

**ORIGINAL**

Decision 90 08 008 AUG 8 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Michael Dennison,

Complainant,

vs.

Pacific Bell,

Defendant.

Case 89-08-040  
(Filed August 25, 1989)

Michael Dennison, for himself, complainant.  
Thomas J. Ballo, Attorney at Law, for  
Pacific Bell, defendant.

O P I N I O N

I. Summary

The relief sought by Michael Dennison (complainant) is denied.

II. Background

This complaint was filed on August 25, 1989. Complainant deposited \$678.05 with the Commission. The \$678.05 was subsequently transferred by complainant to Pacific Bell (Pacific or defendant) at the request of the Commission. (Tr. 11-2.)

Defendant filed a "Motion to Dismiss and Answer to Complaint" on October 6, 1989. A hearing was set for October 18, 1989, but was not held due to the earthquake on October 17, 1989. The hearing was rescheduled and held on November 16, 1989. The case was submitted upon receipt of the transcript.

### III. Position of the Parties

#### A. Complainant

Complainant testified that in March 1988 he contacted defendant to obtain an estimate for underground telephone service to a building he was designing at 1218 Seventh Street, Berkeley. He was told the charge would be under \$100.00. A similar estimate (of under \$100.00) was obtained for underground electricity service from Pacific Gas and Electric Company (PG&E). Both seeming consistent in cost and reasonable, complainant proceeded to design and construct the building to accept underground electricity and telephone service. PG&E charged \$87.25 and by November 1989 had installed the service.

In March 1989 defendant told complainant that defendant planned to install a line of utility poles on the west side of Seventh Street in order to serve his property. A line of PG&E electricity poles already exists on the east side of the street. Complainant asked defendant to explore alternative cable routing to avoid the negative impacts of additional poles.

On July 6, 1989 complainant received a letter from defendant stating that the cost would be \$678.05 for his chosen option of underground service from an aerial facility. Complainant requested but did not receive a written cost itemization. Conversations resulted in contradictory explanations of the \$678.05, and none addressed the original estimate of under \$100.00.

In his filed complaint, complainant seeks two items. First, complainant asks that defendant demonstrate that means other than a new line of poles have been explored for providing service to his building. Second, the charge should approximate the quoted amount of under \$100.00.

At hearing, complainant stated that subsequent events made the first request moot. Complainant asserted that the second request remains valid, however, and he would show a pattern of

misinformation and confusion on the part of Pacific that would support his request. Complainant asserts that a utility must be held accountable for what it says (e.g., the under \$100.00 estimate). Complainant states that the hearing should not be just for the strict legal view of the issues, but to hold the utility responsible for its behavior.

Complainant offered Exhibit 1 to establish that complainant's plan was always for underground telephone service. Exhibit 1 is an "Intention To Construct and Authorization" from PG&E dated January 3, 1989. This is the standard form sent by PG&E to Pacific to coordinate use of poles and underground trenches. Exhibit 1 indicates that the customer is

"...to do all trenching, backfill and install 1-2" PL. [plastic] duct from pole to main switch."

Exhibit 1 also shows service from an existing pole (by item number 4 on page 2 of the exhibit) going north and making a 90-degree turn west. Complainant points out that since there is no pole at the 90-degree turn, even if Pacific did not understand the service was to be underground, Pacific must have been able to deduce that the only other way a 90-degree turn could have been accomplished was in an underground trench. Further, Exhibit 1 refers to a "riser quad." at number 4. Complainant believes that Pacific should have been able to deduce from this that the requested service was underground.

Complainant points out that the pole in Exhibit 1 (by number 4) is in his planned new driveway. This was discussed with PG&E on November 16, 1988 (Exhibit 4). PG&E admits that the first intent (Exhibit 1, dated January 3, 1989) did not reflect the need to move the pole out of the planned driveway (Exhibit 4). A second intent (Exhibit 3) was prepared July 7, 1989 which moved the pole out of the driveway and approximately 25 feet north of complainant's property line.

Complainant discussed the \$678.05 with Pacific's Lee Hubbard on August 28, 1989. Complainant was told that PG&E's first intent (Exhibit 1, dated January 3, 1989) indicated to Pacific that the service would be aerial, and Pacific designed it that way. Pacific believes that complainant changed the service. The change required Pacific to redesign the service, incurring engineering costs which are assessable to complainant.

Complainant asserts that he did not change the job, however. Rather, PG&E's first intent (Exhibit 1) was mistaken, and it was PG&E's error. Plus, even Exhibit 1 shows the service to be underground, albeit from the wrong pole since it was in the planned driveway.

Further, complainant says Pacific advised him the first intent did not indicate underground telephone service even if it showed underground electricity service. Complainant testifies that it would be rare for a customer to want underground electricity but overhead telephone services.

Complainant offered Exhibit 2, which includes the first cost breakdown complainant testifies he received (dated November 8, 1989 and received only as a result of a data request after the formal complaint was filed). (See Appendix A for an explanation of the \$678.05 based on Exhibits 2 and 9.) Complainant does not object to the "hard costs," but does object to the engineering and trench inspection (subway) charges. Further, complainant testifies:

"...I was rather shocked that I had paid \$160 for a trench inspection fee since according to what Pacific Gas and Electric told me, no representative of Pacific Bell did, in fact, inspect the trench at any point that it was open after conduit had been placed. In fact, they did not have the impression that any inspector had come by." (Tr. 43.)

Complainant also testifies that:

"...in some sense I can understand that we don't want to give me preferential treatment over someone else, [and] with that in mind, if in fact the charges are appropriate, then I do not object to them." (Tr. 56.)

Complainant does question the charges, however, given such things as PG&E's error in the first intent, Pacific's confusion, Pacific not knowing PG&E was planning to underground its facilities for seven months, Pacific's lack of honesty and credibility, and the lack of inspection. Complainant testified that he would have selected the aerial option for telephone service if he had understood from the beginning that the cost would be so high. Complainant believes he should only pay \$100.00.

**B. Defendant**

Defendant presented LeRoy White, Facility Engineer, responsible for residential and small business facility design in the area including Berkeley. White testified that it is Pacific's policy not to give estimates for new underground service over the telephone. Rather, Pacific makes an on-site inspection of the soil conditions, concrete involved, neighboring customer facilities, source(s) for connection, and considers the future growth in the area before making an estimate. All such estimates are made in writing. If a call had been made to Pacific, it would have come to White. White did not get a call from complainant for an estimate in March 1988, and testifies that he believes no estimate was given by any other Pacific employee.

White's first contact regarding complainant's service was in January 1989 via the PG&E intent (Exhibit 1). The intent is PG&E's way of asking Pacific if Pacific is interested in purchasing joint poles. If PG&E were proposing joint underground service, PG&E would have identified a pro rata share of the undergrounding costs for Pacific's consideration. No pro rata undergrounding cost was included.

White performed an on-site inspection January 12, 1989. Complainant was present but did not ask White for underground service at that time. Telephone service in the area around the job-site is aerial. Based on the initial intent from PG&E and the on-site inspection, White determined that the telephone service could be aerial from the existing pole (Exhibit 1, by number 4) to the new building. This would be true whether the PG&E service was underground or overhead. White testified that it is not unusual for customers to choose underground service for energy, but aerial service for telephone. There would be no cost to complainant for aerial service.

White subsequently discovered a problem with the aerial service. Three PG&E transformers are on PG&E poles Pacific would have used for complainant's service (on the east side of Seventh Street). The Commission's General Order (GO) 95 does not allow communications equipment within certain distances of power equipment. White determined that a new line of poles would be necessary on the west side of Seventh Street. Complainant was contacted and the proposal discussed. No cost was involved to complainant for aerial service from the new line of pole. Service from either an alternate direction or around the PG&E transformer bank were considered and rejected. Complainant indicated he would contact PG&E about the transformers and get back to Pacific. Pacific did not receive a follow-up call from complainant regarding the transformers.

Not hearing back from complainant, White contacted PG&E on June 29, 1989, to determine the status of complainant's project. White was informed that PG&E intended to move the existing pole (Exhibit 1, by number 4) north of complainant's property line 25 feet. PG&E also indicated that complainant requested underground service, and that PG&E would send Pacific a revised intent. There was no indication that the first intent was mistaken.

White received the revised intent July 5, 1989, and traveled to the job-site to design the underground portion of the

telephone service. Also on July 5, 1989, White calculated the cost to complainant for the underground service according to Pacific's Tariff Rule 16.<sup>1</sup> White reported the cost (\$678.05) to complainant by telephone that evening.

The cost does not include any charges for the first inspection January 12, 1989, nor any charges based on the first intent. Rather, Pacific assessed charges based only on the revised intent--that is, the actual configuration of facilities. The charges would be \$678.05 even if the first intent had not been issued, but only the second intent had been issued. Similarly, the charges have nothing to do with whether the change was or was not requested by complainant. At complainant's request, a copy of the calculations (Exhibit 9) was given to complainant on July 7, 1989.

Further, two letters were sent by White to complainant, both dated July 5, 1989. The first letter offered three options to complainant: (1) all aerial for free; (2) aerial to buried for \$678.05; (3) all buried for \$13,500. This letter also discussed the difficulty with the PG&E transformers (e.g., the GO 95 infraction using the PG&E poles on the east side of the street). The second letter discussed Rule 16, the understanding that complainant chose the aerial to buried option (\$678.05), complainant's and Pacific's responsibilities, the tax calculation, and asked complainant to sign, date, and return a duplicate of the letter with a check for the chosen option.

Pacific did inspect the trench, according to White, as indicated in the explanation of the charges (Exhibit 2), and contrary to statements of PG&E personnel. Pacific must inspect the trench to protect Pacific from liability, to make sure trenches

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<sup>1</sup> Pacific's Tariff Schedule Cal.P.U.C. No. A2 Section 2.1.16, 2nd Revised Sheet 105 (Rule 16). This rule provides that when customers request, or are required to have, underground facilities, the customer will pay three-fourths of the difference in cost between the underground and equivalent aerial facilities.

meet certain specifications, and to make sure the public is protected from harm or danger.

White further clarified that the \$678.05 is only for the cost from the new pole to the point of connection on the complainant's property. There are no other charges (e.g., no charges related to moving the pole, or for more than one intent).

Pacific argues that \$678.05 is the correct charge consistent with its tariffs and is due. Complainant was told of the charges on the day they were calculated by Pacific. Pacific denies that complainant was ever quoted an estimate of under \$100.00. If so, however, that estimate could have only been in relation to the existing pole (Exhibit 1, by number 4), which was only 1 to 2 feet from the property line. Thus, any quote in March 1988 would have been only for the cost of undergrounding for 1 or 2 feet, not the considerably further distance from the moved pole. To the extent a quote may have been given in March 1988, it would not be valid once the facility configuration changed to a pole moved further away.

In addition, Pacific argues that complainant is obligated to pay the correct rate consistent with the tariff even if an incorrect rate has been quoted. (Empire West v. Southern California Gas Co., (1974) 12 Cal. 3d 805, 809-10 (Empire West.) The Court's ruling is reflected in Pacific's Tariff Schedule Cal.P.U.C. No. A2 Section 2.1.12, 2nd Revised Sheet 84 (Rule 12):

"The rates and charges billed by and paid to the Utility for telephone service shall be the rates and charges legally in effect and on file with the Public Utilities Commission of the State of California."

Similarly, Public Utilities (PU) Code § 453 prohibits complainant being accorded a preference:

"No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."



Pacific argues that the correct tariffed rate is \$678.05. That charge must be assessed based on Empire West, Pacific's Rules 12 and 16, and PU Code § 453.

#### IV. Discussion

Two issues are before us. First, did Pacific explore other alternatives? Second, should the charge for complainant's service be under \$100.00, \$678.05, or some other amount?

Complainant testified at the hearing that the first request was made moot by subsequent events. That is, subsequent to the filing of the complaint, PG&E has removed the hurdle of using the poles on the east side of Seventh Street. (Tr. 6; also Exhibit 2, page 4.) It appears that this option is the one desired by complainant and can now be exploited. Further, Exhibit 2 identifies at least six different serving arrangements that were examined. Finally, White also testified regarding two options that were explored. (Tr. 95-100.) Options were considered, but the issue is now moot.

The second issue is the amount of the correct charge. Complainant argues that Pacific must be held accountable for what it says (e.g., the under \$100.00 estimate) and must be held responsible for its behavior. Complainant argues that he should be charged only an amount under \$100.00 based on the original quoted charge, a pattern of misinformation and confusion perpetrated by Pacific, and a failure to inspect the trench despite charging for the inspection.

It is a longstanding provision of public utility regulation that the lawful tariff rate must be collected regardless of any quotations by a utility at variance with the tariffs, whether written or oral. (Pinney & Boyle Mfg. Co. v. Atchison, T. and S.F. Ry. (1914) 4 Cal RRC 404.) A utility is under the duty to strictly adhere to its lawfully published tariffs. (Temescal Water Co. v. West Riverside Canal Co. (1935) 39 Cal RRC 398.) Scheduled

rates must be inflexibly enforced to maintain equity and equality for all customers without preferential treatment for some. (Empire West.)

Furthermore, the rate when published becomes established by law and can only be varied by law, not by an act of the parties. (Johnson v. Pacific Tel. & Tel. Co. (1969) 69 Cal PUC 290.) A misquotation or misunderstanding of the rate does not relieve the parties from assessing and paying the correct rate. (Sunny Sally, Inc. v. Lom Thompson (1958) 56 Cal PUC 552.) Even if Pacific misquoted the charge, complainant is required to pay the correct charge when determined.

The correct charge for this service is \$678.05. We find that 4 hours of engineering (including travel, measuring, making notes, soil inspection, drawing a rough draft of the site, coordination with PG&E on trench placement, calculation of the charges according to Rule 16, preparation of the final design draft and administrative time) at Pacific's per hour rate is reasonable. We find that two hours of subway inspection (including picking up and delivering materials, and inspection of the trench on both September 7, 1989 and September 14, 1989) at Pacific's per hour rate is reasonable. Similarly, we find the material and trench costs reasonable, and the three-quarter rule and tax calculations correct.

Complainant offers the statements of PG&E personnel that they did not see a Pacific inspector. Complainant did not present a PG&E witness, however, to testify that Pacific did not perform the inspections. Nor did complainant present a letter from PG&E supporting this claim, as he did regarding the mistakes with the first intent (Exhibit 4). Pacific testified that it performed the inspections. We find that Pacific did accomplish the inspections.

Findings of Fact

1. Pacific explored at least six alternatives to provide service to complainant, as described in Exhibit 2.
2. Pacific testified to the examination of alternatives for serving complainant.
3. PG&E has now removed the hurdle of using the poles on the east side of Seventh Street, which is complainant's preferred alternative.
4. Alternatives have been considered, and the issue is now moot.
5. Miscommunication and confusion occurred between complainant, defendant, and PG&E.
6. Complainant must pay the correctly calculated charge for the service he has obtained (or will obtain) according to defendant's tariffs, including Rule 16, despite any quotations to the contrary.
7. For the aerial to underground connection selected by complainant, engineering and subway time of six hours at defendant's per hour rate, plus material and trench costs, are reasonable.
8. Pacific inspected the trench.
9. The three-quarter rule and tax calculations are correct.
10. The correct charge consistent with defendant's tariff is \$678.05.

Conclusions of Law

1. The lawful tariff must be collected regardless of any quotations at variance with the tariffs, whether written or oral.
2. A misquotation or misunderstanding of the rate does not relieve the parties from assessing and paying the correct rate.
3. Complainant should pay \$678.05 for the requested aerial to underground service as the reasonable charge consistent with defendant's tariffs.

O R D E R

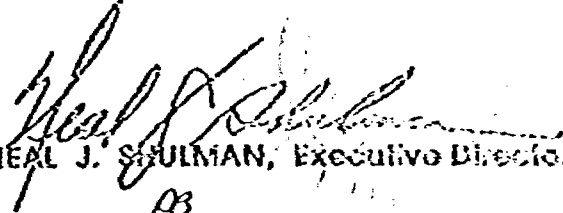
IT IS ORDERED that this complaint is denied and this proceeding is closed. The \$678.05 paid by Michael Dennison to Pacific Bell for the requested underground telephone service is correct. No refund or adjustment is authorized.

This order is effective today.

Dated AUG 8 1990, at San Francisco, California.

G. MITCHELL WALK  
President  
FREDERICK R. DUDA  
STANLEY W. HULETT  
JOHN B. OHANIAN  
PATRICIA M. ECKERT  
Commissioners

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

  
NEAL J. STULMAN, Executive Director  
PB

## APPENDIX A

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## PACIFIC'S CHARGES TO DENNISON

LINE: NO :	ITEM		: COST :
1	Engineering	\$360.00	
2	Subway	160.00	
3	Material	54.30	
4	PG&E Trench Cost	<u>132.00</u>	
5	Subtotal of items above	706.30	
6	3/4 Rule	<u>x 0.75</u>	
7	3/4 Subtotal	529.73	529.73
8	Tax Rate	<u>x 0.28</u>	
9	Tax	148.32	<u>148.32</u>
10	TOTAL		\$678.05

FURTHER EXPLANATION:

1. Engineering (all on July 5, 1989 by LeRoy White, Facility Engineer)

\$90 per hour                      4 hours                      \$360.00

One hour travel from Hayward to Berkeley.

One-half hour at site measuring from property line to utility pole and to make notes on requirements for placing conduit into the ground, and on the type of soil to be placed between the property line and the pole.

One-half hour to draw rough draft of the vicinity of the proposed construction.

One hour travel from Berkeley to Hayward.

One-half hour to make necessary arrangements with PG&E on trench placement and to calculate the cost factors to the 3/4 rule (Pacific Tariff A2, Section 2.1.16 (Rule 16)).

One-half hour to draw the final draft of the design, reflecting the conduit and trench design, and administrative time to get the design approved by Pacific's accounting department.

APPENDIX A

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PACIFIC'S CHARGES TO DENNISON

FURTHER EXPLANATION (continued):

2. Subway (on September 7 and 14, 1989 by Terry Manning, Subway Inspector)

\$80 per hour                      2 hours                      \$160.00

One hour to pick up conduit and deliver materials to job site, inspect the trench prior to compaction and conduit placement, September 7, 1989.

One hour to inspect final work, to assure that conduit placement and attachments to the pole meet Pacific's specifications, September 14, 1989.

3. Material

\$1.81 per foot              30 feet duct                      \$ 54.30

4. PG&E Trench Cost                      \$132.00  
(Pacific's prorata share of the cost incurred by PG&E)

(END OF APPENDIX A)