had outmanuevered (sic) All Metal by filing a written application for a pole attachment agreement before All Metal had the opportunity to so do." All Metal then avers that it learned from Pacific that Pacific was "treating International Cable as the first applicant for a pole attachment in the Altadena area, and that pursuant to Telephone Company policy they would not entertain other applications in that area", despite the fact that All Metal was financially able to install a "high quality" system in that area while International was not.

All Metal, in response to paragraphs XII and XIII of the complaint, "notes" that its oral application to Pacific preceded both the oral and written application of International, and that "the only reason All Metal did not submit a written application for a pole attachment agreement was the position taken by The Pacific Telephone and Telegraph Company employees that such a written application would not be entertained after International Cable made

its letter request, as aforesaid, upon learning of All Metal's intention of going into the Altadena area". (Ans., par. 9.) (We note that the pleadings herein disclose that International's franchise from Los Angeles County, for portions of the Altadena-La Canada area, was granted on March 31, 1964 and that All Metal's franchise was granted on March 8, 1966, some two months after International, as averred by Pacific (Offer of Proof, p. 7), had formally applied to Pacific for pole attachments in the Altadena area.)

All Metal then avers that it inquired of Pacific concerning availability of telephone company lines and facilities, "on a lease basis", to connect All Metal's head end site with its prospective subscribers in Altadena, and that on or about February 28, 1966, shortly after All Metal was "awarded" its Los Angeles County franchise (All Metal avers, variously, that the franchise was "awarded" on February 11, 1966 and February 17, 1966, and that the ordinance "formalizing" the franchise was adopted by the Board of Supervisors on March 8, 1966 and thereafter published as required by the local ordinance), All Metal made a written request to Pacific for lines and facilities in the Altadena area, and on May 19, 1966 entered into a Memorandum of Agreement "to get work started" and deposited $30,000 with Pacific to cover the estimated cost of work and materials pending execution of a formal contract, which was ultimately executed on June 13, 1966 and is now before the Commission for "approval". (It should bear emphasis that although the parties have used the term "approval" in connection with contracts presented to the Commission that may require its action, what the Commission actually does is simply to grant or

withold "authorization", sometimes conditional, for the utility to carry out the terms of such agreements. The distinction may appear to be a question of semantics, but it is, nevertheless, real and in some cases, as here, may involve a question of jurisdiction.)

All Metal then asserts that Pacific, at no time from December, 1965 to date, disclosed to All Metal any information whatsoever about International, or Pacific's negotiations with International, except the information that Pacific was treating International as the first and only applicant for a pole attachment agreement in the Altadena area.

Specifically responding to Paragraph XV of the complaint (which alleges a conspiracy between Pacific and All Metal to destroy International's property rights and those of others similarly situated), All Metal asserts that Pacific's employees with whom it had contact during the entire period of its contract negotiations all emphasized their obligation "to respect the confidentiality of dealings with customers and Pacific's desire to avoid involvement in any CATV enterprise." Consequently, All Metal asserts, "the contention that All Metal and Pacific entered into a conspiracy of any kind is as ridiculous and farfetched as it is false." (Ans., par. 13 and, in similar vein, pars. 14-16.)

Responding to paragraph XVI of the complaint (which alleges details of the "conspiracy", poses the resultant burdens International has claimed would be cast on Pacific's ratepaying customers by construction of channel facilities "at a price less than the cost thereof", and alleges delay by Pacific in filing complainant's pole attachment agreement with the Commission), All Metal asserts that the charges made under its contract of June 13, 1966 will produce for Pacific "a profit at least as great as the

return derived by Pacific on equipment furnished to telephone subscribers", and that the contract, in any event, is by its terms subject to Commission "approval" and adjustment of rates. All Metal then avers that the balance of paragraph XVI (sub-pars. 2-6) contains allegations that are either "false", "misleading", or "unfounded", and that "if a three-month delay in processing an application for a pole attachment agreement is legitimate cause for complaint to the Public Utilities (sic) and cause for filing charges of conspiracy and criminality, then the Commission should shortly be receiving many, many complaints in form similar to the instant one." (Ans. par. 17.) (Our decision herein may, we hope, serve to alleviate All Metal's concern on that score.)

All Metal continues, in its answer, with responsive matter purportedly directed at specific allegations (pars. XVII-XXXII) of the balance of the complaint. Its response to those allegations, like that addressed to earlier portions of the complaint, is, for the most part, so replete with invective, argument and explanatory detail of an evidentiary nature that, except for some assertions tending to indicate its position and objectives, one is at some pains to discover just what it conceives to be the issues of fact or law involved in this controversy. Since All Metal's Brief and its Answer, incorporated therein, are of record, and since enough, we think, has been said to indicate the nature of its contentions of fact and law, further detailed reference to those documents, at this point, will serve no useful purpose.

We note, however, what All Metal says in paragraph 20 of its answer, identified with paragraph XIX of the complaint. All Metal states that "it should be noted" that its complaint in Case

No. 8421 complains only of Pacific's conduct; that since this Commission has no jurisdiction over CATV companies any cause of action All Metal might have against International was to be pursued in the courts and not before this Commission, and that this Commission (as set forth in All Metal's complaint) should be concerned about the activities of a public utility "which might give an inequitable preference to one of two business competitors." In any event, the averment proceeds, there was no conspiracy involved in the filing of that complaint and International was not deliberately omitted as a defendant pursuant to a conspiracy of any kind.

We next turn to a discussion of the written argument presented by the Memoranda of Points and Authorities filed by complainant and Pacific in elaboration of their contentions made at the hearing on August 19. To the extent that All Metal's "Brief", incorporating its Answer, may contain legal argument, that also will be considered. We note, parenthetically, that both All Metal's Answer and Brief and complainant's Memorandum were filed subsequent to August 31, 1966, the date fixed by the Examiner at the hearing. No good reason appears, however, for not giving due consideration to those documents. We will first consider complainant's contentions.

Complainant argues, in substance, that Pacific, by means of its channel facility arrangements with All Metal, has discriminated "to an extreme" against complainant, which has a prior pole attachment agreement with Pacific covering portions of the same area in Altadena and which, as a member of the "public" as regards Pacific's "provision of services", is entitled, complainant

argues, to equal treatment by Pacific, to be enforced by this Commission. Complainant, at the hearing, referred to a number of sections of the Public Utilities Code and to Commercial Communications vs. Public Util. Comm. (1958), 50 Cal. 2d 512, which sections and cited case, together with authorities cited in its Memorandum, assertly provide ample jurisdiction for this Commission to entertain the instant complaint and grant the relief requested.

Statutes cited by complainant at the hearing and in its Memorandum are:

Public Utilities Code secs.

207 - Defining "Public or any portion thereof."

216 - Defining public utilities subject to Commission jurisdiction.

451 - Requiring all charges by a utility for products or commodities furnished, or any service rendered, to be reasonable, and that utilities shall furnish adequate, etc. service and facilities necessary for public safety, etc.

453 - Forbidding utilities to grant preferences or subject any person to any prejudice or disadvantage, with respect to rates, charges, service, facilities, or in any other respect, etc.; provides Commission may determine any question of fact "arising under this section."

701 - Granting Commission general supervisory and regulatory power over public utilities, necessary and convenient in the exercise of its jurisdiction.

702 - Requiring public utilities to comply with any Commission orders "relating to or affecting its business as a public utility", and securing compliance therewith by its employees.

761 - Authorizes Commission, after hearing and findings, to prescribe by order or rule reasonable utility equipment, practices and facilities.

762,767 - Authorizes Commission, after hearing and findings, to direct additions, extensions, repairs or improvements to, or changes in, existing plant or structures of any utility, or two or more utilities, including division of costs (762). Provides for joint utility use of poles, etc. (767).

851 - Relates to sales, leases, encumbrances or other dispositions of utility's line, plant, system, "or other property necessary or useful in the performance of its duties to the public"; does not prevent sales, leases, encumbrances or other disposition by any public utility "of property which is not necessary or useful in the performance of its duties to the public..."

6001,6302 - Legislative grant to local bodies to enfranchise, among others, companies that distribute electric power along public ways.

7901 - Grants telephone utilities use of public rights of way.

7903 - Provides criminal penalties for appropriation of confidential information by any employee or agent of a telephone utility.

Other Statutes and General Orders

G.O. 95 - Rules for Overhead Electric Line Construction.

Government Code, Sec. 53066 - Grants cities and counties authority to enfranchise or license CATV companies to place wires, conduits, etc. in public ways and easements of the local governments.

Complainant argues that whether the California Supreme Court has held CATV service not to be telephone utility service (Television Transmission v. Public Util. Comm., supra), or the FCC has assumed jurisdiction over Pacific's channel facility offering as a link in interstate common carrier service (an assumption that complainant, citing authorities, strenuously controverts), are considerations irrelevant to the instant case. What complainant stresses here is that there is not, and should not be, a legal distinction between Pacific's "facilities leased" pursuant to a pole attachment agreement and its "facilities leased" pursuant to its

"so-called contract for community antenna television channels." Complainant asserts that in neither case are the facilities used as telephone facilities, but in both cases existing and new plant are made available to the CATV operator and are used for the purpose of facilitating the transmission of television signals, and that though there may be a difference in the amount of "service", to pretend there is a difference in kind as between the two "facilities" is mere sophistry.

Complainant argues further, that public interest and public policy require, in order to conserve physical space in, above and under the public ways and to maintain esthetic values, that, when possible, all pole and wire users join together in a common use of one set of poles and wires; that this policy is recognized in paragraph 8 of complainant's pole attachment agreement (quoted, Memo. p.6), and by section 762 of the Public Utilities Code (quoted, in part, Memo., p.6), and that section 767 of the Code gives the Commission authority to require two or more public utilities to make use of the same wire, poles, pipes and other equipment.

Accordingly, complainant argues, although neither complainant nor All Metal is a public utility, this Commission "has the power and jurisdiction to regulate their use of the public right of way, and the joint use of the poles, wires, and conduits placed thereon...whether owned by a telephone corporation with a statewide franchise, a power and light corporation with a county franchise, or a private company with a local franchise." Such jurisdiction, complainant asserts, "is, of course, in addition to and different from the jurisdiction the Commission has over the myriad of activities of The Pacific Telephone and Telegraph Company, as a telephone corporation."

Complainant suggests that this Commission should not be bound by decisions of other state commissions or courts (some of which are cited in Pacific's Memorandum), which, even if rendered under laws identical with those of California and on questions "squarely and directly" presented, would be of no aid (except perhaps in a rate or tariff filing case) when applied to the "unique facts" of this case.

In conclusion, complainant refers to the testimony of Clarence Unnevehr, mentioned earlier, and asserts that such testimony "demonstrates":

> (a) The installation of both double-lashed cable and new plant construction in the area covered by complainant's pole attachment agreement.
>
> (b) Interference with and damage to existing telephone plant.
>
> (c) Creation of irreparable damage to complainant "by the addition of new installations to be moved, or to be re-arranged, at complainant's expense, and a threat of more of the same."
>
> (d) That if the restraining order is removed, "complainant's opportunity to realize the fruits of its franchise and pole attachment agreement will be completely eliminated."

Complainant argues that the above testimony, coupled with the verified complaint, various admissions, to date, of the two defendants, and the "obvious and continuing loss of income resulting from the defendants' actions", amply demonstrate both the propriety and necessity of continuing the restraining order, to which Pacific, complainant states, has indicated no objection. (Pacific's view, expressed at the hearing and in its Memorandum, was to the effect that since, in any event, authorization for its channel offering to All Metal was required, either by this Commission or the FCC, it was indifferent to continuation of the restraining order.)

Pacific, discussing in its Memorandum the nature of pole attachment and channel agreements, points out that its individual pole attachment agreements, in a standard form, provide that: the CATV operator (licensee) may place its "cables, guy wires, anchors and other appurtenances" on Pacific's poles, subject to certain specified restrictions including the requirement that the CATV operator pay for all necessary rearrangements of Pacific's facilities; Pacific will furnish space for attachment of CATV-owned facilities for $2.50 per pole per year in the case of cable attachments and $1 per pole per year for attachment of CATV amplifiers; the CATV facilities so attached may be used for distribution to licensee's subscribers, within the area covered by the agreement, of off-the-air television programs, incidental transmission of CATV-originated or off-the-air FM music and for occasional transmission of CATV-originated television broadcasts.[3/]

Pacific asserts that from the inception of CATV service, it has, without exception, furnished pole attachment space to the first applicant for such space who could fulfill the obligations set forth in the agreement; i.e., pole attachment space has been rendered on a "first come, first served" basis; likewise, because pole space allotted to communication facilities is limited and is becoming increasingly crowded, Pacific, without exception, has refused to permit later applicants to attach their facilities to poles which are included within the area encompassed in an existing pole attachment agreement.

3/ Exhibit "A" of the Memorandum is a copy of the "standard" pole attachment agreement with International, dated March 28, 1966.

With respect to the furnishing of channel facilities to CATV operators, Pacific states that it has also entered into several agreements pursuant to which it furnishes such facilities to CATV operators (a typical agreement is the one with All Metal, Exhibit B of the Memorandum). Under channel agreements, Pacific asserts, the operators provide their own antennae and related facilities ("head end" facilities); set their own rates subject to applicable municipal regulation (Gov't. Code, Sec. 53066); select off-the-air television signals to be delivered to Pacific for distribution to their patrons; and solicit, select and collect from their own patrons. (Pacific notes here that, contrary to repeated assertions of CATV operators and their attorneys, channel agreements are not "leases" and certainly are not "lease-backs". This is so, Pacific asserts, because possession and control of and title to the channel distribution facilities remain at all times in Pacific.) Pacific asserts - and the agreements annexed to its Memorandum disclose - that both channel and pole attachment agreements restrict the CATV operator to transmission of the same type programs, mentioned above.

With regard to attachment of CATV-owned facilities to utility-owned poles being a "public utility service" and, as such, subject to regulation by this Commission, Pacific argues that the pole attachment arrangement is conceptually no different from that which would obtain if Pacific were to rent to a CATV operator some of its vacant land or vacant office space in one of its buildings. In such cases, Pacific asserts, it performs no "service"; hence, no violation of the Consent Decree would be involved in such pole attachment arrangements.

Because no "service" is performed under pole attachment agreements, and because it enters into such agreements only when pole space is vacant, Pacific states it has not regarded the terms and conditions of these agreements as subject to regulation by this Commission; however, in a 1954 rate case (The Pacific Tel. & Tel. Co., Decision No. 50258, 53 Cal. P.U.C. 275, 320) the Commission held that certain "special contracts", among them contracts for pole attachments, "performed by the use of operative property and operative personnel of applicant,...necessarily and lawfully constitute public utility service subject to the jurisdiction of this Commission." On rehearing of that case, however, and upon Pacific's agreement to file the special contracts with the Commission, the Commission stated (The Pacific Tel. & Tel. Co., Decision No. 50837 (1954) 53 Cal. P.U.C. 662, 665):

> "The proposals of the Company respecting the other special contracts, set forth in Items 4 and 5 above will effectively bring to the knowledge of the Commission the nature and extent of such contracts. Filing by the Company as proposed in Items 4 and 5 above will not be construed by the Commission as a public holding out. Such filing will not be construed by the Commission as constituting evidence on that subject."

Continuing with the argument, Pacific notes that it voluntarily sought Commission authority to raise its contract rental charges for pole attachments, and the Commission in that case "accepted the fact" that Pacific does not hold itself out as offering pole attachment space to CATV operators or to anyone else (Pacific Tel. and Tel. Co., Decision No. 67694 (1964) 63 Cal. P.U.C. 221, 222).

Pacific has referred to a number of decisions rendered by courts and state commissions in other jurisdictions which, it asserts, are to the effect that the rental of vacant space on its poles is not part of the public service performed by a telephone utility in the business of telephonic communication, and that the granting or witholding by a telephone utility of permission to CATV companies, or others, to use such vacant pole space, absent a public offering, does not involve any question of discrimination, whether competing CATV companies are in the same geographical area or not (Ceracche Television Corp. v. Public Service Com'n. (1960) 267 N.Y.S. 2d 969; WCOG, Inc., et al. v. Southern Bell, et al. (N.C. Utilities Comm. June 7, 1966) CCH Utilities Law Reporter, par. 20,373, and other cases cited on page 9 of Pacific's Memorandum).

Pacific states, however, that it stands willing to file a tariff which would govern the terms and conditions applicable to the rental of pole attachment space to CATV operators "provided that this Commission deems such a filing to be in the public interest, that Pacific's ability to render efficient telephone service is not thereby impaired in any way - now or in the future - and that attachments are limited to one per pole", and that Pacific's willingness to file such a tariff with this Commission has been made known to the CATV industry.

As to any distinguishing differences in this Commission's jurisdiction between pole attachment agreements for CATV-owned facilities and agreements whereby telephone utilities furnish distribution channel facilities to CATV operators, Pacific asserts that its offering of distribution channels to CATV operators is a public utility service, recognized as such by this Commission (Pac. Tel. & Tel. Co. - Omni-Video, Inc., supra) as consistent with other private line services, such as channels for teletypewriter, signal, telephotographic and facsimile services, and channels for transmission of both broadcast and closed circuit television signals, each of which is a telephone-company-provided communications service, and each is offered to the public through facilities dedicated to the public use. These are the basic tests, Pacific asserts (citing cases) which determine the public utility character of telephone services. Moreover, Pacific maintains, the California Supreme Court has declared that Pacific "is entitled to use its lines interchangeably 'for transmitting telephone messages, telegraph messages, teletypewriter messages, telephotographs, programmed services (including radio and television broadcasts) and any other communications service by means of the transmission of electrical impulses.'" (Pac. Tel. & Tel. Co. v. City of Los Angeles (1955) 44 Cal. 2d 272,281. Also cited: Television Transmission v. Public Util. Com., supra, at p. 87, and, as in accord, the Commission's decision in Re Pac. Tel. & Tel. Co., Decision No. 67334 (1964) 62 Cal. P.U.C. 754 - the "STV" case.)

Notwithstanding the great number and variety of questions raised, the essential issue framed by the pleadings in this case (as well as by the pleadings in All Metal's complaint against Pacific, Case No. 8421) is one of unreasonable discrimination, asserted to

have been practiced by Pacific in the provision of agreements for pole attachments and distribution channels in partially overlapping areas in Los Angeles County covered by complainant's and All Metal's local CATV franchises. We must determine whether there has been "any preference or advantage" or "any prejudice or disadvantage" granted to or suffered by complainant which may be contrary to the provisions of section 453 of the Public Utilities Code.

Discrimination by a public utility does not mean, merely and literally, unlike treatment accorded by the utility to those who may wish to do business with it, but refers to partiality in the treatment of those in like circumstances seeking a class of service offered to the public in general. With respect to a utility's offer to serve the general public or a limited portion thereof, as evidenced by its schedules of rates and rules, the offer is made, to the extent of the utility's ability to provide the service, to serve impartially any member of the public who may qualify under the rules and is willing to pay the rates; here the duty to serve impartially is correlative with the right to demand and receive the service applied for. It is, moreover, unlawful in California for a public utility, including a telephone corporation, to make effective any contract, arrangement or deviation for the furnishing of any "public utility service" at rates or under conditions other than the rates and conditions contained in its tariff schedules on file and in effect at the time, unless it first obtain the authorization of this Commission to carry out the terms of such contract, arrangement or deviation (Gen. Order No. 96-A, Sec. X.A.; emphasis added).

The CATV channel facilities and service provided by Pacific, either by written contract or pursuant to a tariff offering, unquestionably constitute "public utility service". Pacific

constructs, owns, operates and maintains the plant used in the service and provides the energy for transmitting the signal through the facilities so constructed, in the same manner as it provides channels for transmission of other private line services related to telephony which, likewise, are offered to the public through facilities dedicated to the public use. Unless such CATV channel facilities are offered to the public by a filed tariff, authority must first be obtained by Pacific, pursuant to General Order No. 96-A, to make effective any special contract for their provision.

The FCC has asserted jurisdiction over the offering by telephone companies of CATV channel distribution service for signals deemed by that Commission to constitute a link in interstate communications. At least to the extent that the signal transmitted by Pacific's channel facilities is not interstate in character, jurisdiction over the latter resides with this Commission. We do not question the FCC's assertion of authority to control interstate activity under its jurisdiction.

Pacific's willingness, as pertinent to the present controversy, to enter into temporary individual license agreements with CATV operators for use by the latter of vacant space on its poles, is neither an offer nor a providing of "public utility service", since the utility does not hold out such contracts impartially to the general public or does it thereby provide any "service" related to the concept of dedication to the public of a communication service or facility which is the hallmark of a public utility calling. If, for example, an electric utility owning a hydroelectric lake were to grant, subject to certain conditions, temporary individual fishing or boating privileges therein, surely this would not be considered under any rule of law of which we are aware to

constitute an "offer" to the general public to provide a "service" to which the general public is entitled in the same sense in which it has a right to demand impartial electric service from the utility; although here, as in the case of pole attachments, a plant "facility" is used in providing the fishing or boating privileges, and the economic results of such use of those facilities would, as also is the case with pole attachments, be reflected in the utility's overall financial situation. This is not to say, however, that Pacific, either voluntarily or pursuant to a proper order of this Commission, may not at some time make a public offering of pole space to CATV operators.

Although the Commission in its first decision in The Pacific Tel. and Tel. Co., 53 Cal. P.U.C. 275, 320, considered that such pole attachment contracts, performed by the use of Pacific's operative property and personnel, "necessarily and lawfully constitute public utility service subject to the jurisdiction of this Commission," and required that such contracts be filed with the Commission and authorized pursuant to General Order No. 96-A (it having appeared that "all of the revenues, expenses and plant effects" relating to such "contract services" were reflected in Pacific's presentation of that rate proceeding), the Commission, on rehearing of that application, expressly stated and provided (53 Cal. P.U.C. 662, 664-666) that the filing by Pacific of such contracts would be construed neither as a "public offering of the services or facilities" referred to therein, nor "as constituting evidence on that subject." The purpose of such filings, stated by the Commission in the sentence immediately preceding the last two quotations above, was that they "will effectively bring to the knowledge of the Commission the nature and extent of such contracts." In short, what the Commission did in that case was

to provide a procedural method for bringing to its attention an activity of the utility that might be relevant to its determination of reasonable rates.

Such procedural requirements do not touch the question of whether the licensing of vacant space on Pacific's poles to CATV operators constitutes, under the circumstances disclosed by this record, a "public offering" or a "public utility service." The short answer to that question is that Pacific has not yet undertaken (other than as conditionally suggested in its Memorandum) to make such a public offering voluntarily and this Commission has not yet ordered it to do so in an appropriate proceeding.

We hold, therefore, that in the absence of a public offering the rental or licensing by Pacific of vacant space on its poles to CATV operators does not constitute a "public utility service". Therefore, authorization by this Commission of the pole attachment agreement between Pacific and International dated March 28, 1966 is not necessary. Special individual contracts by Pacific for use of such facilities should, however, under the procedural rules mentioned above, be supplied for the information of this Commission.

It follows that complainant, possessing a pole attachment agreement with Pacific is not in like, or similar, circumstances with All Metal, whose agreement with Pacific calls for rendition

of a public utility service in all respects like other private line services provided by Pacific and which is subject to different charges, restrictions and conditions of service than those found in Pacific's pole attachment agreements.

Our decision herein will be limited to the issue which we consider to be the controlling one disclosed by the pleadings and arguments of the parties, namely, the issue of unjust discrimination under a provision of California law enforceable by this Commission.

We hold that Pacific, in providing the facilities or service described in the International and All Metal agreements in question, did not violate the provisions against preference or prejudice set forth in section 453 of the California Public Utilities Code.

Accordingly, we conclude that the Commission's temporary restraining order, issued herein on August 16, 1966, should be dissolved and that International's complaint herein should be dismissed. Likewise, for the reasons stated above we conclude that the related complaint of All Metal, in Case No. 8421, should be dismissed, by separate order, however, contemporaneously to be issued in that case.

O R D E R

IT IS ORDERED that:

1. The temporary restraining order issued herein on August 16, 1966 be and said order hereby is dissolved.

2. The complaint of International Cable T.V. Corporation, filed herein on August 15, 1966, is dismissed.

The effective date of this order shall be ten days after the date hereof, subject to extension of said effective date, by further order herein, upon good cause first having been made to appear to the Commission within said original ten day period.

Dated at San Francisco, California, this 9th day of NOVEMBER, 1966.

President

Commissioners

We will file a separate opinion.

Frederick B. Holoboff

George G. Grover

Decision No. 71559

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

INTERNATIONAL CABLE T. V. CORPORATION, a California corporation, Complainant,	)	
vs.	)	Case No. 8499
ALL METAL FABRICATORS, INC., a California corporation, and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California corporation, Defendants.	)	

DISSENTING OPINION OF COMMISSIONERS GROVER AND HOLOBOFF

We dissent. In our view, Pacific's pole contact policy and practices constitute a public utility offering.

"Dedication," "holding out," "public offering" -- these concepts look to what a utility does. Procedural niceties are not controlling; reality is. Pacific has established on this record that it has a consistent policy with respect to CATV pole attachments; that policy is clearly public in concept: "first come, first served" -- "one customer only". There is nothing private or personal in this concept -- indeed Pacific appears to stress how impartially it treats all comers.

More important, Pacific's pole attachment practices are inextricably linked to its channel facilities practices. There is no reality in the suggestion that the agreements are just like leases of vacant property. From the standpoint of the CATV industry (and that industry is the "public" we are talking about), the difference between a pole attachment "agreement" and a channel facilities "offering" is of secondary importance.

Since the pole attachment agreement is part of a public utility offering, the Commission should have considered and decided the issue of discrimination.

George G. Grover

Frederick B. Holoboff

December 31, 1966