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ORIGINAL

Decision No. 80332

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MOBILE U.H.F., INC., a California corporation,

Complainant,

v.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Defendant.

Case No. 8798

M. A. Hoffman, for Mobile U.H.F., Inc., complainant.
Richard Siegfried and Robert Michalski, Attorneys at Law, and J. E. Bailey, for The Pacific Telephone and Telegraph Company, defendant.
Janice E. Kerr, Attorney at Law, for the Commission staff.

OPINION ON REHEARING

Background

Complainant in this proceeding is a California corporation engaged in the business of owning private mobile communications systems, maintaining and leasing them to various individuals, particularly regulated trucking companies.

As part of the package which complainant merchandises, it acquires telephone services from defendant which are used to provide land-line links between the customer's offices and the remote transmitter locations, both for the transmission of two-way voice, and for transmitter control. Complainant makes the arrangements to procure the telephone service, but use and operation of the telephone service are left to its clients.

The issues originally framed by the pleadings included claims by Mobile U.H.F., Inc. (Mobile or complainant) that defendant was interfering with its business in various ways, including threatening to discontinue service, on the theory that Mobile was not entitled under defendant's tariffs to be a utility customer and that service should be rendered directly by defendant to complainant's customers. Defendant's responsive pleadings claimed various tariff violations by complainant including making direct electrical connections of its equipment to defendant's system, transmitting voice on signal channels, and permitting and encouraging customers to make all day or all week dial-ups; the latter conduct was assertedly in violation of the abuse of service provisions of defendant's tariff.

In Decision No. 74088, herein, The Pacific Telephone and Telegraph Company (Pacific or defendant) was ordered as an interim measure to restore any service to Mobile which might have been disconnected and to maintain such services.

Extensive hearings were held before Examiner Gillanders. The ensuing Decision No. 78130, issued on December 22, 1970, determined that defendant had not discriminated against or harassed complainant, but that the incidents described were due to defendant's attempts to compel Mobile (and its competitors) to conform to defendant's concepts of how complainant's system should be operated. The decision determined that Pacific's tariffs did not inhibit it from selling to complainant for resale to its customers as authorized users.

It further found that defendant's insistence on selling only RTOC service to Mobile and others similarly situated was unjust, unreasonable and improper. Defendant was directed to offer two-wire (D.C. continuous) circuits (on a less than full-time basis), and it was decided that the rates should be based on cost. It was

further found that defendant's tariffs insofar as they prohibited cross connection of private line channels, except at the transmitter location, were unjust, unreasonable and improper as applied to private radio systems and directed the filing of a tariff schedule authorizing cross connection at "the most convenient point".

The decision also declared defendant's tariff, insofar as it dealt with the attachment of nonharmful customer-owned equipment, unreasonable. The abuse of service provision was found too vague to be enforced, impliedly authorizing the continuation of complainant's clients' practices of using exchange lines on a semi-permanent dial-up basis, to provide control and voice transmission between base and remote transmitter.

Pacific's petition for rehearing was filed on January 6, 1971. Mobile's pleading in opposition to Pacific's petition was entered on February 3, 1971; that pleading also sought modification of the decision.

Decision No. 78718 ordered rehearing limited to oral argument and denied the complainant's petition for modification.

Oral argument was held before Examiner Gilman in Los Angeles on January 11, 1972, and the matter was resubmitted 30 days thereafter.

Resale

Decision No. 78130 determined that Mobile could be a "customer" under Pacific's tariff (Cal. P.U.C. 44-T, 5th Rev. Page 22) even though the actual users of the telephone service would be complainant's customers.

On rehearing, Pacific claimed that maintaining this interpretation would raise the "spectre of resale". Pacific contends that allowing a retailer who "packages" telephone service with other nonregulated communications services to intervene between Pacific and the ultimate consumers would threaten its ability to collect revenues and enforce its rules.

One of the necessary corollaries of the Richfield[1/] dedication rule is that regulated utilities may sometimes find themselves faced with unregulated competitors who provide the same or similar services to selected private individuals. Neither this Commission nor a regulated utility have any direct statutory mandate to inhibit the growth of or artificially affect the market structure for such related businesses (except in the field of transportation, cf. §3501-5511 Public Utilities Code).

The Commission has in the past undertaken to affect the market structure for some related utility business to the extent of conditioning or prohibiting their freedom to purchase utility service for resale (cf. PG&E, Decision No. 63562, Application No. 42434, 59 Cal. P.U.C. 547). Nevertheless, competition in markets which the Legislature has not expressly placed under our supervision, must be presumed to be in the public interest; any Commission action which indirectly inhibits competition in such a field must be accompanied by a finding of an "overriding consideration" (Northern California Power Association v. P.U.C., 5 Cal. 3d, 370).

Pacific asserts that its tariffs authorize an embargo preventing Mobile from purchasing telephone service from defendant for resale to complainant's customers as part of a package of communications services. Absent pleading and proof to the contrary, we must presume that complainant's sales of telephone service are not to the public and that, consequently, complainant is not a public utility telephone corporation regardless of whether his operations would otherwise come within the definition stated in Section 234, Public Utilities Code.

Pacific's position if adopted would be anticompetitive in two respects.

1/ Richfield Oil Corp. v. P.U.C., 54 Cal. 2d, 419, cert. den. 5 Led. 2d 193.

First, it would be practically impossible for complainant to construct and own his own telephone lines. Pacific, within its own territory, is thus the only potential source of telephone lines. A decision to embargo sales for resale would force complainant's potential customers to deal with Pacific directly rather than with related nondedicated businesses. Adopting Pacific's interpretation of its tariff would, in effect, be a decision that there should be no related businesses in this one market.

Secondly, complainant's decision to market a complete package gives it a competitive advantage over other purveyors of private radio systems, who provide only part of the package. Pacific seeks to remove one of the competitive distinctions affecting that market.

Thus, if we were to interpret and enforce Pacific's tariffs as it seeks, we would be, first, destroying legitimate competition between a public and a presumptively private purveyor of telephone service. Secondly, we would be restricting the area of potential competition between purveyors of radio systems, none of whom are regulated.

The Public Utilities Code deals generally with competition between public utilities. When an exercise of our jurisdiction is sought which would affect other types of competitive relationships, the Opinion in Northern California Power Association (supra) describes the findings and conclusions necessary to support such action. The record herein provides no such support.

Voice on Signal Grade Service - New Service

The decision under review noted that complainant had ordered signal grade private lines for his customers to be used in the transmission of voice and transmitter control information between base and transmitter. The decision determined that such use was prohibited by Pacific's tariffs.

Since the only other private line service offered for such use was an RTOC, which was found inadequate, defendant was ordered to offer a new service which would allow voice transmission on a circuit having the other operational advantages of the signal grade circuit.

Pacific contends that the need for a new service was not properly in issue herein, and that the evidence did not support a public offering of a new service, which is allegedly technically and economically unfeasible. The finding of public need and necessity included a finding that complainant's individual needs for service were not satisfied by an RTOC. There was a further finding (No. 6) that defendant's tariffs prohibited use of signal grade circuits for the transmission of voice.

As will be seen, these questions are interrelated. If there is no public need and thus no basis for a new service, we must then determine whether and in what manner Mobile's needs for private service can be met. Two provisions of Pacific's tariff schedule 104-T are material.

104-T Original Sheet 4, paragraph B, indicates that the channels including the 30-baud channel herein involved, are not "suitable" for voice transmission. The other provision is to be found in 104-T, 2nd Revised Sheet 17. Special Condition 1, which provides "Channels furnished under this schedule...may not be used for any purpose for which services or channels are offered..." in other private line schedules. This is the only language in 104-T directly prohibiting any form of use.

We think that the existence of two potential customers and the dissatisfaction with present service offerings are not in itself sufficient to justify a requirement that defendant dedicate itself against its will to a new service (cf. §762 Pub. Util. Code, Greyhound Lines v. P.U.C., 68 Cal. 2d 406). The staff in its discretion chose not to assist the Commission in determining

whether or not the needs of two customers who testified were typical of a wider group; and, consequently, on this record we cannot find our previous order concerning new service was supported in the record.

While there is insufficient basis to find a general public need for service other than an RTOC, there is more than sufficient basis to find that an RTOC does not satisfy complainant's individual purpose.

A finding of private convenience and necessity, while immaterial under Section 762, is material under Pacific's tariffs.

We conclude that Special Condition 1 of Schedule 104-T bars transmission of voice on signal grade circuits only when alternative forms of private line offering suit a customer's purpose.

The decision under review relied on 104-T, Original Sheet 4, paragraph B, as supporting an unconditional prohibition against voice transmission. However, that paragraph merely indicates the service is not "suitable" for voice transmission. This is the language of warranty, not of prohibition. We interpret this to mean that defendant does not guarantee sound quality, but it does not, per se, prohibit any form of use.

Decision No. 78130 indicated several areas in which the RTOC was unsuitable for at least complainant's purpose. First, was the circuitry's poor reliability. Hopefully, the service is by now improved to the point where neither complainant nor any other operator in the future will be able to demand signal circuits for voice transmission on this ground alone. On this record, all we say is that if any future attempt to deny complainant or any other operator the use of signal circuits for the purposes indicated, it will again raise the issue of service reliability on RTOC's.

Secondly, the RTOC does carry a warranty of voice quality which complainant neither needs nor is willing to pay for. It is alleged that the devices which defendant employs to improve sound quality are part of the reason for the unreliability.

Pacific argues, however, that complainant is not really satisfied with the quality of service on signal circuits and must add his own amplifiers to the circuit to make them serviceable. It further claims that such amplification degrades service both to Mobile's customers and to other patrons of the system. Insofar as other patrons are concerned, Schedule 135-T and couplers, where objectively necessary, should provide all the protection needed against injurious amplification. Prohibiting all voice transmission on a circuit simply because a voice user might be tempted to amplify and because of the mere possibility of side effects, is too radical a remedy. As to Mobile's customers, they need no paternalistic volunteer protection by Pacific. As buyers in a competitive market, they presumptively are capable of protecting themselves. Thus, the fact, if it be a fact, that complainant needs to amplify to use signal circuits, is not in itself sufficient to bring Special Condition 1 of 104-T into operation.

Finally, the RTOC is offered full time only. Mobile's customers need service only during the business day and are typically willing to release the circuits during the evening and on weekends. Pacific argues that such usage is full time on the basis that a reasonable rate for an RTOC offered on a part-time basis would be no less than the present rate for full-time service.[1/] Such arguments would require the consideration of the reasonableness of the present RTOC rate in comparison with the hypothetical rate. However, as Pacific has so forcefully pointed out, this is a complaint in which fewer than 25 customers are represented; and, consequently, consideration of reasonableness of existing rates would, under Section 1702, Public Utilities Code, be in excess of jurisdiction. Therefore, we should not consider defendant's economic

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1/ We point out that such reasoning apparently is based on purely economic questions, and ignores the value-of-service considerations which would obviously be material if Pacific were to propose a rate for such service.

arguments in determining whether an RTOC suits complainant's purpose.

On the record properly before us, we can see that Pacific offers RTOCs only in a large package, and that complainant's needs are for a smaller package. This fact alone would preclude us from concluding that complainant can be denied signal service for voice use.

In summary, the evidence in the proceeding showed a private need not satisfied by Pacific's RTOC offering, with, however, insufficient evidence to support a finding that such need was shared by a portion of the public. Because of the way 104-T is drafted, the mere unsatisfied private necessity operates to deprive Pacific of the right to refuse signal circuits for voice transmission. In practical effect, Pacific is left with two options: to retain its present form of tariff with complainant and others remaining free to use signal circuits for voice, or to seek to modify its tariffs by which it will itself put both adequacy of service and reasonableness (including various value of service aspects of the problem) in issue.

Extended Dial-Up

Pacific challenged our decision of the long term dial-up issue on the grounds that complainant's practices occupied a disproportionate share of defendant's facilities for a very low charge. Pacific claimed that permitting complainant's customers to continue extended dial-ups posed a severe threat to the availability of service to customers with conventional calling patterns, and threatened its revenues significantly.

In other proceedings subsequent to the initial decision herein, the Commission determined (Decision No. 79649 in Cases Nos. 9044, 9045) that extended dial-ups generally presented "...no emergency situation", and that any different rate or service treatments were not justified, pending the completion of extended studies.

The pleadings and decision in Cases Nos. 9044 and 9045 on their face appear to encompass complainant's extended dial-up practices. The Commission's determination in those cases that any changes in the status quo are not urgent and that any final resolution of service and revenue questions require extensive studies, are incompatible with defendant's contentions offered in justification of immediate termination of complainant's extended dial-up practices.

Decision No. 79649 contemplated that all extended dial-up customers would continue their operations pending final resolution of those cases. No sufficient reason has been advanced to show why complainant alone, out of all of those potentially in violation of the present abuse of service rule, should be singled out for its enforcement.

Interconnection Between Private Lines

Defendant is prepared to modify its tariffs as required in ordering paragraph 3 of Decision No. 78130 and to permit cross connection of private lines used by those ultimate consumers who share the same transmitter. However, its petition claims that the requirement for connection at the point "most convenient" for the system operator is ambiguous and unreasonably disregards possible inconvenience and unnecessary expense and operational difficulties for defendant.

We think the objection well taken. Defendant in filing the new tariff, may propose alternate language which appropriately recognizes the material interests of both parties.

Foreign Attachments

On rehearing defendant asserted that it was uncertain as to the proper interpretation of Decision No. 78130 on the foreign attachment problem. Pacific claimed that the decision could be interpreted to allow complainant to himself directly wire his private system equipment without interposition of a utility-provided interconnection device.

In the interest of clarity, Finding 11 of that decision will be rescinded as immaterial and Conclusion 11 of the decision will be rescinded as incorrectly describing the operation of defendant's tariffs. Since Pacific's tariff 135-T already provides for foreign attachments to private lines of the type herein concerned, ordering paragraph 4 is unnecessary.

The requirement that the utility provide the actual interface between the customer-owned system was not directly attacked by complainant. We interpret complainant's arguments instead as seeking to compel defendant to provide direct electrical interconnection pursuant to the tariffs.

There can be no dispute as to defendant's obligation to provide interconnection if complainant continues to seek private line service under present tariffs or under a potential new service offering. There may be future disputes as to whether defendant should provide a simple interconnection device such as a plug-and-jack or amphenol connector or whether more complex and expensive hazard-protective devices are necessary. Such disputes should be few. The electrical connection privilege is apparently sought by complainant only in conjunction with circuits which would be somewhat isolated from the general exchange network while in use by complainant's customers, and Pacific has represented that such isolation, by itself, provides significant protection to the system, Pacific's other subscribers and its employees.

The present state of the record provides no sufficient basis for determining whether and to what extent the interfaces provided should incorporate hazard protective features. Other than that, Pacific's tariffs reasonably provide for interconnection with Pacific providing whatever interface equipment is necessary.

Findings

1. Finding No. 6 of Decision No. 78130 misinterprets defendant's tariffs.

2. Findings Nos. 7 and 8 of Decision No. 78130 are not supported by the record herein.

3. There is no sufficient basis for a finding that the extended usage of complainant's customers is more injurious to service to nonextended usage customers or to defendant's revenues than the extended usage which is the subject of Cases Nos. 9044 and 9045.

4. We cannot find on this record whether complainant's present and future connections of foreign attachments will be harmless to defendant's system service subscribers or employees.

5. There is insufficient evidence to support a finding of an overriding consideration against sales for resale of telephone service for control and operation of private mobile radio services.

6. There is insufficient evidence to find that complainant's service is dedicated to a portion of the public.

7. Defendant now offers no private line service consistently capable of being used in the manner in which complainant utilizes signal grade circuits.

Conclusions

1. Conclusions 2, 4 and 5 of Decision No. 78130 are unnecessary to the decision of the issues herein and should be rescinded.

2. Conclusions 6 and 7 of Decision No. 78130 should be rescinded; instead, we conclude that Pacific cannot, under Special Condition 1 of Schedule 140-T, refuse to provide signal channels unless it be established that the needs of an applicant for service are provided for by another private line offering.

3. Conclusions 12 and 13 of Decision No. 78130 should be rescinded as prejudicial to issues now pending before the Commission in Cases Nos. 9044 and 9045.

4. In order to justify any action restricting complainant's right to resell service, it must either be demonstrated that the complainant is thereby engaged in an uncertificated public utility operation or that there is some overriding public concern justifying such restriction.

5. Ordering paragraph 3 of Decision No. 78130 is ambiguous and unreasonably disregards the interests of Pacific. A new tariff authorizing cross connection of private lines should consider the interests of the operators of both systems.

O R D E R

IT IS ORDERED that:

1. Findings 6, 7, 8 and 11 and Conclusions 2, 4, 5, 6, 7, 12, and 13 of Decision No. 78130 are rescinded.

2. Ordering paragraphs 1, 2, 4, and 5 of said decision are rescinded.

3. Ordering paragraph 3 of Decision No. 78130 is rescinded and Pacific is ordered to file a new tariff provision for the interconnection of private lines used with private radio transmitters.

4. Pacific shall not attempt to enforce directly or indirectly its tariff rule stated in 36-T, 2nd Revised Sheet 53-A, Paragraph II A.12.b. against complainant until further order of the Commission.

5. Pacific shall not refuse or withdraw signal grade private line service to complainant on the grounds that circuits are used to transmit voice until further order of the Commission.

6. Pacific shall not refuse or withdraw service to complainant on the grounds that said service is to be resold.

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

Dated at San Francisco, California, this 1st day of AUGUST, 1972.

President

Commissioners