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ORIGINAL

Decision No. 77185

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA COMMUNITY TELEVISION ASSOCIATION, Complainant, vs. GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation, SOUTHERN CALIFORNIA EDISON COMPANY, a corporation, Defendants.	Case No. 9008 (Filed December 31, 1969)

Harold R. Farrow and Walter Kaitz, for California Community Television Association, complainant.
A. H. Hart and H. Ralph Snyder, for General Telephone Company of California, defendant.
R. E. Woodbury, H. W. Sturgis, H. C. Tinker and L. C. Hauck, by H. C. Tinker and L. C. Hauck, for Southern California Edison Company, defendant.
S. M. Boikan, Counsel, and J. G. Shields, for the Commission staff, intervener.

INTERIM OPINION ON ORDER TO SHOW CAUSE

The Commission, on consideration of the complaint of California Community Television Association, whose members allegedly comprise a majority of the cable television companies operating in California, issued and duly served an order to show cause and temporary restraining order (Decision No. 76782, dated February 10, 1970), returnable February 25, 1970, requiring defendants - both regulated public utilities - to appear and show cause why a cease and desist order should not issue:

"(1) prohibiting both defendants from increasing pole attachment rates above $3.00 per year;

(2) directing Edison to continue to issue and service pole use agreements in accordance with its publicly announced offerings prior to July 30, 1969, at the rates in effect at that date; and

(3) directing General to continue to issue and service pole use agreements in accordance with its letter to the Chairman of the Federal Communications Commission, dated December 1, 1969, at the rates in effect as of that date.

"IT IS FURTHER ORDERED that, pending the hearing on this order to show cause, the defendants are hereby restrained and ordered to cease and desist from engaging in, or performing the following acts:

(1) increasing pole attachment rates above $3.00 per year;

(2) in the case of defendant Edison, from refusing to continue or to service pole use agreements in accordance with its publicly announced offerings prior to July 30, 1969 at the rates in effect as of that date;

(3) in the case of defendant General, from refusing to issue or service pole use agreements in accordance with its letter to the Chairman of the Federal Communications Commission dated December 1, 1969, at the rates in effect at that time."

Both the sufficiency of the complaint and the Commission's jurisdiction to grant the requested relief were put in issue by responsive pleadings timely filed by both defendants prior to issuance and service of the show cause order. Edison, in addition, on February 13, 1970 filed a petition for nullification or clarification of that order. The petition, meritorious in some respects, will be disposed of in this interim decision.

The Commission staff, by petition and order, has intervened in this proceeding with all the rights of the named parties (Rule 53, Revised Rules of Procedure; Decision No. 76850, dated February 27, 1970).

Following public hearings and oral argument before Examiner Gregory, the order to show cause was submitted, on March 6, 1970, "for interim decision and order...for whatever appropriate order may be issued by the Commission on the state of the record at this time" (Tr. 409). Complainant, joined by the Commission staff, urges that the temporary restraining order be continued in effect as a temporary cease and desist order pending a hearing on the merits, with some modifications, proposed by the staff but not acceptable to defendants, that purport to respond to Edison's petition to clarify such order. With respect to defendants' motions to dismiss the complaint for lack of jurisdiction, complainant and the staff urge that the present record does not afford a sufficient factual basis for an informed decision on that issue. The staff asserts, among other matters, that present-day communication technology and concepts of utility service must be considered in evaluating the nature of defendants' practices in connection with use of their poles and conduits by cable television companies.

Defendants, citing court and commission decisions from this and other states holding that pole attachments, not being a communication or power service which such utilities have undertaken to provide the public, are not a "public utility service" and that regulation of such incidental activities as "public utility service" is beyond the power of state regulatory bodies. 1/

1/ Complainant has filed with the Federal Communications Commission a complaint essentially similar to the one here. We are not presently advised of any action by the FCC on that complaint. This record informs, however, that the FCC, by letter action on January 28, 1970, requested that operating telephone companies of the Bell, General, United and Continental systems defer proposed increases in charges to cable television operators for pole or conduit rights, pending resolution of certain questions in dockets now before that commission (Ex. 34).

Complainant, at the hearing, presented supporting evidence from cable television operators both within and outside defendants' respective utility service areas. The evidence tended to show the relative costs to the cable television operators of using the utilities' poles or conduits for their facilities; the difficulty of obtaining final clearance from the utilities of applications for pole use, due to changes by the utilities in their respective policies, contract terms and charges while such applications were contemplated or pending; and the prospect of cancellation of local franchises, necessitating further applications to local governing bodies for authority to construct their own pole lines should the utilities continue to delay or refuse pole use applications, with resultant jeopardy to construction plans and financial outlays of the cable television operators.

The temporary restraining order, quoted above, does not prohibit defendants from issuing or servicing pole use agreements in accordance with rates or policies in effect prior to July 30, 1969, with respect to Edison, or prior to December 1, 1969, with respect to General. Edison, however, by its petition for clarification has pointed to certain ambiguities in the restraining order arising, among other matters, from the fact that its answer had been filed, as this record shows, prior to issuance of that order. In addition, the petition states that neither did complainant allege nor has Edison now or ever had in effect a pole attachment charge of $3.00 per year, either based upon said charge per pole per year, or upon said charge per attachment per pole per year. Instead, Edison's contracts with cable television operators provided, prior to July 30, 1969 and until and on December 31, 1969, for various charges per pole per year, ranging from $2.00 to $5.00, depending on the number of

cables and signal amplifiers attached to a pole. Thus, while a composite annual charge could have been $3.00, no specific single rate of that amount, the petition states, has obtained for attachments by cable television contractors.

Edison's petition further states that while it entered into several individual contracts on a case-by-case basis with members of the cable television industry prior to July 30, 1969, it has denied (Answer, par. 2, pp.4-5) and does deny that it has offered or does offer or provide "public utility service" in connection with pole use agreements, or has held or holds out any services impartially to the general public or any portion thereof or provides any "service" related to the concept of dedication to the public. Petitioner asserts that complainant has not alleged that Edison has ever "publicly announced" an offering of pole use agreements and is thus uncertain as to what is intended by the reference in the show cause order to its "publicly announced offerings prior to July 30, 1969".

Petitioner further states that in a "good faith effort" to comply with the Commission's "desires", Edison caused written instructions to be sent to appropriate company personnel promptly after receipt of the show cause order;[2/] that it believes, with some

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2/ The instructions (Petition, pp. 5, 6), after reciting issuance and receipt of the show cause and temporary restraining order, are as follows:

"1. The mailing of Edison's Agreement Form No. PS-52 (Pole Contact - CATV Companies) be discontinued until further notice;

2. Discontinue the approval and execution of any pole attachment agreements submitted by CATV Companies until further notice; and

3. Segregate all payments received from any person, firm or corporation for CATV contact rental, and hold such payments until further notice. Any such payments made by check should not be negotiated."

uncertainty, that the instructions conform to the order; and that if there is anything further the Commission desires Edison to refrain from doing pending a hearing on the order, such order be modified accordingly. Edison concludes by requesting that the show cause order be vacated, or that such other or further order or clarification thereof be issued as may be proper under the circumstances.

General, in addition to its joint challenge with Edison to our jurisdiction over the subject matter of the complaint and our power to grant injunctive relief (except as injunctive power is specifically provided by Public Utilities Code Sections 1006, 2102, 2573, 8108 and 8133 - not applicable here), has alleged that its pole rental rates are reasonable (Answer, p. 6). General's counsel asserted during oral argument (Tr. 322-23) that though the utility intends to hold its pole attachment rate at $3.00 per pole per year, "assuming expeditious regulatory action", it also intends in its new pole rental agreements (Ex. 3), to charge a "processing fee" of $4.00 per pole and a penalty of $5.00 plus retroactive rental charges for unauthorized attachments. Counsel, arguing the reasonableness of the new charges as justification for lifting injunctive restraints, referred to testimony of some of complainant's witnesses from the cable television industry, who on cross-examination indicated that they did not consider such charges unfair or unreasonable (Burcham, Tr. 68; Butcher, Tr. 163).

The present complaint is the most recent phase of a long-standing controversy between the expanding cable television industry and telephone and electric power utilities in California concerning use by the former of the latter's poles or conduits for attachment or placement of facilities owned and operated by the cable television companies for service to their own patrons. The pleadings present

squarely, for the first time in California, issues concerning both the intrinsic nature of pole attachments and this Commission's jurisdiction to regulate them as a "public utility service" of the investor-owned telephone and electric power utilities.

At the outset, we note that cable television entities are not, in California, "telephone corporations" subject to regulation as such by this Commission (Television Transmission v. Public Util. Com., 47 Cal.2d 82). Also, cable television companies in this state may place their own poles, wires, conduits and other facilities in public ways and easements of cities and counties, pursuant to franchises granted by the local governmental bodies (California Government Code, sec. 53066). The cable television industry in this state, however, has, as this record shows, generally preferred, for economic reasons, to seek pole contact arrangements with telephone or electric power utilities, when available. It is the policy of this state and of this Commission, of which we here take judicial notice, that undergrounding of utility and other cable installations is desirable for esthetic reasons.

Approaching the questions raised by the show cause order, we observe that this Commission, pursuant to its General Order No. 95 and preceding general orders and statutes (General Orders Nos. 64, 64-A; Stats. 1911, Ch. 499, Stats. 1915, Ch. 600; see Sincerney v. City of Los Angeles, 53 Cal.App. 440; Polk v. City of Los Angeles, 26 Cal.2d 519), has for many years prescribed and enforced rules of statewide application, in the interest of adequate service and safety to the public and others, for construction, reconstruction, maintenance, operation or use of overhead electrical supply and communication lines. We have no doubt that defendants, if not complainant's members as well, are subject to General Order No. 95 in connection

with pole attachments for cable television service (see also, Public Utilities Code, sec. 768.5).

We note, also, that Section 489 of the Public Utilities Code provides, in pertinent part, that:

> "...every public utility...shall file with the commission...schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service...."

Section 491 of the Code forbids any utility to change any rate or classification, or any rule or contract relating to or affecting any rate, classification or service, or any privilege or facility, except after 30 days' notice to the Commission and to the public. Other provisions of that section are not pertinent to this discussion. Also, Section 454 of the Code forbids increases in rates, or alterations in contracts or practices that result in increased rates, without a showing of necessity before this Commission.

This record shows that Edison (Answer, p. 6, First Affirmative Defense, par. 3) has included in its gross operating revenues the revenues generated from pole attachments by cable television companies and others. Although no similar allegation appears in General's answer, we may infer, from the fact its former and proposed charges appear in its pole lease agreements in evidence, that revenues generated by such contracts would accrue to that utility also. The present record, however, is silent as to what accounting treatment is accorded by either defendant to such revenues, or to associated expense, overheads, or related pole plant, or whether revenues at past or proposed rates are compensatory or not. We note this point here, in passing, for the reason that it bears directly on the requirement of Section 489 of the Public Utilities Code, mentioned

above, for filing by utilities of all contracts which in any manner affect rates, whether such contracts provide for a "public utility service" or not.

We note, also, that Section 851 of the Code forbids unauthorized dispositions by a utility of property wholly devoted to public use. The policy underlying that section is the prevention of conversion of public use into private uses. The use of public utility poles contemplated by the state franchise granted all telephone utilities (Public Utilities Code, sec. 7901) and by local franchises to electric power utilities is a wholly public use. Disposition of any part of a utility's property wholly devoted to public use, without authorization by the state through this Commission, is contrary to the intent of Section 851, whether such disposition, as by pole leases, is in connection with a "public utility service" or not.

The limitations of this proceeding, as to issues and parties, make it inappropriate to decide whether any of defendants' pole use contracts are invalid for lack of authorization pursuant to Section 851 of the Code. We only point to that section to indicate another facet of this Commission's regulatory authority that, in an appropriate proceeding, may very well have significant implications for defendants, as well as for other utilities in California that make their poles or conduits available for private uses.

A different question, however, is presented by the requirement of Section 489 of the Code that contracts of a utility "which in any manner affect or relate to rates, tolls, rentals, classifications, or service" be filed with this Commission. So far as this record shows, defendants have included revenues from pole contacts in their gross operating revenues without separation of such revenues or of expenses allocable to such use. (Edison has indicated that

after receiving the show cause order it directed concerned personnel to "segregate" payments received for CATV contact rental and hold such payments until further notice - Petition, par. III.)

Although we recognize that a public service corporation may carry on a related non-utility business (Commercial Communications, Inc. v. Public Utilities Commission, 50 Cal.2d 512, and cases cited therein), there is no question but that this Commission, in a general rate proceeding, may adjust rates for avowed public utility service so as to protect the ratepayer against burdensome contracts for non-utility activities. In so doing, it is not necessary to find that the contract is for a "utility service". Defendants should be ordered to file with this Commission their existing and all future cable television pole use agreements, for the Commission's information in connection with its regulatory authority over defendants' rates.

We now revert to the jurisdictional issues and to the question of need for further injunctive procedures. First, as to the jurisdictional issues, we are aware that the cases cited by defendants tend to the view, in their several contexts, that pole attachments are not a "public utility service" because they are not a "service" that communication or electric utilities, as such, are obliged to render and to which the general public thus has a commensurate right of access upon payment of reasonable rates. We also recognize that the dedication concept is still vital in California public utility law (Richfield Oil Corporation v. Public Utilities Commission (1960) 54 Cal.2d 419), and that this Commission cannot regulate public utility rates unless the utility's property has been devoted to public use (Marin Water and Power Company v. Town of Sausalito (1914), 168 Cal. 587).

Although dedication to public use will not be presumed without evidence of unequivocal intention to do so (Allen v. Railroad Commission (1918) 179 Cal. 68), and a mere declaration of lack of intent will not suffice, the fact that a utility has reserved a portion of otherwise dedicated property for its private, or a particular, use can be inferred from its conduct with respect to such property (Richfield Oil Corporation, supra at p. 436). Conversely, it may also be inferred, from a utility's conduct, that a purported private or particular use of otherwise dedicated property is, in fact, not only public in nature but also has been devoted to public use, and that the purported private nature or reservation for private use of such property is merely illusory.

In determining the mixed question of law and fact involved in the concept of dedication, as related to this Commission's regulatory jurisdiction, we must look both to the nature of the activity and to the question of dedication (Commercial Communications, Inc., supra, at p. 518).

To recapitulate, complainant asks that defendants be required to file tariffs with this Commission "for all services to be furnished by said defendants to the CATV industry, including pole rental rates, practices and procedures" (Complaint, pp. 15, 16). Defendants deny that they are rendering a "service" that requires a tariff filing or is otherwise within the regulatory jurisdiction of this Commission. They ask that the complaint be dismissed.

The issues of fact and law imbedded in this controversy, both at state and federal regulatory levels, have serious implications not only for the parties directly concerned here but also for the cable television industry, generally, and for all investor-owned utilities that may provide access to their poles by that industry.

To summarily dismiss this complaint, as defendants have requested, in our opinion would foreclose consideration by this Commission of additional facts and arguments necessary for an informed decision. Accordingly, we conclude that defendants' motions to dismiss should be denied, with leave to renew them upon final submission of this case after further hearings and argument.

General has also moved to strike portions of the complaint "which relate to previous actions and policies of General with respect to pole attachments, are not relevant, are argumentative and surplus, and should be stricken" (General's Motions and Answer, p. 5, referring to Complaint, pars. 4, 5, 6, 7, 8, 9, 10, 11, 12, 18 and 19). The motion to strike should be and hereby is denied (Rule 10, Revised Rules of Practice and Procedure).

We now consider the question of whether further injunctive orders should be issued pending final determination of this case. General challenges our power to issue such orders in the absence of specific statutory authority, except as noted earlier in connection with certain sections of the Public Utilities Code, inapplicable here. The proposition is too well settled to require citation of authority that this Commission has general power to issue injunctive orders in the exercise of its jurisdiction; however, as the relief is equitable in nature it must weigh all considerations including equities of the parties and others who will be affected by such orders.

The complaint here, though somewhat discursive throughout and, as Edison's petition points out, imprecise in its allegations concerning that defendant's pole attachment rates, nevertheless alleges facts and circumstances that, even if denied, present serious jurisdictional and regulatory questions within the competence of this

Commission to decide (see Palermo Land & Water Co. v. Railroad Commission (1916), 173 Cal. 380). We hold that the order to show cause and temporary restraining order herein was properly issued on the basis of complainant's allegations. As we have noted earlier, this case was at issue on the pleadings prior to issuance of the show cause order. Accordingly, the examiner limited the hearing on that order to consideration of the propriety of further injunctive relief (Tr. 5-6).

An injunctive order, to preserve the status quo pending final resolution of issues, is a two-edged procedural tool that may do more harm than good if not used with discretion. Here, the parties, this Commission and the ratepaying customers of defendant utilities and the cable television companies have substantial interests at stake, respectively, in the eventual outcome of this case. Unless the parties can submit and argue the case on agreed facts, with consequent time-cost savings to themselves and this Commission, the controversial nature of the issues of fact and law presented here suggests that protracted hearings and argument may be in store before those issues are finally determined by this Commission and, quite possibly, by reviewing courts.

Meanwhile, both the cable television operators and defendant utilities face the prospect of financial and regulatory uncertainty, compounded by Edison's increased pole charges in effect since January 1, 1970 and General's proposed increases designed to become effective shortly, except for its present $3.00 per pole per year rental rate as to which it has agreed to "hold the line".

We are of the opinion that if complainant and defendants could agree on reasonable procedures designed to protect their respective interests, imposition of a temporary cease and desist order

would be unnecessary. Edison, as we have noted, has already segregated payments received from cable television pole attachments under its new contracts. General's new pole attachment policies and contract terms are designed to become effective at various times after December 1, 1969, depending on termination dates of existing agreements and the effective dates of any new contracts to be executed with present or future CATV pole users. It would not seem difficult for General, likewise, to segregate payments from its CATV pole contractors pending final resolution of the issues here.

We have concluded that the respective interests of the parties and of this Commission would be better subserved by issuance of a temporary cease and desist order, to be stayed if, prior to the effective date of such order, defendants, with complainant concurring, agree and so advise this Commission, in writing, that they will (a) service cable television pole attachment applications, from both existing contractors and future applicants, in accordance with defendants' most recent policies and contract terms, adopted July 30, 1969 by Edison and December 1, 1969 by General (with the exception of General's present $3.00 annual rate per pole as to which that defendant has conditionally agreed to "hold the line"); and (b) segregate and hold in identified reserve or memorandum accounts pending further orders of this Commission all payments for CATV pole rentals received pursuant to contracts outstanding on July 30, 1969 and those subsequently executed, in the case of Edison, and, with respect to General, pursuant to all contracts outstanding on December 1, 1969 and those subsequently executed.

If, prior to the effective date of this interim decision, complainant and both defendants fail to lodge with this Commission, at its San Francisco office, their agreement and concurrence with the

foregoing conditions, the temporary cease and desist order hereinafter provided will take effect without further notice or order.

INTERIM ORDER

IT IS ORDERED that:

1. The respective motions of Southern California Edison Company and General Telephone Company of California to dismiss the complaint herein are, and each of said motions is, hereby denied, with leave, however, to each of said defendants to renew its said motion upon final submission of this proceeding.

2. The motion of General Telephone Company of California to strike portions of the complaint herein, as specified in the foregoing opinion, is denied.

3. Southern California Edison Company, a corporation, and General Telephone Company of California, a corporation, and their respective officers, agents, employees and attorneys, shall cease and desist and hereafter refrain, pending final determination by this Commission of this proceeding or further interim order or orders herein, from engaging in or performing the following acts:

(a) In the case of defendant Edison from refusing to issue or service CATV pole use applications and agreements in accordance with its policy and contract provisions, including rates and charges, adopted July 30, 1969.

(b) In the case of General, from refusing to issue or service CATV pole use applications and agreements, including rates and charges, in accordance with provisions set forth in the letter, dated December 1, 1969 from General Telephone & Electronics Corporation to the Federal Communications Commission, Exhibit 20 herein, except with respect to General's existing $3.00 annual rate per pole.

(c) In the case of both said defendants, from failing or refusing to segregate and hold in identified reserve or memorandum accounts pending further orders of this Commission, all payments for CATV pole rentals received pursuant to contracts outstanding on July 30, 1969 and those subsequently executed, in the case of Edison, and, with respect to General, pursuant to all contracts outstanding on December 1, 1969 and those subsequently executed.

4. If, prior to the effective date of this interim decision, complainant and both defendants, respectively, shall have lodged with this Commission, at its San Francisco office, their written concurrence and agreement with the provisions of paragraphs 3(a), (b) and (c), hereinabove, then, and in that event, the temporary cease and desist order set forth in said paragraph 3 and subparagraphs (a), (b) and (c) thereof shall be stayed; otherwise said cease and desist order shall be and remain in full force and effect from and after the effective date of this interim decision and until final determination of this proceeding or further interim order or orders herein.

5. Defendants, within sixty days after issuance of this interim decision, shall transmit to this Commission, at its San Francisco or Los Angeles office, one fully conformed, legible copy of each of their respective cable television pole lease agreements existing from and including July 30, 1969, in the case of Edison, and from and including December 1, 1969, in the case of General, to and including, in the case of both defendants, the date of issuance of this interim decision, together with a copy of each such agreement executed thereafter, until further order or direction of this Commission.

6. Further hearings, including prehearing conferences, and further argument herein shall be had, upon due notice, at such times and places as may hereafter be determined.

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

Dated at San Francisco, California, this 5th day of MAY, 1970.

William Symons, Jr.
President

Commissioners