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Decision No. 84775

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

REDEVELOPMENT AGENCY OF THE CITY OF SANTA MARIA, a public body, corporate and politic, Complainant, v. GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation, Defendant.	Case No. 9813 (Filed October 25, 1974)

Fitzgerald & Johnson, by James T.Johnson, Attorney at Law, for applicant.
A. M. Hart, H. R. Snyder, Jr., and Kenneth K. Okel, by Kenneth K. Okel, Attorney at Law, for defendant.
Malcolm H. Furbush, Robert Ohlbach, and Joseph S. Englert, Jr., by Joseph S. Englert, Jr., Attorney at Law, for Pacific Gas and Electric Company, interested party.

O P I N I O N

This is a complaint by the Redevelopment Agency of the City of Santa Maria (Agency), a body corporate and politic organized under the Community Redevelopment Law of the State of California commencing with Health and Safety Code Section 33000 et seq. The Agency has undertaken redevelopment of a blighted area within the city of Santa Maria in the county of Santa Barbara known as the Central Plaza Neighborhood Development Program (Program) consisting of approximately a nine square block area. The program was adopted and approved as Ordinance No. 796 by the City Council of the city of Santa Maria, which ordinance among other things, required all utilities within the program area to be placed underground.

General Telephone Company of California (General) owned and operated aerial communication facilities located on designated streets and alleys in Santa Maria, which the city abandoned by resolution, reserving easements therein for utility purposes, all with the necessary filing of notice and recordation accomplished. General's communications facilities have already been undergrounded in public streets in the program area. Agency requested General to underground the facilities at its own expense. General refused to so do, alleging that its tariff Rule No. 40[1/] did not require it to pay for the undergrounding in the program area. Since General is a privately owned public utility subject to our jurisdiction, Agency brings this complaint requesting an interpretation of General's Rule 40 in its favor and an appropriate order therefor.

In addition to the facts set out above, the parties have stipulated to the following:

(a) The subject matter of this dispute, involving the interpretation of General's Rule 40, is subject to the original jurisdiction of the Public Utilities Commission (PUC).

(b) General agreed to perform the undergrounding construction and hookup work if the sum of $40,000 (the estimated approximate cost of such work) was deposited in an interest-bearing escrow account at a mutually agreed bank, all pursuant to a written agreement (Exhibit 6) between the parties signed September 24, 1974.

1/ Attached to the complaint as Exhibit 2, and attached hereto as Appendix A.

(c) On November 29, 1974 Agency's check for the above sum was deposited as agreed in the United California Bank in Santa Maria.

(d) Agency requested Pacific Gas and Electric Company (Pacific) to underground its electrical distribution facilities in the subject program area which Pacific agreed to do under its tariff Rule 20-B 2/, (essentially meaning the Agency would pay for the underground costs). Pacific and Agency entered into a written agreement which, among other things, reserved the right to Agency to protest the required payment of funds subject to later determination. 3/

(e) General's Rule 40 and Pacific's Rule 20 were ordered to be filed by the PUC in Decision No. 73078 dated September 19, 1967 in Case No. 8209 (67 CPUC 490), and correspond with the model rules set out therein for communications and electric utilities respectively as Appendices E and D. These rules were in full force and effect at all times pertinent hereto.

(f) The Commission takes official notice of Case No. 8209 and Decision No. 73078, supra.

(g) An itemized estimate of General's undergrounding costs for the program area was submitted as Exhibit 7. The amount thereof is not now disputed. If the parties are unable to agree upon the reasonableness of the program expenditures, the Commission shall then determine this matter.

2/ Pacific's entire Rule 20 is Exhibit 8, and is attached hereto as Appendix B.

3/ This is certainly the reason for Pacific's appearance as an interested party though it is clear that its dispute with Agency is not directly involved here and therefore is not being determined herein.

Additionally, General concedes that Agency has met the requirements of its Rule 40-A.1.a. (General brief, p. 15). Thus we are treating that portion of the tariff as fully complied with, and shall not further comment on it.

The matter was submitted before Examiner Phillip E. Blecher on the facts set forth above, with the briefing scheduled to be completed by June 20, 1975, which it was.

Agency's Position

Prior to the inception of Case No. 8209 on June 22, 1965, the existing state law required a public utility holding franchise rights in public streets to relocate its facilities at its own expense for another proper governmental use of the street. (Citations omitted.) Assuming that the Commission was aware of the state of this law at the time of its investigation in the above case, the Commission while not directly considering the question of relocation, rendered Decision No. 73078 in the above case on the question of conversion from aerial to underground facilities at the time of relocation. This progressive step for aesthetic and economic reasons was encouraged for both electric and communications utilities by the Commission's policy statement in that decision[4/], thus indicating the legislative intent leading to its decision. Since the stipulated facts involve essentially a relocation of existing aerial facilities in public ways where the public ways are to be used for other public purposes, the relocation of the facilities was necessary, the conversion from overhead to underground being merely incidental, and thus should be treated in the same manner as an ordinary relocation, i.e., to be done at the utility's expense.

4/ "It is the policy of this Commission to encourage undergrounding." 67 CPUC 490, 512.

Rule 40-A.1.b. means what it says literally: that the communications utility will replace its aerial facilities at the time and only to the extent (emphasis added) that the overhead electric distribution facilities are replaced. Stated in another way, to give effect to Rule 40-A.1.a. and to accomplish the aesthetic and economic benefit intended thereby, the aerial communication lines should be undergrounded at the same time and in the same area as the electrical lines, and no other limitation was intended. Since Rule 40-A.1 does not contain any express financial or budgetary limitation, it is immaterial as to whether the electric utility converts at its own expense or not. Thus, since Pacific has converted, all conditions of General's Rule 40-A.1.a. have been fulfilled and General must bear the expense of the subject conversion.

General's Position

Its obligation to convert existing aerial communication facilities to underground at its own expense is limited to those cases where the electric utility is likewise obligated to convert its facilities in the same general location at its own expense. This conclusion is based on the Commission's rationale in adopting uniform conversion rules for both electric and communication utilities in Decision No. 73078 (Appendices D and E, respectively). This decision required electric utilities to file annual budgets showing the allocation for conversion in each city and county served.[5/] The local government, after consultation with the electric utility, would determine where the budgeted funds would be used. Only then would both classes of utility be required to underground at their own expense.

5/ See Appendix B -- Rule 20-A.2.

It contends that the funds budgeted by Pacific for Santa Maria were insufficient to cover the subject program, causing Pacific to require Agency to pay for the electric conversion.[6/] Since the phone utility's liability only exists concurrently with the electric utility's liability and since Pacific did not have the cost burden here General's Rule 40-A.1.b. has not been met, and it is not, and should not be, required to pay for the conversion.

General agrees with Agency's statement of prior state law relating to relocation, but concludes it is inapropos since the PUC has original jurisdiction of the interpretation and construction of Rule 40, the only issue in the instant case. The position now taken by General is consistent with its proposal to the PUC in Case No. 8209 that it was willing to convert at its own expense when, inter alia, the electric distribution facilities were being placed underground at the electric utility's expense. General also contends that the PUC in the above case concluded that electric utilities had the responsibility to budget amounts for conversion projects (General brief, p. 26) and used the rule it ordered adopted by the electric utilities (Footnote 5, supra) as the method to regulate the amount of conversion work of both the electric and communication utilities, making the communication utility's liability solely dependent on the obligation of the electric utility. Thus Agency's interpretation of Rule 40, which effectively requires only the communications utility to bear the expense of conversion in every case under Rule 40-A.1 is an absurd result clearly not intended by Decision No. 73078.

6/ See (d), p. 3, supra. Agency protested this payment to Pacific, and these parties have agreed to a later determination of their dispute.

Discussion

Decision No. 73078 (67 CPUC 490) gave birth to the sole issue in this case: the interpretation of General's undergrounding rule, Rule 40. It thus is necessary to briefly review the basis and rationale for this decision as it may affect the instant proceeding.

We have previously herein stated Commission policy in regard to undergrounding (Footnote 4). The entire thrust of that decision was to aid and abet that policy. We adopted a flexible program which ultimately placed the responsibility on the utilities to underground (p. 510). We stated that the utilities would "be expected to budget increasing amounts in subsequent years to meet the demand and need for aesthetic conversions" (p. 511). We also said on page 511 of that decision,

> "The record reveals that respondent utilities (including General and Pacific) often are required to relocate their facilities due to street or highway widening. It appears that the practice of these utilities, when overhead facilities are involved, is to remove existing overhead and replace such facilities with new overhead facilities. In view of the fact that the cost differential between overhead facilities and equivalent underground facilities has markedly decreased and the fact that the cost differential between overhead and underground communications facilities has virtually been eliminated, such relocations must be given high priority under the conversion rule ordered herein." (Emphasis added.)

Findings 1 and 2 therein are as follows:

> "1. The citizens of California through their elected officials and representatives have indicated a demand for underground electric and communications facilities.
> "2. The conversion rules herein authorized should provide a framework for the electric utilities and communications utilities to proceed with a reasonable program."

Appendix D of Decision No. 73078 (Appendix B herein), the conversion rule for electric utilities and Pacific's Rule 20 contain a budgetary clause (A.2.) and a minimum distance clause (A.3.). Section A, in toto, deals with the circumstances under which the utility only will bear the expense of undergrounding.

Appendix E of Decision No. 73078 and General's Rule 40 (Appendix A herein) contains neither a budgetary clause nor a minimum distance clause in Section A, which deals with the same matter as Pacific's like paragraph. General's Rule 40-A contains a section (1.b.) not contained in Pacific's rules. The interpretation of this section is the sole issue here. It reads as follows:

> "1.b. The Company will replace its aerial facilities at the time and only to the extent that the overhead electric distribution facilities are replaced."

There can be no serious dispute that the conversion rules ordered in Decision No. 73078 were intended to be uniform, but uniform as to whom? Were they intended to create a uniform obligation of both electric and communications utilities to convert at their own expense, as General contends? (General brief, p. 17.) If so, why isn't the language in Part A of both rules uniform, particularly when they were ordered and created simultaneously? The only logical inference that can be drawn is that the obligations of the two classes of utility need only be uniform within each class; otherwise, why have separate and divergent rules for each? Each class of utility has a uniform rule, but there the uniformity ceases.

Pacific's Rule 20-A.2. sets forth the method of allocating budgeted funds for undergrounding; General's Rule 40 does not. If the intention was to create a uniform obligation, why doesn't General's ordered rule contain a method for allocating undergrounding funds? Under General's interpretation, the missing language would be supplied by its paragraph A.1.b. set out above, thus creating uniformity where none appears to otherwise exist. We think this is neither logical nor reasonable. If the Commission at that time had intended to create any budgetary restrictions for the communications utilities, it had merely to insert a paragraph in their rule similar to the paragraph inserted in the electric utilities rule. Since this was omitted, we can and do reasonably infer that the intention of the Commission was to create distinct and separate obligations for the two classes of utilities. This creates the obvious possibility that the communications utility might be required to bear the expense of undergrounding its facility where the electric utility might not be so required. This is exactly the result we believe was intended. We have earlier set out our policy and quoted from page 511 of Decision No. 73078 (page 7, supra). There is no dispute concerning the often required relocations of utility facilities or the utilities' practice in that regard. Nor is there any dispute with the Commission's statement "In view of the fact...that the cost differential between overhead and underground communications facilities has virtually been eliminated, such relocations must be given high priority under the conversion rule ordered herein." If this is so, and there is no reason or evidence to controvert these statements of fact, then there is no defensible argument for General's proposition here. If the cost of both types of facilities is virtually identical we see no reason for communications utility's burden to be dependent upon

that of the electric utility, particularly where (1) the conversion rules for the two types of utilities are not identical; (2) there is no express financial or budgetary limitation in the communications conversion rule; (3) General's interpretation of its Section A would impliedly create a budgetary limitation; (4) the communications company would be required to bear the cost of an aerial to aerial relocation, which cost would be virtually the same as an aerial to underground relocation. To interpret this rule in the manner requested by General here would effectively allow General to avoid even the cost of an aerial relocation, which it concedes it can be compelled to pay. Since the communications utility can be compelled to pay for an aerial relocation, and the cost of an aerial to underground relocation is virtually identical, we see no viable distinction between compelling the cost burden in one case and not the other. Correlatively, to create such a distinction requires a tortured and tortuous interpretation upon the clear language of General's Rule 40-A.1.b. We believe the words of that rule were and are intended to have their ordinary meaning and we hereby impart this meaning to them, under the axiomatic rule of construction that words are given their ordinary meaning wherever it is possible to so do, especially in the light of our policy and the public position on undergrounding. The words, in Rule 40-A.1.b., "at the time and only to the extent that the overhead electric distribution facilities are replaced" mean that the burden of cost will be borne by the communications company at the time overhead electric facilities are undergrounded and in a physical and lineal area not to exceed the scope of the physical and lineal area undergrounded by the electric utility involved.

We have considered all the evidence and arguments propounded by both parties and believe that the views expressed above are justified, reasonable, and in full concert with our intention to equate the economic benefits of simultaneous conversions with the aesthetic benefits to the entire populace.

Findings

1. The Commission policy on undergrounding in 1975 is identical to that set forth in Decision No. 73078 dated September 19, 1967.

2. The conversion rules ordered in that decision are intended to be uniform for each type or class of utility, and not for all utilities, regardless of type or class.

3. General's Rule No. 40 complies with the conversion rule required of communications utilities.

4. Communications utilities, under their uniform conversion rule, may be required to bear the cost of conversion of overhead to underground facilities, regardless of whether electric utilities are required to bear such cost.

5. It is reasonable and justified to require communications utilities to bear the cost of undergrounding in cases where the electric utility does not, as their cost differential between relocating aerially and underground has been virtually eliminated.

Conclusions

1. General's Rule No. 40-A.1.b. (and Rule I.A.2. of Appendix E of Decision No. 73078) means that the communications utility need not underground except at the same time and in the same physical and lineal area as the electric utility undergrounds, and does not mean that the communications utility need only bear the cost of such undergrounding when the electric utility bears the cost of its undergrounding. This interpretation is justified and reasonable.

2. General should be required to bear the cost of the undergrounding of its communication facilities for the subject program.

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O R D E R

IT IS ORDERED that General Telephone Company of California, a corporation, bear the expense of replacing its existing aerial facilities with underground facilities within the area commonly known as Central Plaza Neighborhood Development Program in the city of Santa Maria, county of Santa Barbara, developed by the Redevelopment Agency of Santa Maria, a public body, corporate and politic.

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

Dated at San Francisco, California, this 12th day of AUGUST, 1975.

President

Commissioners

GENERAL TELEPHONE COMPANY OF CALIFORNIA

RULE NO. 40

FACILITIES TO PROVIDE REPLACEMENT OF AERIAL WITH UNDERGROUND FACILITIES

A. REPLACEMENT OF AERIAL WITH UNDERGROUND FACILITIES

1. In Areas Affected by General Public Interest

The Utility will, at its expense, replace its existing aerial facilities with underground facilities along public streets and roads, and on public lands and private property across which rights-of-way satisfactory to the Utility have been obtained, or may be obtained without cost or condemnation, by the Utility, provided that:

a. The governing body of the city or county in which such facilities are located has

(1) Determined, after consultation with the Utility and after holding public hearings on the subject, that undergrounding is in the general public interest in a specified area for one or more of the following reasons:

(a) Such undergrounding will avoid or eliminate an unusually heavy concentration of aerial facilities;

(b) Said street, or road or right-of-way is in an area extensively used by the general public and carries a heavy volume of pedestrian or vehicular traffic;

(c) Said street, road or right-of-way adjoins or passes through a civic area or public recreation area or an area of unusual scenic interest to the general public.

(2) Adopted an ordinance creating an underground district in the area requiring, among other things,

(a) That all existing and future electric and communication distribution facilities will be placed underground, and

(b) That each property owner will provide and maintain the underground supporting structure needed on his property to furnish service to him from the underground facilities of the Utility when such are available.

b. The Utility will replace its aerial facilities at the time and only to the extent that the overhead electric distribution facilities are replaced.

2. At the Request of Governmental Agencies or Groups of Applicants.

In circumstances other than those covered by 1. above, the Utility will replace its aerial facilities located in a specified area with underground facilities along public streets and roads, and on public lands and private property across which rights-of-way satisfactory to the Utility have been obtained, or may be obtained without cost or condemnation, by the Utility upon request by a responsible party representing a governmental agency or group of applicants where all of the following conditions are met:

a. All property owners served by the aerial facilities to be replaced within a specific area designated by the governmental agency or group of applicants first agree in writing, or are required by suitable legislation, to pay the cost or to provide and to transfer ownership to the Utility, of the underground supporting structure along the public way and other utility rights-of-way in the area, and

b. All property owners in the area are required by ordinance or other legislation, or all agree in writing, to provide and maintain the underground supporting structure on their property, and

c. The area to be undergrounded includes both sides of a street for at least one block, and

d. Arrangements are made for the concurrent removal of all electric and communication aerial distribution facilities in the area.

3. At the Request of Individual Applicants

In circumstances other than those covered by 1. or 2. above, where mutually agreed upon by the Utility and an applicant, aerial facilities may be replaced with underground facilities, provided the applicant requesting the change pays, in advance, a nonrefundable sum equal to the estimated cost of construction less the estimated net salvage value of the replaced aerial facilities.

4. At Utility Initiative

The Utility may, from time to time, replace sections of its aerial facilities with underground facilities at Utility expense for structural design considerations or its operating convenience.

PACIFIC GAS AND ELECTRIC COMPANY

RULE NO. 20

REPLACEMENT OF OVERHEAD WITH UNDERGROUND DISTRIBUTION FACILITIES

A. The Utility will, at its expense, replace its existing overhead distribution facilities with underground distribution facilities along public streets and roads, and on public lands and private property across which rights of way satisfactory to the Utility have been obtained by the Utility, provided that:

1. The governing body of the city or county in which such distribution facilities are and will be located has

a. Determined, after consultation with the Utility and after holding public hearings on the subject, that such undergrounding is in the general public interest for one or more of the following reasons:

(1) Such undergrounding will avoid or eliminate an unusually heavy concentration of overhead distribution facilities;

(2) Said street or road or right-of-way is extensively used by the general public and carries a heavy volume of pedestrian or vehicular traffic;

(3) Said street or road or right-of-way adjoins or passes through a civic area or public recreation area or an area of unusual scenic interest to the general public.

b. Adopted an ordinance creating an underground district in the area in which both the existing and new facilities are and will be located requiring, among other things, (1) that all existing overhead communication and electric distribution facilities in such district shall be removed, and (2) that each property owner served from such electric overhead distribution facilities shall provide, in accordance with the Utility's rules for underground service, all electrical facility changes on his premises necessary to receive service from the underground facilities of the Utility as soon as it is available; and (3) authorizing the Utility to discontinue its overhead service.

2. The Utility's total annual budgeted amount for undergrounding within any city or the unincorporated area of any county shall be allocated in the same ratio that the number of customers in such city or unincorporated area bears to the total system customers. The amounts so allocated may be exceeded where the Utility establishes that additional participation on a project is warranted. Such allocated amounts may be carried over for a reasonable and necessary period of time in communities with active undergrounding programs. In order to qualify as a community with an active undergrounding program the governing body must have adopted an ordinance or ordinances creating underground district and/or districts as set forth in Section A.1.b. of this rule. Where there is a carry-over, the Utility has the right to set, as determined by its capability, reasonable limits on the rate of performance of the work to be financed by the funds carried over. Where amounts are not expended or carried over for the community to which they are initially allocated they shall be assigned where additional participation on a project is warranted or be reallocated to communities with active undergrounding programs.

3. The undergrounding extends for a minimum distance of one block or 600 feet, whichever is the lesser.

B. In circumstances other than those covered by A. above, the Utility will replace its existing overhead distribution facilities with underground distribution facilities along public streets and roads or other locations mutually agreed upon when requested by an applicant or applicants where all of the following conditions are met:

1. a. All property owners served from the overhead facilities to be removed first agree in writing to perform the wiring changes on their premises so that service may be furnished from the underground distribution system in accordance with the Utility's rules and that the Utility may discontinue its overhead service upon completion of the underground facilities, or

b. Suitable legislation is in effect requiring such property owners to make such necessary wiring changes and authorizing the utility to discontinue its overhead service.

2. The applicant has:

a. Furnished and installed the pads and vaults for transformers and associated equipment, conduits, ducts, boxes, pole bases and performed other work related to structures and substructures including breaking of pavement, trenching, backfilling, and repaving required in connection with the installation of the underground system, all in accordance with the Utility's specifications, or, in lieu thereof, paid the Utility to do so;

b. Transferred ownership of such facilities, in good condition to the Utility; and

c. Paid a nonrefundable sum equal to the excess, if any, of the estimated costs, exclusive of transformers, meters and services, of completing the underground system and building a new equivalent overhead system.

3. The area to be underground includes both sides of a street for at least one block or 600 feet, whichever is the lesser, and all existing overhead communication and electric distribution facilities within the area will be removed.

C. In circumstances other than those covered by A. or B. above, where mutually agreed upon by the Utility and an applicant, overhead distribution facilities may be replaced with underground distribution facilities, provided the applicant requesting the change pays, in advance, a nonrefundable sum equal to the estimated cost of the underground facilities less the estimated net salvage value and depreciation of the replaced overhead facilities. Underground services will be installed and maintained as provided in the Utility's rules applicable thereto.

D. The term "underground distribution system" means an electric distribution system with all wires installed underground, except those wires in surface mounted equipment enclosures.