

Decision S4 C7 112

JUL 18 1984

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

JEFFERY HOWARD WEBER and
CASEY D. CLAIR

Complainants,

vs

PACIFIC TELEPHONE,

Defendant.

Case 83-12-06
(Filed December 21, 1983)

O P I N I O N

Complaint

Jeffery Howard Weber and Casey D. Clair alleged that in August 1981, they were seriously injured in a vehicular accident wherein they collided with an anchor guy wire owned and maintained by Pacific Bell.¹ They further allege that Pacific Bell's anchor guys were required "to be shielded" as provided in Rule 86.9 of General Order (GO) 95² and that "such shielding was not on the guy

¹ Until January 1, 1984, Pacific Bell was known as the Pacific Telephone and Telegraph Company.

² "86.9 Protection

"A substantial wood guard (preferably painted white), or metal guard, or a plastic guard of suitable materials, not less than 8 feet in length, shall be securely attached to each anchor guy which is exposed to traffic. Such a guard will not be required where the anchor rod is 1½ inches or greater in diameter, has an overall length above ground of not less than 8 feet and extends to a height of not less than 6 feet vertically above ground.

"NOTE: Revised September 15, 1964 by Decision No. 67820."

wire at the time of the accident." Complainants also allege that Pacific Bell is subject to the provisions of Rules 31.1 and 31.2 of GO 95³ and that it "does not and did not comply with GO 95, Rules 31.1, 31.2, and 86.9."

Complainants state that Pacific Bell "sporadically uses plastic pipe on anchor guy wires which it knows is not permitted pursuant to this rule (86.9) as amended by this decision (D.67820)."

Complainants state that defendant intentionally does not "inspect its transmission facilities" as required by Rule 31.2.

Complainants seek the following items of relief:

- "1. As a Finding of Fact, the defendant Pacific Telephone knowingly does not comply with General Order No. 95, Rule 86.9 as amended by Decision No. 67820;
- "2. As a Finding of Fact, the defendant Pacific Telephone intentionally does not comply with General Order No. 95, Rule 31.2;
- "3. As a Finding of Fact, the defendant Pacific Telephone negligently did not comply with General Order No. 95, Rule 31.1 regarding this specific accident;
- "4. As a Conclusion of Law, the defendant Pacific Telephone is in violation of General Order No. 95, Rule 86.9 as amended by Decision No. 67820;
- "5. As a Conclusion of Law, the defendant Pacific Telephone is in violation of General Order No. 95, Rule 31.2;
- "6. As a Conclusion of Law, the defendant Pacific Telephone violated General Order No. 95, Rule 31.1, regarding this specific accident;
- "7. That the Commission immediately order the defendant Pacific Telephone to undertake an inspection of all of its anchor guy wires throughout the State of California and to report

³ Specifically regarding this accident, complainants state that Pacific Bell "negligently did not use due care to reduce to the minimum the hazard of injury to the public" as Rule 31.1 requires.

to the Commission within 90 days all instances not in compliance with General Order No. 95, Rule 86.9 and immediately undertake timely repairs and corrective action to those anchor guy wires not in compliance and report to the Commission every 30 days its progress on repairs and corrective action until the work is completed;

"8. That the Commission issue an Order Instituting an Investigation into the practices and policies of the defendant Pacific Telephone in regard to its compliance with General Order 95, Rules 31.1, 31.2, and 86.9;

"9. That the Commission award the complainants attorneys' fees and costs."

Background

This proceeding arises out of a vehicular accident occurring on or about August 15, 1981, wherein complainants Weber and Clair collided with Pacific Bell's anchor guy wire. Complainants filed an action against Pacific Bell, et al. in the Superior Court in San Francisco. (Action No. 790614.) A copy of complainants' first amended complaint, filed February 26, 1982, is attached to one of Pacific Bell's pleadings in this proceeding.

Action No. 790614 was tried beginning November 28, 1983, before a jury of 12 persons, who returned a verdict for Pacific Bell. The verdict, dated December 14, 1983, was that complainants Weber and Clair take nothing.⁴

In January 1984, complainants filed a motion for a new trial, or for a judgment notwithstanding the verdict, which the court denied on February 16, 1984.

On February 17, 1984, complainants filed a notice of appeal from the denial of their motion. The matter is now pending in the Court of Appeal.

⁴ It is noteworthy that the complaint to the Commission was filed December 21, 1983, only one week after the jury verdict and judgment.

Proceedings Before the Commission

When the judgment of the Superior Court favored Pacific Bell, complainants immediately filed their complaint in C.83-12-06. Pacific Bell filed its answer on January 26, 1984. On February 10, 1984, complainants obtained a subpoena and two subpoenas duces tecum from the Commission and served them upon Pacific Bell. Pacific Bell filed a motion to quash the subpoena and the subpoenas duces tecum on February 22, 1984, and served interrogatories on complainants on February 27, 1984. On March 1, 1984, complainants filed a response to Pacific Bell's motion to quash. No hearing on the motion to quash has been held.

On April 6, 1984, complainants filed their answers to Pacific Bell's interrogatories; and Pacific Bell filed its motion to dismiss or in the alternative to suspend this proceeding pending the outcome of the civil case now on appeal. On April 17, 1984, complainants filed their response to Pacific Bell's motion.

Discussion

Complainants, by filing a complaint, seek the issuance of an order instituting investigation into the practices and policies of Pacific Bell regarding its compliance with Rules 31.1, 31.2, and 86.9 of GO 95. Whether the Commission should investigate any phase of a public utility's business is entirely discretionary with the Commission. Requests for such investigations come from many sources and by telephone, petition, letter, and personal visits. Occasionally, such requests are made by pleadings of various kinds. That a request for an investigation is included in a complaint, however, does not give it any greater dignity than a request by telephone; the Commission's discretion is not diminished.

Our discretion to begin or decline to begin an investigation is exercised in light of the facts alleged in the request, the information available to us through our staff regarding

the alleged problem, the interests of other agencies, and the magnitude of the problem in relationship to other matters requiring our attention and the work of our staff.

We note that the request in this instance is based principally on a single vehicular accident. The complainants do allege that in the course of investigating this accident evidence revealed that Pacific Bell does not and did not comply with Rules 31.1, 31.2, and 86.9, but they do not state of what that evidence consists. Also, this allegation must be viewed in relationship to the standards alleged to be violated. They are very broad, giving considerable discretion to the utility to use its judgment. Rule 31.1 requires "suitable design and construction", the "furnishing of safe, proper, and adequate service", and the "exercise of due care". Rule 31.2 requires frequent and thorough inspection to insure the "good condition" of the lines. Rule 86.9 requires either a "substantial wood guard", a "metal guard", or a "plastic guard of suitable materials". Formal investigations are not designed to determine whether a public utility is exercising "due care" or whether its design or construction is "suitable". This is more appropriately handled on a case-by-case basis, exactly as complainants have tried to do in their civil action. Alternatively, a rulemaking investigation could be commenced to make these rules more specific. But, since such new rules would operate prospectively, they would not help the complainants.

We have no reason to believe from the allegations of the complaint or from our staff that guy guards pose a significant problem for the public in Pacific Bell's service area. Moreover, our staff resources are already overtaxed to handle the major projects we have assigned as well as the rate and certification matters regularly filed by public utilities. Accordingly, we conclude that it not be appropriate or necessary to investigate Pacific Bell's guy guard policies and practices.

Complainants also ask that the Commission immediately order Pacific Bell to inspect all of its anchor guys, to report within 90 days all instances of anchor guys not complying with Rule 86.9, to make repairs, and to report progress every 30 days until work is completed.

The entire factual basis for this request is that Pacific Bell's anchor guy with which complainants collided was allegedly not in compliance with Rule 86.9. That issue was litigated in Action No. 790614 and complainants lost. Now complainants seek to base their request on that same allegation. This is insufficient support for an order requiring such far reaching action by Pacific Bell.

We also note that the effect of either an order instituting an investigation or an order requiring an inspection would be to shift the burden of proof from complainants to the staff (in the case of an investigation) or to Pacific Bell (in the case of an inspection). We do not perceive how this shift of the burden of proof would be helpful to complainants, unless such investigation or inspection produced evidence useful to complainants in the event of retrial of their civil action. If this were the purpose of the complaint and the requests contained therein, it would not be proper use of our forum or our process.

The remaining items of relief sought by complainants, consist of requests for certain findings and conclusions. Findings and conclusions are required by law to support our orders. However, since we have concluded to deny the affirmative relief sought by the complainants, it is not necessary to make the findings and conclusions requested by complainants. Were we to do so without also granting some form of relief would merely result in a declaratory order. A declaratory order might be useful to one or the other of

the parties in later civil litigation, but it would serve no useful purpose in our proceedings. We have traditionally shunned requests for declaratory orders. ✓

Conclusions of Law

1. A request for an order instituting an investigation is addressed to the Commission's discretion.
2. The facts alleged do not provide a sufficient basis for ordering Pacific to conduct an inspection of all its anchor guys.
3. The complaint should be dismissed for failure to state a cause of action. ✓

O R D E R

IT IS ORDERED that the complaint is dismissed.

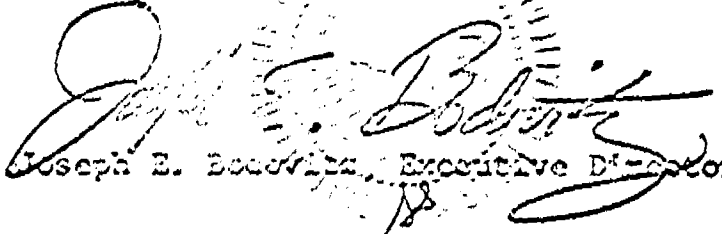
This order becomes effective 30 days from today.

Dated JUL 18 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
FRASCILLA C. CREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Boevert, Executive Director