

ORIGINAL

Decision No. 79468

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MARIE QUAN MAK aka (QUAN BACK LEAN),

Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Case No. 9087
(Filed July 3, 1970;
Amended August 12, 1971)

Marie Quan Mak, for herself, complainant.
Richard Siegfried, Attorney at Law, for
The Pacific Telephone and Telegraph Company,
defendant.

O P I N I O N

This is a complaint by Marie Quan Mak (hereinafter referred to as Mak) against The Pacific Telephone and Telegraph Company (hereinafter referred to as PT&T). The complaint relates to the location, installation and maintenance of a terminal on property owned by Mak.

A duly noticed public hearing was held in this matter before Examiner Jarvis in San Francisco on November 5, 1970, and August 18, 1971, and it was submitted on September 4, 1971.

Mak purchased an apartment building in San Francisco, known as 729-31-33 Clay Street, in July, 1925. She lived in one of the apartments from 1925 until 1930, when she went to the Orient. She returned to San Francisco in 1947 and again lived in one of the apartments until 1954, when she moved to San Mateo. Mak contends that there were no cables, wires or terminals attached to the roof of the apartment building in 1925, 1930 or 1947.

PT&T introduced in evidence two permits. One is dated June 16, 1910, and signed by Ow Lum, Lessee. It authorized PT&T to

attach cable and a terminal to the building to provide service to it and adjoining premises. The other is dated December 16, 1927, and signed by Leen Quan by Madison and Burke, agents. It authorized PT&T to place a terminal on the west fire wall of the building and clamp a cable to the south exterior wall above the second floor windows. Each agreement provided that it was "revocable by giving the Pacific Telephone and Telegraph Company 90 days' notice in writing, and is given on the condition that the work shall be done with care, and that all damages to the premises caused thereby shall be made good by the said Telephone Company." Mak claims the permits are fraudulent because they were not executed by the person who owned the apartment house on the dates indicated.

Regardless of what point in time they were originally installed, there was a PT&T terminal and cable attached to the roof of the apartment house in May, 1967. The terminal served the tenants in the apartment house and adjacent buildings. Mak had problems with the roof which was leaking and causing damage in the apartments. She contends the leaking was caused by damage done to the roof by PT&T repairmen working on the terminals. Early in 1967 it was apparent that the roof needed to be repaired, and Mak made arrangements with a roofer to do the job.

In May of 1967, Mak contacted PT&T and requested that the terminal and all wires and cable be removed from the roof. She indicated that she was having the roof repaired and that she did not want any other buildings served from her property. A PT&T representative told Mak that a terminal was necessary in order to provide service for her tenants. The PT&T representative told Mak that the telephone company would cooperate with the roofer by temporarily hanging the cable and terminal over the fire wall and that lines feeding other buildings would be removed from the terminal on the roof. Mak agreed to the proposal. However, a few days later she changed her mind and again demanded that the terminal and all cable wires be removed from the roof. In the interim the terminal had been temporarily located outside the fire wall. Service to other property was terminated.

Mak was again advised that a permanent terminal was necessary in order to provide proper service for the tenants of the apartment house. PT&T contacted the owner of an adjacent building which has a terminal thereon and sought permission to use that terminal for service to Mak's property. The adjacent owner refused permission.

The roof was repaired. Thereafter, minor damage including heel marks appeared on the roof. Mak contends that it was caused by PT&T repairmen working on the terminal. Mak then caused a cyclone fence to be built enclosing the roof and posted a no trespassing sign which included the statement: "Installation of any kind prohibited." After the cyclone fence was erected, one of Mak's tenants had trouble with her telephone. The source of trouble was at the terminal. Because of the cyclone fence, PT&T repairmen could not get to the terminal, although the record indicates that the fence was cut in an attempt to reach it. Because of the dispute between the parties, PT&T did not contact Mak for six months to seek permission to go on the roof to reach the terminal so that the tenant's telephone service could be restored. When Mak was contacted, she granted permission for PT&T to go on the roof and temporarily build a line in from another terminal.

While the dispute between the parties was going on, Mak was hospitalized. She contends that her condition resulted from PT&T's conduct in connection with this matter.

Mak seeks herein an order awarding her damages in the amount of \$8,753.86, computed as follows: rental for the use of the apartment house roof from 1929 to 1968, at the rate of \$10.00 per month, \$4,680.00; the cost of repairing the roof, \$960.00; hospital expenses, \$988.86; post-hospital care, \$900.00 and general expenses involved in prosecuting the complaint, \$250.00. She also seeks an order prohibiting PT&T from using her property to serve persons not located thereon and defining the manner in which the property is to be served.

PT&T contends that the Commission has no jurisdiction to consider the question of damages. It concedes that the Commission has jurisdiction to consider the question of the mode and location of telephone service and equipment at the apartment house.

The material issues presented herein are as follows:

(1) Does the Commission have jurisdiction herein to consider the claim for damages asserted by Mak? (2) If the Commission has jurisdiction over damages, what amount, if any, should be awarded? (3) What order should be made with respect to the location and maintenance of telephone facilities at the apartment house?

Mak contends that the Commission has the duty of regulating public utilities and, therefore, has the jurisdiction to award the damages requested herein. This is not the law. The Commission's jurisdiction is limited to the powers conferred upon it by the Constitution and laws of California. Assuming, for the purpose of discussion only, the truth of the facts presented by Mak, she has presented evidence which might sustain an action for breach of contract or in tort. Since PT&T installed and maintained telephone facilities under the color of right of the two permits, it would be estopped from disputing their validity and applicability. The permits were in effect at the time of the acts of damage alleged herein. The refusal of PT&T to compensate Mak could be considered a breach of that portion of the permits where PT&T agreed to "make good" all damages to the premises. This presents a classical situation of breach of contract. The Constitution and statutes give jurisdiction over actions for breach of contract to the courts and not the Commission. (Cal. Const., Art. VI, Sections 1, 5; Code Civ. Proc. Sections 20, 21, 22, 24, 25, 26, 30, 337.) The California Supreme Court has clearly stated that the "Commission is not a body charged with the enforcement of private contracts. (See Hanlon v. Eshelman, 169 Cal. 200, [146 Pac. 656].) Its function, like that of the interstate commerce commission, is to regulate public utilities and compel the enforcement of their duties to the public...not to compel them to carry out their contract obligations to individuals." (Atchison, T.&S.F. Ry. Co. v. Railroad Commission, 173 Cal. 577, 582.) If PT&T's alleged conduct be considered as tortious (either trespass or fraud), a similar result would obtain. The Commission has no jurisdiction to award monetary damages for tortious

conduct. (Vila v. Tahoe Southside Water Utility, 233 Cal. App. 2d 469; M.L.M. Jones v. P.T.&T. Co., 61 Cal. P.U.C. 674; see also Cal. Constit., Art. VI, Sections 1, 5; Pub. Util. Code Section 2106; Code Civ. Proc. Sections 20, 21, 22, 24, 25, 27, 28, 29, 30, 338.) Mak must go to court rather than the Commission to recover any damages to which she may be entitled.

The only relevant jurisdiction conferred upon the Commission to grant monetary awards is contained in Sections 734, 735 and 736 of the Public Utilities Code which deal with reparations.^{1/} We have carefully examined the evidence, applicable law and PT&T tariffs and can find no basis upon which reparations can be awarded herein. Since neither damages nor reparations can be awarded herein, it is not necessary to determine what amount, if any, Mak may have been damaged.

We turn now to the last point for consideration herein. The temporary terminal reposes on the apartment house roof over the fire wall with access precluded by the cyclone fence. This situation is not satisfactory because if trouble develops at the terminal, PT&T repairmen cannot reach it to make necessary repairs.

At the hearing Mak stated that she did not wish to do anything which would prevent her tenants from receiving telephone service. She indicated that she was reluctant to permit the terminal on the roof because she was fearful of damage thereto. PT&T presented five alternate proposals for service to the apartment building. Plan 1 would place the terminal permanently back in its original location inside of the fire wall on the roof. Plan 2 provides for the installation of a box in the sidewalk on Clay Street, conduit from the box through the building's basement wall and the placing of a terminal in the basement. Plan 3 is similar to Plan 2, except that the terminal would be placed in the box in the sidewalk and the service wires would be placed in the conduit. Plan 4 would run underground cable to the

^{1/} Under Sections 1401 et seq. of the Public Utilities Code, the Commission is given jurisdiction to determine just compensation in specified eminent domain proceedings.

edge of the apartment house, conduit up the face of the building over the main entrance to the second floor, bring the conduit through the wall and place the terminal in the hallway on the second floor. Plan 5 is similar to Plan 4, except that the terminal would be placed on the outside of the building.

The advantage of Plans 2-5 is that the terminal would be removed from the roof. However, they contain some disadvantages. Plans 2-5 would result in exposed wires throughout the building from the terminal or entry point to each apartment where service is provided. Also, some of the plans would provide less wires than others for telephone service.

Rules 11A(8) and 19 of PT&T's tariff (Schedule Cal. P.U.C. No. 36-T) provide in part as follows:

"8. Revocation of Permission to Use Property

"If the utility's service facilities to the customer are installed on property other than the customer's property and the owner of such property revokes his permission to use it, the utility shall have the right to discontinue service upon 10 days' written notice, without obligation or liability to the customer. If service is discontinued under these conditions, the customer may have service re-established under the provisions of Rule 16 or Schedule 23-T."

"19. ACCESS TO SUBSCRIBERS' PREMISES

"The Company's authorized employees may enter a subscriber's premises at all reasonable hours for any purpose reasonably pertinent to the furnishing of telephone service and the exercise of any and all rights secured to it by law or by these Rules and Regulations.

"The Company may remove any and all of its property, located on the subscriber's premises at the termination of service, as provided for in these Rules and Regulations."

Rule 19 does not apply to the facts presented herein because Mak is not a subscriber to telephone service at the premises. Rule 11A(8) is applicable.

Under the law, Mak cannot be required to give permission for PT&T to place terminal and other facilities on her property. However, such refusal can result in the termination of telephone service

for her tenants. The temporary terminal must be replaced, and it is necessary for PT&T to have reasonable access to a permanent terminal.

Since Mak indicated she did not wish to deprive her tenants of telephone service, the Presiding Examiner at the hearing inquired of her which of the five plans would be acceptable to her. She indicated she would agree to Plan 1 (on the roof), provided that the terminal would only be used to furnish service to her tenants. However, after the hearing Mak transmitted to the Commission a document which in part states: "That compliant prays the Commission for mercy on her madness that in a moment of unsound mind, I made a statement that can destroy my three years of hardworks in investigating and looking high and low for proofs to prove that the Pacific Telephone and Telegraph Company is using fraudulent claims to use my roof at 729-31-33 Clay Street, San Francisco, California. It was almost at the close of the hearing on August 12, 1971 before the Commission that for suddenly I went out of my mind, saying 'I agreed to Pacific Telephone and Telegraph Company installing a terminal on my roof.' And, only just a few minutes before this statement, I was protesting against this terminal on my roof. I really do not know why I blurted out that suicidal statement. I pray and beg of the Commission to let me withdraw my erroneous statement. I never want that terminal on my roof." The document has been marked in evidence as Exhibit 21.

It is time for this dispute to end. It is necessary to have a permanent terminal to provide proper telephone service to persons in the apartment building and to provide safe access for PT&T repairmen in connection with such service. The Commission will enter an order herein requiring PT&T to install a terminal in accordance with Plan 3, so that the terminal will be in the sidewalk, and, after the initial installation, it will not be necessary for PT&T repairmen to enter the building to work on the terminal. PT&T will be required to pay all costs in connection with the installation. If Mak does not

give the necessary consent for such installation, PT&T will be authorized to terminate service to her tenants in accordance with Rule 11A(8) of its tariff.

It is not disputed that PT&T has no right to serve other premises from Mak's building without her consent. The ensuing order will so provide. No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. Mak purchased an apartment building in San Francisco, known as 729-31-33 Clay Street, in July, 1925. She lived in one of the apartments from 1925 until 1930, when she went to the Orient. She returned to San Francisco in 1947, and again lived in one of the apartments until 1954, when she moved to San Mateo.

2. There was a PT&T terminal and cable attached to the roof of the apartment house in May, 1967. The terminal served the tenants in the apartment house and adjacent buildings. Mak contends that there were no cables, wires or terminals attached to the roof of the apartment building in 1925, 1930 or 1947. Whenever the terminal and cable were attached to the building, it was done by PT&T under the color of right of two permits. One is dated June 16, 1910, and signed by Ow Lum, Lessee. It authorized PT&T to attach cable and a terminal to the building to provide service to it and adjoining premises. The other is dated December 16, 1927, and signed by Leen Quan by Madison and Burke, agents. It authorized PT&T to place a terminal on the west fire wall of the building and clamp a cable to the south exterior wall above the second floor windows. Each permit provides that it is "revocable by giving the Pacific Telephone and Telegraph Company 90 days' notice in writing, and is given on the condition that the work shall be done with care, and that all damages to the premises caused thereby shall be made good by the said Telephone Company." Mak claims the permits are fraudulent because they were not executed by the person who owned the apartment house on the dates indicated.

3. Prior to 1967, Mak had problems with the roof which was leaking and causing damage in the apartments. She contends the leaking was caused by damage done to the roof by PT&T repairmen working on the terminals. Early in 1967 it was apparent that the roof needed to be repaired, and Mak made arrangements with a roofer to do the job.

4. In May of 1967, Mak contacted PT&T and requested that the terminal and all wires and cable be removed from the roof. She indicated that she was having the roof repaired and that she did not want any other buildings served from her property. A PT&T representative told Mak that a terminal was necessary in order to provide proper service for her tenants. The PT&T representative told Mak that the telephone company would cooperate with the roofer by temporarily hanging the cable and terminal over the fire wall and that lines feeding other buildings would be removed from the terminal on the roof. Mak agreed to the proposal. However, a few days later she changed her mind and again demanded that the terminal and all wires and cable be removed from the roof. In the interim the terminal had been temporarily located outside the fire wall. Cable and wires servicing other buildings were removed from Mak's property.

5. Mak was advised that it was necessary to have a permanent terminal to provide service to the tenants in the apartment house. PT&T contacted the owner of an adjacent building which has a terminal thereon and sought permission to use that terminal for service to Mak's property. The adjacent owner refused permission.

6. After the temporary terminal was installed, the roof was repaired. Thereafter, minor damage including heel marks appeared on the roof. Mak contends that it was caused by PT&T repairmen working on the terminal. Mak then caused a cyclone fence to be built enclosing the roof and posted a no trespassing sign which included the statement: "Installation of any kind prohibited." After the cyclone fence was erected, one of Mak's tenants had trouble with her telephone. The source of trouble was at the terminal. Because of the

cyclone fence, PT&T repairmen could not get to the terminal. The fence was cut in an attempt to reach it. Because of the dispute between the parties, PT&T did not contact Mak for six months to seek permission to go on the roof to reach the terminal so that the tenant's telephone service could be restored. When Mak was contacted, she granted permission for PT&T to go on the roof and temporarily build a line in from another terminal.

7. While the dispute between the parties was going on, Mak was hospitalized. She contends that her condition resulted from PT&T's conduct in connection with this matter.

8. Mak seeks herein an order awarding her damages in the amount of \$8,753.86, computed as follows: rental for the use of the apartment house roof from 1929 to 1968, at the rate of \$10.00 per month, \$4,680.00; the cost of repairing the roof, \$960.00; hospital expenses, \$988.86; post-hospital care, \$900.00 and general expenses involved in prosecuting the complaint, \$250.00. She also seeks an order prohibiting PT&T from using her property to serve persons not located thereon and defining the manner in which the property is to be served.

Conclusions of Law

1. The Commission has no jurisdiction to award damages herein for breach of contract, trespass or fraud.

2. There is no basis in the record to make an award of reparations herein.

3. The Commission has jurisdiction herein to make an order dealing with the location of telephone facilities at the said apartment house.

4. PT&T should be ordered to install a permanent terminal in accordance with Plan 3 and to pay all costs in connection therewith.

5. If Mak refuses PT&T permission to install the permanent terminal, PT&T should be authorized to terminate service to persons in the apartment house in accordance with its tariff.

6. PT&T should be ordered to provide no service to other premises from Mak's property unless she gives consent thereto.

O R D E R

IT IS ORDERED that:

1. Within sixty days after the effective date of this order, The Pacific Telephone and Telegraph Company (PT&T) shall remove the temporary terminal from the roof of the property owned by Mak at 729-31-33 Clay Street and install at said property a permanent terminal in the sidewalk on Clay Street with conduit through the basement wall to bring the service wires into the building and relocating the wires, with exposed wiring, to the various telephone users in the building.

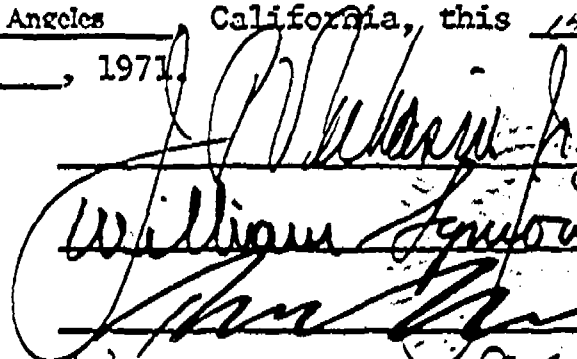
2. PT&T shall pay all costs in connection with the removal of the temporary terminal and the installation of the permanent terminal and realignment of facilities in connection therewith.

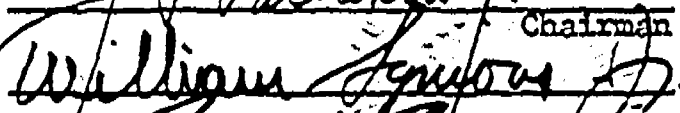
3. If Mak does not grant PT&T access to the roof of said building to remove the temporary terminal and appropriate permission to install the permanent terminal, conduit and other wires as provided in Paragraph 1 of this order, PT&T is authorized to discontinue service to persons living in the apartment house in accordance with Rule 11A(8) of its tariff (Cal. P.U.C. Schedule 36-T).


4. PT&T shall not utilize the property at 729-31-33 Clay Street, San Francisco, to provide telephone service to any other property unless it first receives permission to do so from Mak.

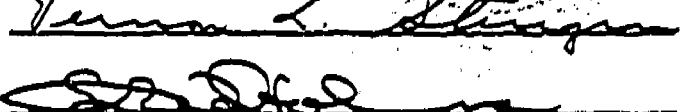
The effective date of this order shall be twenty days after the date hereof.

Dated at Los Angeles California, this 14th day of DECEMBER, 1971.



Chairman






Commissioners