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Decision No. 82311

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Alan D. Smith,

Complainant,

vs.

Pacific Telephone and Telegraph Co.,

Defendant.

Case No. 9588
(Filed July 18, 1973)

Alan D. Smith, for himself, complainant.
Richard Siegfried, Attorney at Law, for defendant.

O P I N I O N

The complaint involves a dispute over whether Alan D. Smith (Smith) should be required to pay an estimated cost of $125 for underground telephone service to his newly constructed residence. Hearing was held before Examiner Bernard A. Peeters on October 1, 1973 in San Francisco and submitted on that date.

The material issue is: Did The Pacific Telephone and Telegraph Company (PT&T) apply its tariff rules improperly to Smith's detriment.

Complainant Smith testified that sometime during the month of June 1972 he called the Mill Valley office of PT&T and inquired about the cost of providing underground telephone service to his residence, then under construction. Smith had previously called Pacific Gas and Electric Company (PG&E) and obtained an estimate for $90.90 for undergrounding its electrical service. Mr. Roy Lundquist, an installer foreman at PT&T's Mill Valley office, received Smith's call and advised him that there would be no charge, provided that PG&E dug the trench. Thereupon Smith called PG&E on June 30, 1972 and advised it to proceed with undergrounding his electrical service.

Sometime in September 1972 PG&E had completed its work and Smith called PT&T to advise it that the trench was open and it should proceed to install the underground telephone service. On Friday, September 15, 1972 PT&T sent a man to Smith's home to do the installation. PT&T then determined, for the first time, that the telephone service pole was not located on Smith's property. The installer returned to the office and informed the engineering department of this fact. Later in the afternoon, about 4:15 p.m., a Mr. Leland Moon, an outside plant engineer, called Smith and informed him that there would be a $125 charge for the underground installation which would have to be paid in advance. Smith called Moon's attention to the earlier conversation with a PT&T employee wherein he was told there would be no charge. Moon confirmed this fact, and that there would be no charge if the service pole was on or adjacent to Smith's property, which was believed to be the fact. However, Moon said that he had to correct the employee who had initially talked to Smith and that he would like to waive the charge, but that the tariff rules required that a charge be made.[1/] Smith paid the $125 on September 15, 1972. Telephone service was installed on September 18, 1972. On September 19, 1972 the formal paperwork for an official estimate was initiated. Later that week Moon called Smith to inform him that the official estimate of the job was $150, but since a price of $125 was

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1/ The Commission takes official notice of the provisions of PT&T's tariff applicable to the facts herein presented. PT&T's Rule 16 I.C.1.b. of Cal. P.U.C. Schedule No. 36-T, 2d Revised Sheet 61-A provides as follows:

> "Rule 16 I.C.1.b.
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> Where the service connection facilities will be connected to aerial distribution facilities the applicant will pay in advance a nonrefundable amount equal to three-fourths of the estimated difference in the cost of constructing underground and equivalent aerial facilities for that portion of the underground service connection facilities not on the property to be served."

initially quoted, the company would stand by it. Subsequently, Smith discussed all of the above with Mr. Franklyn Rudolph, manager of the Mill Valley office. Rudolph confirmed all prior conversations and statements, but insisted that the tariff rule must be applied since the Public Utilities Commission would not permit a waiver.

Smith avers that he relied upon the information first received, and based upon that, he authorized PG&E to proceed. If he had known there would be a charge for the telephone undergrounding, he would not have authorized PG&E to go ahead since the combined cost of undergrounding was not worth it to him.

PT&T's witness testified that at the time Smith was notified of the charge he could have elected not to underground telephone service and thus have avoided the $125 charge. Smith's position is that having relied upon PT&T's initial advice three months earlier he committed himself to a charge of $90.90 for undergrounding all utility service, not $215.90, and that but for the misrepresentation by PT&T he was arbitrarily deprived of his option to forego all undergrounding and incur no charge at all.

PT&T's normal practice in handling inquiries about undergrounding is to refer the call to the business office, which then refers it to the engineering department. If time permits, the engineering department makes a field inspection to see what the obligations are. It is not normal practice for an installer foreman to handle inquiries about underground service but, as in this case, an installer foreman does handle such calls on occasion.

It is also the practice of PT&T to inform the customer of the circumstances under which no charge would be made for underground service and the circumstances under which a charge would be applicable. However, this was not done in Smith's case. It was not until sometime in March 1973 that an attempt was made to inform Smith of the specific provisions in PT&T's tariff rules pertaining to underground service.

PT&T's defense is that the complaint does not set forth facts sufficient to constitute a cause of action under Section 1702 of the Public Utilities Code;[2/] that it properly applied its tariff rule; and that a utility is not bound by quotations furnished by its agents which are at variance with its tariffs.

It is our opinion that the complaint sets forth sufficient facts to constitute a cause of action.

While we agree with PT&T that there should be no concessions from the published rates of public utilities, In re Application of Various Public Utilities (1913) 2 CPUC 73, 84, and that a utility is under the duty of adhering strictly to its lawfully published rates, Temescal Water Co. v West Riverside Canal Co. (1935) 39 CPUC 398, 402; J. Richard Co. v San Gabriel Valley Water Co. (1951) 50 CPUC 545, 550, we do not agree that it adhered strictly to its tariff rules in this case.

Within the same rule upon which PT&T places one of its defenses is the following provision:

> "In exceptional circumstances, when the application of these rules appears impractical or unjust, the Utility or the applicant may refer the matter to the Public Utilities Commission for special ruling or for the approval of mutually agreed upon special conditions prior to commencing construction." (Rule 16, paragraph I.C.1.b., Schedule Cal. P.U.C. No. 36-T.)

2/ "1702. Complaint may be made...by any...person...by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. . . ."

It is obvious that the above rule was promulgated for the specific purpose of avoiding absurd results from the unjust or arbitrary application of the tariff. The Commission has recognized that the tariff of a utility must not be applied in an unjust or arbitrary manner. (Faia v P.T.&T. Co., Decision No. 75379 dated March 4, 1969 in Case No. 8647; B. U. Beckman v P.T.&T. Co. (1964) 63 CPUC 305; Frost v P.T.&T. Co. (1965) 63 CPUC 801.)

Here PT&T did not apply its tariff rules in a just and reasonable manner. It failed to apprise Smith of the tariff rules in the first instance according to its stated policy, thus depriving him of his option to have no underground service. Then, at a later time, it applied only a portion of its rule, to his detriment.

The record shows that both Moon and Rudolph considered Smith's request for a waiver of the $125 charge. The record also shows that the official estimate of the job was $150, of which $25 was waived. Both employees stated that, although at the first contact with Smith a statement was made that there would be no charge for undergrounding, they were required by the Public Utilities Commission to assess a charge in accordance with the tariff rule, even though Moon indicated he would be willing to waive the charge under the circumstances. The record does not show that PT&T advised Smith of the rule's provision for a special ruling or that it utilized this provision itself.

PT&T admits that there was a misunderstanding with respect to the location of the service pole but is unsure where the fault lies. PT&T also admits that it was approximately three months after the initial request for underground service was made that a physical inspection of the site was made, at which time PG&E had completed its undergrounding and telephone service was ready to be installed.

It appears that during the first conversation Smith had with Lundquist in June 1972 there was no specific discussion about the location of the pole and what the consequences would be with respect to whether there would be a charge or not depending upon the location of the service pole.

We are of the opinion that PT&T should have fully advised Smith of the tariff rule at the time of his initial inquiry in accordance with its stated practice. Without full knowledge of the rule's provisions Smith relied, to his detriment, on the advice given. But for the misrepresentation Smith would have been able to exercise his option to forego all undergrounding with no charge to himself for utility service connections.

We are also of the opinion that PT&T unjustly, arbitrarily, and selectively applied its rule by not utilizing the tariff provision which permits obtaining a special ruling from the Commission and in not apprising Smith of this provision.

PT&T may not apply a valid tariff provision in an unreasonable and arbitrary manner. (Viviano v P.T.&T. Co. (1968) 69 CPUC 158, 170; Casselberry v P.T.&T. Co., Decision No. 80679 dated October 31, 1972 in Case No. 9273; Section 734 of the Public Utilities Code.)

No other points require discussion.

Findings of Fact

1. Smith received an estimate of $90.90 from PG&E in June 1972 for underground electrical service to his residence.

2. After receiving PG&E's estimate in June 1972, Smith was advised by PT&T that there would be no charge for underground telephone service to his residence if the trench used by PG&E could be used by PT&T.

3. Smith was not advised, at the time of his request in June 1972, that if the service pole was not located on his property there would be a charge for underground service.

4. In reliance upon the advice that there would be no charge by PT&T for undergrounding telephone service, Smith advised PG&E to proceed with their work.

5. In September 1972 Smith advised PT&T that the PG&E trench was open and ready for telephone service to be installed.

6. PT&T's first field investigation was made on September 15, 1972 when it was determined the service pole was not on Smith's property.

7. Smith was first advised on September 15, 1972 that there would be a charge of $125 for undergrounding because the aerial distribution facility (service pole) was not located on his property as originally thought.

8. PT&T's Rule 16 provides for a nonrefundable charge to be made to the customer for undergrounding when the service connection facilities will be connected to aerial distribution facilities.

9. PT&T's Rule 16 also provides that when the application of its rules appears impractical or unjust the utility or the applicant may refer the matter to the Public Utilities Commission for special ruling or approval of mutually agreed upon special conditions prior to commencing construction.

10. PT&T did not avail itself of the provision in Rule 16 set forth in Finding 9 nor advise Smith of the provision.

11. The official estimate for the undergrounding was $150 of which $25 was waived by PT&T.

12. PT&T admits there was an initial misunderstanding with respect to the location of the aerial distribution facility (service pole).

13. Smith requested a refund of the $125 charge, but was refused by PT&T on the assertion that the Public Utilities Commission would not permit a waiver of the rules.

14. PT&T applied its tariff rule in an unjust, unreasonable, and arbitrary manner.

15. The undergrounding charge is a one-time nonrefundable charge, the refunding of which will not be discriminatory.

Conclusions of Law

1. The application by PT&T of its rule pertaining to charges for underground service to Smith's residence, in light of the facts heretofore found, was unjust, unreasonable, and arbitrary.

2. In view of PT&T's action which caused Smith to incur unwarranted charges for underground service, PT&T should be ordered not to apply its Rule 16 I.C.1.b. in Cal. P.U.C. Schedule No. 36-T in this instance.

O R D E R

IT IS ORDERED that The Pacific Telephone and Telegraph Company shall not apply Rule 16 I.C.1.b. in Cal. P.U.C. Schedule No. 36-T in this instance and shall refund $125 to complainant Alan D. Smith.

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

Dated at San Francisco, California, this 8th day of JANUARY, 1974.

President

Commissioners