

ORIGINAL

Decision S4 11 009

NOV 7 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Sonitrol Security, Inc.,
Complainant,

vs.

The Pacific Telephone and
Telegraph Company, a
Corporation,

Defendant.

Case 10916
(Filed October 10, 1980)

ORDER MODIFYING DECISION 82-12-108
GRANTING PETITION FOR ATTORNEY'S FEES
AND DISMISSING CASE 10916

Complainant, Sonitrol Security, Incorporated (Sonitrol)^{1/} and defendant, Pacific Bell (Pacific--formerly known as The Pacific Telephone and Telegraph Company), jointly petition this Commission to modify Decision (D.) 82-12-108 (as previously modified by D.83-08-040, D.83-08-044, and D.84-01-035) dated December 22, 1982, in the above matter, to approve a settlement agreement executed by both parties (Exhibit A to the joint petition), and to dismiss Case (C.) 10916.

On January 10, 1984 Sonitrol filed a petition for the award of attorney's fees as the prevailing party in the above proceeding against Pacific. In its petition Sonitrol alleges that essentially all of the relief sought by Sonitrol was granted and therefore the attorney's fees and costs incurred in vindicating its claims should be awarded to Sonitrol pursuant to long-established common law principles. The claim for attorney's fees

^{1/} As used in this decision, "Sonitrol" includes Sonitrol Security, Incorporated, Sonitrol dealers, and related subscribers.

is based on common law principles rather than on Article 18.6 of this Commission's Rules of Practice and Procedure because Article 18.6, Procedure for Awarding Compensation to Public Participants in Commission Proceedings, effective May 6, 1983, is to apply to issues raised subsequent to the effective date of the order promulgating the rules and D.82-12-108 on the subject proceeding was issued December 22, 1982, some four and one-half months prior to the effective date of Article 18.6. We agree that Article 18.6 is inapplicable in this matter.

Ordering Paragraphs 8 and 9 of D.82-12-108, as modified by D.83-08-040, D.83-08-044, and D.84-01-035, stated as follows:

"8. By March 1, 1984 Pacific shall submit for Commission staff review the results of its study on the feasibility of installing line channel service units on Sonitrol customers' facilities that occupy less space than the presently used 150-A units.

"9. Pacific and Sonitrol shall jointly draft a form letter to be sent to Sonitrol's customers of record, past and present, informing them of this decision and instructing them how to apply for reparations, including what information, if any, they must provide in such an application. Pacific and Sonitrol shall jointly determine what information should be provided by each of them and by the claimants in order for accurate reparations to be calculated. Pacific shall compute and report to the Commission, by March 1, 1984, with copy furnished at that time to Sonitrol, the proper amount of reparations due all claimants as described in the text of this decision. Sonitrol shall either accept Pacific's computation or provide comments to the Commission within 15 days of the filing of the report."

Pacific was unable to complete its study by the March 1, 1984 date and submitted a partial report. Further, in its petition for attorney's fees, Sonitrol did not set forth the specific amount requested. Consequently, an Administrative Law Judge's (ALJ) Ruling issued April 2, 1984 noted that as of that date we knew neither the specific amount of the award Sonitrol was requesting nor the precise amount of reparations due as a result of D.82-12-108, as modified by D.83-08-040, D.83-08-044, and D.84-01-035. Therefore, we requested that:

- "1. Within 30 days of the date of this ruling Sonitrol submit an itemized bill for fees and costs incurred to date, including supporting materials and affidavits, the number of hours worked on each portion and issue of the case, the qualifications of the lawyers involved and their standard billing rates, and comparable rates in the San Francisco area for work done by lawyers with similar backgrounds and experience; and
- "2. Within 30 days of the date of this ruling Pacific submit a detailed itemization of all reparation due as a result of D.82-12-108, as modified by D.83-08-040."

On May 1, 1984, Pacific filed a report in response to the above ALJ Ruling stating that reparations had been computed for 3,593 claims totaling \$349,936.09; that because of the difficulty, if not the impossibility of obtaining requisite records, the balance of reparation claims could only be computed on an average basis; and that Pacific would welcome the opportunity to meet with Sonitrol, the Commission staff, and ALJ Johnson to explain the work in more detail and to answer questions,

On May 8, 1984, Sonitrol filed an affidavit of Charles T. C. Compton in support of the petition for attorney's fees indicating a total amount claimed of \$183,476.78. Also, by letter dated May 17, 1984, Sonitrol indicated to this Commission that it had contacted Pacific's attorney in order to arrange a meeting to discuss the amount of reparations as well as a final settlement and resolution of all remaining issues between the parties. The negotiations continued and culminated in a settlement agreement which addressed reparations, interest on reparations, attorney's fees, tariff changes, channel service units, and other items.

Pacific processed 3,617 claims for reparations for current customers and those that were discontinued within the last two years which totaled \$351,549, an average of \$97.19 a claim. Because of the difficulty of obtaining records, Pacific applied this \$97.19 average figure for a group of 521 claimants who had disconnected more than two years ago to yield a total of \$50,636. The total reparations thus computed are \$402,185. The parties agree that these reparations were calculated in compliance with D.83-12-108, as modified by D.83-08-040.

Interest was calculated at a rate of 10% per annum compounded monthly for the period December 22, 1982 through October 22, 1984 to yield \$80,559.

The attorney's fees were agreed to be the \$183,477 claimed by Sonitrol, plus \$9,500 for attorney's fees and costs after March 31, 1984, as well as \$8,166 for the fees paid to a consultant, Kenneth Edwards. This amount equals the total interest plus 30% of the total reparations. Pacific proposes to pay this amount to Wilson, Sonsini, Goodrich & Rosate

(Sonitrol's attorneys) within seven days of receipt of a Commission decision approving the settlement agreement and will make reparations to the claimants within 60 days thereafter with each individual claim reduced by 30% to reflect payment of attorney's fees.

Pacific agrees to submit an advice letter filing offering a new voice-grade, nondesigned channel which will not require a channel service unit or similar unit. Pacific will suggest charges comparable to a Type 1009 channel. Sonitrol acknowledges that the new channel may not meet its requirements and may, at its option, order a Type 3009 channel.

Pacific proposes to continue installing for new channels and will begin installing for existing channels a multi-unit attenuator for those designed circuits without direct current (DC) continuity which still require attenuators. It should be noted that under these circumstances the monthly report ordered by D.82-12-108, as modified by D.83-08-040, concerning these attenuators will no longer be required.

It is axiomatic that nothing in the above-discussed settlement agreement will modify or render inoperative D.82-12-108, as modified by D.83-08-040 and D.84-01-035, and that such agreement is subject to our approval.

Generally, the Code of Civil Procedures provide that except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. There are, however, three exceptions to the above general rule consisting of the "common fund" principle, the "substantial benefit" principle, and the "private attorney general" doctrine.

With respect to the "common fund" principle, the Court stated in Serrano v Priest (1977) 20 Cal 3d 25, 35 as follows:

"Although American courts, in contrast to those of England, have never awarded counsels' fees as a routine component of costs, at least one exception to this rule has become as well established as the rule itself: that one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs.' (Quinn v. State of California (1975) 15 Cal.3d 162, 167 /124 Cal.Rptr. 1, 539 P.2d 7617; fns. omitted.) This, the so-called 'common fund' exception to the American rule regarding the award of attorneys fees (i.e., the rule set forth in section 1021 of our Code of Civil Procedure), is grounded in 'the historic power of equity to permit the trustee of a fund of property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund property itself or directly from the other parties enjoying the benefit.' (Alyeska Pipeline Co. v. Wilderness Society (1975) 421 U.S. 240, 257 /44 L.Ed.2d 141, 153, 95 S.Ct. 16127; fn. omitted.)"

See also the affirming discussion in Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal 3d 891, where the court held, inter alia, that the Commission has the authority in cases involving reparations to award attorney's fees under the common fund theory.

D.82-12-108 awarded reparations to a specific group of Pacific's customers, i.e., those billed in accordance with tariff provisions for a Type 3001 channel when an adequate Type 1009 channel was available and those who had their Type 3001 channels adjusted to a transmission loss greater than 10 decibels (dB). The reparations are to be disbursed among the various Sonitrol customers who in general bore no portion of the legal expense in this proceeding. Consequently, in accordance with the "common fund" principle, the reparations and attorney's fees should be disbursed as set forth in the settlement agreement.

Furthermore, our review of the balance of the settlement agreement indicates that its terms are not unreasonable.

The proposed offering of a new voice-grade, nondesigned channel which will not require a channel service unit or similar equipment will provide a new option for both existing and future Sonitrol customers and necessitates further modification of D.82-12-108 as previously modified by D.83-08-040. The specific portions of the decision requiring modification are Findings of Fact 15 and 22, Conclusions of Law 4 and 5, and Ordering Paragraphs 4, 5, and 6. The changes relate to offering the new channel as an alternative to Type 1009, Type 3001, and Type 3009 channels. Those customers who have ordered Type 3009 channels since D.82-12-108 was issued will be permitted to convert at no charge to the new channel for 180 days following the effective date of the new channel. Those customers presently using Type 1009 channels who are permitted to convert at no cost to Type 3009 channels under D.82-12-108 as modified will still be permitted to use Type 1009 channels and, at any future time, to obtain one conversion, at no cost, to either a Type 3009 channel or to the new channel. Furthermore, those customers currently using Type 3001 channels will be permitted to convert, at no cost, to either the Type 3009 channel or the new channel.

Findings of Fact

1. Pacific and Sonitrol executed a settlement agreement to resolve and compromise all remaining issues in C.10916 including specifically the amount and distribution of reparations, Sonitrol's entitlement to and the amounts of attorney's fees, the entitlement to and amount of interest on the reparations, and the appropriate tariff for service to Sonitrol dealers and customers within Pacific's service area.

2. The total reparations computed in compliance with D.83-12-108 as modified by D.83-08-040 amount to \$402,185.

3. The interest on the above reparations for the period December 22, 1982 through October 22, 1984 is \$80,559.

4. The attorney's fees due Sonitrol's attorneys total \$201,143 which is equal to the total interest plus approximately 30% of the reparations.

5. Pacific should make an advice letter filing offering a new voice-grade, nondesigned channel which will not require a channel service unit or a similar device.

6. The proposed offering of a new voice-grade, non-designed channel which will not require a channel service unit or similar equipment will provide a new option for both existing and future Sonitrol customers and necessitates further modification of D.82-12-108 as previously modified by D.83-08-040.

7. Pacific should continue installing for new channels and begin installing for existing channels (after the new voice-grade, nondesigned channel offering becomes effective) a multi-unit attenuator for those designed circuits without DC continuity which still require attenuators.

8. The monthly reports concerning attenuators required by D.82-12-108 as modified by D.83-08-040 are no longer required.

Conclusions of Law

1. The reparations ordered by D.83-12-108, as modified by D.83-08-040, are to be disbursed among the various Sonitrol customers who, in general, bore no portion of the legal expense. Consequently, such reparations constitute a "common fund" out of which attorney's fees and costs can be paid. No portion of the reparations should be recognized as an expense for ratemaking purposes.

2. D.82-12-108, as previously modified by D.83-08-040, D.83-08-044, and D.84-01-035, should be further modified as set forth in the following ordering paragraphs.

3. The settlement agreement between Pacific and Sonitrol should be approved.

4. C.10916 should be dismissed.

5. Because the reparations should be granted as expeditiously as possible, the order should be effective today.

IT IS ORDERED that:

1. D.82-12-108, as previously modified by D.83-08-040, D.83-08-044, and D.84-01-035, be further modified as follows:

a. Finding 15 is modified to read:

"Pacific is not obligated to restore Sonitrol circuits served as Type 1009 channels to their former level where the quality of transmission has deteriorated to a level unsatisfactory to Sonitrol customers, but should convert these to the new voice-grade, nondesigned channel not requiring a channel service unit or similar device authorized herein or to Type 3009 channel with no imposition of connection or other nonrecurring charge."

b. Finding 22 is modified to read:

"Sonitrol customers presently receiving service under the provisions of Type 3001 channel tariff should be transferred to the Type 3009 channel tariff or to the new voice-grade channel authorized herein."

- c. Conclusion of Law 4 is modified to read:
"Existing voice frequency monitoring customers receiving service under the provisions of Pacific's tariffs for Type 3001 channels should be transferred to the tariff for Type 3009 channels or to the tariff for the new voice-grade channel authorized herein."
- d. Conclusion of Law 5 is modified to read:
"All new voice frequency monitoring customers should receive service in accordance with the provisions of the tariff for Type 3009 channels or the new voice-grade channel authorized herein."
- e. Conclusion of Law 11.a. is added to read:
"11.a. The reparations to be paid to the Sonitrol customers constitute a 'common fund' out of which attorney's fees and costs can be paid, in accordance with Serrano v Priest (1977) 20 Cal 3d 25, 35."
- f. Ordering Paragraph 4 is modified to read:
"Pacific shall transfer those Sonitrol customers who are receiving service in accordance with the tariff provisions for Type 3001 channels to the tariffs for Type 3009 channels or the new voice-grade channel authorized herein. No installation charge or other non-recurring charge shall be imposed for this conversion."
- g. Ordering Paragraph 5 is modified to read:
"At such time as the transmission quality of a Sonitrol Type 1009 channel deteriorates to an unsatisfactory level, Pacific shall convert

the channel to Type 3009 channel or the new voice-grade channel authorized herein without imposition of an installation charge or other nonrecurring charge."

h. Ordering Paragraph 6 is modified to read:

"Pacific shall provide service for all new voice frequency monitoring customers in accordance with the provisions of the tariff for Type 3009 channels or the new voice-grade channel authorized herein."

2. Pacific is no longer required to file a monthly report on channel service units, as ordered in D.84-01-035.

3. The total reparations computed in compliance with Ordering Paragraph 9 of D.82-12-108 amount to \$402,185. The interest on this amount is \$80,559, making a total amount to be paid Sonitrol by Pacific of \$482,744, no portion of which shall be included as an expense for ratemaking purposes. Within 7 days of the effective date of this order Pacific is to pay Sonitrol's attorneys \$201,143 of this amount. The balance of \$281,143 is to be paid claimants within 60 days of the effective date of this order. Each individual amount to be refunded each claimant is equal to the computed reparation reduced by 30% to reflect payment of attorney's fees and costs.

4. Within 45 days of the effective date of this order Pacific is to submit an advice letter filing offering a new voice-grade, nondesigned channel which will not require a channel service unit or similar equipment. Such an offering will provide an alternative to existing and prospective Sonitrol subscribers.

C.10916 ALJ/emk

5. C.10916 is dismissed.

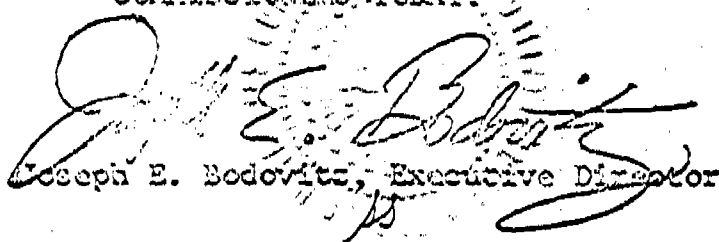
6. As set forth above, D.82-12-108 is modified, Sonitrol's petition for attorney's fees is granted, and C.10916 is dismissed.

This order is effective today.

Dated NOV 7 1984, at San Francisco, California.

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

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


Joseph E. Bodovitz, Executive Director

With respect to the "common fund" principle, the Court stated in Serrano v Priest (1977) 20 Cal 3d 25, 35 as follows:

"Although American courts, in contrast to those of England, have never awarded counsels' fees as a routine component of costs, at least one exception to this rule has become as well established as the rule itself: that one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs.' (Quinn v. State of California (1975) 15 Cal.3d 162, 167 [124 Cal.Rptr. 1, 539 P.2d 761]; fn. omitted.) This, the so-called 'common fund' exception to the American rule regarding the award of attorneys fees (i.e., the rule set forth in section 1021 of our Code of Civil Procedure), is grounded in 'the historic power of equity to permit the trustee of a fund of property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund property itself or directly from the other parties enjoying the benefit.' (Alyeska Pipeline Co. v. Wilderness Society (1975) 421 U.S. 240, 257 [44 L.Ed.2d 141, 153, 95 S.Ct. 1612]; fn. omitted.)"

D.82-12-108 awarded reparations to a specific group of Pacific's customers, i.e., those billed in accordance with tariff provisions for a Type 3001 channel when an adequate Type 1009 channel was available and those who had their Type 3001 channels adjusted to a transmission loss greater than 10 decibels (dB). The reparations are to be disbursed among the various Sonitrol customers who in general bore no portion of the legal expense in this proceeding. Consequently, in accordance with the "common fund" principle, the reparations and attorney's fees should be disbursed as set forth in the settlement agreement.