

Decision 91-08-011 August 7, 1991

AUG 7 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Hermann Maeder, )  
 )  
 Complainant, )  
 )  
 vs. )  
 Pacific Bell (U 1001 C), )  
 Defendant. )

ORIGINAL

Case 90-11-043

(Filed November 26, 1990)

OPINION

This complaint was filed on November 26, 1990 by Hermann Maeder, a resident of California living at 16520 Spotted Fawn Lane, Cottonwood, California. The defendant, Pacific Bell, filed its answer on December 31, 1990 and the assigned administrative law judge (ALJ) convened a prehearing conference in Redding, California on February 7, 1991. An evidentiary hearing was held on April 2, 1991 in Sacramento, California. Both parties presented oral testimony and introduced exhibits consisting of photographs and maps. The matter was submitted on the filing of concurrent briefs on May 13, 1991.<sup>1</sup>

Maeder complains that Pacific Bell and members of his homeowners association have discriminated against him, preventing him from obtaining telephone service as a participant in several multiparty service extension projects. Maeder also alleges that Pacific Bell unreasonably refused to allow him to establish a part-aerial, part-underground extension and to construct a trench at a

<sup>1</sup> Charles Hoagland attended the hearing and served both as a percipient witness and as Maeder's representative.

low-cost location. The complainant asks the Commission to order Pacific Bell to provide a service extension free of charge.

Complainant's Testimony

In his complaint and testimony, Maeder gives an account of his ten-year struggle to obtain telephone service from Pacific Bell at his residence in Quail Ridge Estates II. In 1981, Maeder purchased a lot in this rural subdivision situated in the foothills 6 miles east of U.S. Highway 99 in Tehama County. Subsequently, he purchased two additional lots so that today he owns the entire eastern frontage of Spotted Fawn Lane. This street is an unpaved cul de sac within an easement 50 feet wide and approximately 2,000 feet long, owned and maintained by the Quail Ridge Estates II homeowners association.

When Maeder first located in Quail Ridge Estates II, no wireline telephone service was available. In 1985, some of his neighbors obtained rural radiotelephone service, but Maeder considered this option too expensive. Between 1988 and 1990, Pacific Bell undertook five line extension projects in Maeder's vicinity. No one contacted Maeder when the projects were undertaken. Maeder concluded that he had been excluded because he is of Swiss national origin. Maeder believes that Pacific Bell was involved directly or tacitly with members of his homeowners association in preventing him from obtaining telephone service through participation in the group line extension projects.

In July 1988, Maeder contacted Pacific Bell regarding a line extension. He was advised by way of a form contract that he would need an extension of 2,070 feet and that Pacific Bell's Tariff Schedule Cal. P.U.C. No. A4 provides for a free footage allowance of 750 feet for line extension and 300 feet for service

extension.<sup>2</sup> Any extension beyond the free footage allowance would cost \$1.10 per foot. Pacific Bell advised Maeder that he could furnish the necessary facilities in excess of the free footage allowance at his own cost in accordance with utility specifications and that he would be entitled to a refund if other customers subsequently received service from his line extension. Pacific Bell estimated that the cost of an aerial extension, if performed by Pacific Bell, would be \$1,858.56 including contribution for federal taxes.

On November 5, 1988, Pacific Bell engineer William J. Evans, Jr., visited the Maeder property and took measurements. Evans returned on several occasions during February 1989 and set stakes in the area to mark the alignment for the line extension. During these visits, Maeder and his contractor discussed various alternative alignments with Evans. Maeder objected to Evans' proposal on several points. Specifically, Maeder disagreed as to the need for a 12-foot deep culvert under Golden Meadow Trail, which connects to Spotted Fawn Lane, and one 9-foot deep under Spotted Fawn Lane itself. Maeder also objected to placing the extension at the outermost edge of the Spotted Fawn Lane easement. Maeder believed that this location would unnecessarily increase the costs of trenching.

Maeder told Evans that he wanted to traverse a portion of the extension alignment with overhead lines, to avoid having to install the culvert under Golden Meadow Trail, and then to complete the extension underground. Maeder also asked that the last 200 feet or so of the extension be shifted eastward some 20 feet to avoid steep terrain. Maeder preferred this design because his

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<sup>2</sup> The tariff defines a "line extension" as part of the utility's distribution service. A "service extension" or service connection facility is the line connecting the distribution facility and the building to be served. (See Rule 2.1.1.)

contractor advised him it could be constructed for about \$400. Evans declined to accept Maeder's proposals. Maeder then proposed to trench along the opposite, or western boundary of Spotted Fawn Lane. Evans agreed but insisted that the trench extend all the way around the cul de sac end of Spotted Fawn Lane, then return north to reach Maeder's residence. Maeder rejected this option because it would increase his trenching costs.

Maeder despaired of acquiring a line extension to his residence at a cost he considered reasonable. Instead, in September 1989, he purchased Lot 25 at the corner of Spotted Fawn Lane and Golden Meadow Trail and placed a trailer on the lot. Lot 25 was within the free footage allowance, so a service connection to the trailer was made free of line extension charges. The occupant of the trailer made the use of the telephone in the trailer available to Maeder. This arrangement, however, was less than satisfactory because the trailer and Maeder's residence were about 1,200 feet apart, and Maeder is physically disabled.

In April 1990, Maeder noticed another neighbor about 1,000 feet from his residence preparing a trench for a telephone line extension along Golden Doe Lane, a cul de sac street parallel to and about 400 feet east of Spotted Fawn Lane. Maeder observed that this trench was being dug nearer to the edge of the roadway than Evans had allowed for trenching along Spotted Fawn Lane.<sup>3</sup> Maeder concluded that Evans had discriminated against him because Evans allowed the neighbor to trench along the edge of the road.

<sup>3</sup> Trenching closer to the edge of the roadway tends to reduce costs where a street goes through a road cut with steep banks on each side.

while Maeder was required to keep to the boundary of the road easement.<sup>4</sup>

Maeder testified that throughout much of the period in question, he observed several instances in which he believed other neighbors were allowed to connect with Pacific Bell service via a combination of aerial and underground extensions. He also testified that others in his vicinity had obtained telephone service extensions to parcels on which no structures existed. He observed that today telephone service has been extended on three sides of his property, but not to his own residence. From all these circumstances, Maeder concludes that he has been the victim of discrimination by his neighbors and by Pacific Bell because he is Swiss.

Defendant's Testimony

Pacific Bell testified that Maeder was not included in any of the five line extension projects because in every case his inclusion would have caused the costs to other participants to increase. A summary of Pacific Bell's testimony on this point is shown below:

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4 The cul de sac easements in Quail Ridge are 50 feet wide but the travelled portions of Spotted Fawn Lane and Golden Doe are only about 20-30 feet wide and do not fully occupy the easements. As noted below, the roads do not uniformly follow the centerlines of the easements.

<u>Date</u>	<u>Project Name</u>	<u>Distance to Maeder's Residence</u>	<u>Additional Cost with Maeder Included</u>
6/20/88	Reed (10 parties)	2,070'	\$ 274.56
2/6/89	Barre (20 parties)	3,430'	183.10
1/15/90	Gipson (1 party)	2,776'	1,940.22
2/15/91	Hoagland (1 party)	1,245'	373.12
5/7/90	Ebaugh (2 parties)	2,495'	1,025.02

Pacific Bell also pointed out that Maeder's residence was more than 1/2 mile from the Gipson and Barre projects and was ineligible to participate in them for that reason as well.

Pacific Bell claims that its refusal to allow a combination aerial-underground extension was valid because the utility has discretion to determine whether aerial or underground extensions are more cost-effective and whether a customer-provided extension meets the utility's requirements.<sup>5</sup> Pacific Bell's witness Evans testified that the utility will allow customers to connect an overhead service extension to an underground line extension or vice versa. Evans testified that several of Maeder's observations were actually cases where customers had installed underground service extensions at their own expense.

Pacific Bell explained that it refused to allow Maeder to trench along the edge of Spotted Fawn Lane because of its concerns

<sup>5</sup> Pacific Bell's line extension tariff allows a customer to deviate from the route or type of extension so long as the deviation is acceptable to Pacific Bell and the customer pays for any increased costs.

for worker safety and maintaining general standards in the placement of underground utilities. As to the matter of Maeder's neighbor on Golden Doe Lane being allowed to trench closer to his street, Pacific Bell claimed that this was made necessary by differences in geometry and the presence of cut-and-fill along certain portions of Golden Doe Lane. Pacific Bell introduced a set of four photographs depicting the location for Maeder's trench as designed by Evans and a set of eight photographs showing the areas where his neighbor trenched at the road edge.

#### Discussion

The record in this matter amply shows that the exclusion of Maeder from the five line extension projects undertaken between June 20, 1988 and May 7, 1990 was not the result of wrongful discrimination against him on the part of Pacific Bell.<sup>6</sup> The applicable statute concerning discrimination by public utilities is Public Utilities (PU) Code § 453. In pertinent part, the statute provides:

"(a) 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.

"(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status. A person who has exhausted all administrative remedies with the commission may institute a suit for injunctive relief and reasonable attorney's fees in cases of an

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<sup>6</sup> We have no jurisdiction over the affairs of the homeowners association and its members, and therefore, make no findings as to Maeder's allegations of discrimination in regard to them.

alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees."

\* \* \*

"(e) The commission may determine any question of fact arising under this section."

Pacific Bell has shown that in each of the five extension projects, Maeder's inclusion would have resulted in increased costs to the other applicants in violation of its own tariff rules. Rule 4A4.3c provides for collective line extension applications. All applicants within 1/2 mile of each other can be combined into a single line extension project. Other applications situated beyond 1/2 mile are considered separate extension projects. Separate projects may be combined whenever it would result in lower charges, or no increase in charges, for all of the members of the group. In Maeder's case, the distance between his residence and the other applicants was greatly in excess of the standard free footage allowance. As a result, his contribution to the group's combined free footage allowance was overwhelmed by his contribution of footage for which a charge of \$1.10 per foot would have been levied. Moreover, Maeder's residence was more than 1/2 mile from the Gipson and Barre extension projects so he was not eligible to participate in these two projects under the tariff.

Although Maeder asserts that he was not included because of his Swiss nationality, he offered no evidence that Pacific Bell excluded him for that reason. Rather, it is clear that he was excluded because his residence at the end of Spotted Fawn Lane was simply too far from the others to enable him to join the group.



The basis for treating Maeder differently was, therefore, the location of his house and not his national origin or ancestry.<sup>7</sup>

We turn now to Maeder's claims that it was unreasonable and discriminatory for Evans to refuse to allow him to trench along the surface of Spotted Fawn Lane and to employ a combination of aerial and underground methods in his line extension. Tariff Rule A2 2.1.15, paragraph A3 provides that in lieu of paying for the costs of a route or type of construction determined by the utility, "the applicant may furnish such materials or perform such work as may be mutually agreed between the utility and the applicant."

PU Code §§ 451 and 453 set forth the basic standard for reviewing utility practices. PU Code § 451 provides:

"All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

"Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

"All rules made by public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

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7 It is perfectly valid for a utility to establish different classes of customers and to provide different rates and services to each, so long as the difference is reasonable (PU Code § 453(c)) and the basis for the classification is related to the nature of the service and not based on one of the criteria enumerated in PU Code § 453(b).

Under PU Code § 451 there is no significant difference between demanding a charge for a line extension and accepting customer-furnished facilities in lieu of an extension charge. In either case, whatever the utility demands must ultimately be "just and reasonable." Wherever a utility uses its own discretion to accept or reject customer-provided facilities under its tariff, it should not apply that discretion in a manner which is discriminatory or unreasonable contrary to the provisions of §§ 451 and 453.

We rely on utilities to make engineering decisions which promote the intent of the statute and take into account accepted engineering principles, the technical requirements of the telephone network involved, and the actual conditions at the site of a project. We agree that it is reasonable, in general, to locate an underground utility trench at the edge of an easement. However, that principle must yield where, as here, the topography of the underlying land presents an obstacle which would unreasonably increase the costs of the project in excess of the benefits to be had from keeping to the edge of the easement.

In Maeder's case, the 50-foot easement for Spotted Fawn Lane is occupied by a gravel road about 30 feet in width which deviates from the centerline of the easement in order to follow the contour of the ground surface. Spotted Fawn Lane serves only four parcels, three of which are owned by the complainant. In these respects, Spotted Fawn Lane and Golden Doe Lane are virtually identical.

Pacific Bell's witness testified that he chose the location based on the terrain of Spotted Fawn Lane, concerns for safety, ability to serve other customers along the route, the general practice of placing utility service extensions, local government specifications, and to avoid erosion. (See Tr., p. 81, l. 1 to p. 88, l. 4.) Yet in the case of Maeder's neighbor on Golden Doe Lane, the same engineer allowed trenching along the

roadside where the road was cut into a bank or crossed filled areas with steep embankments. Maeder and his witness, Hoagland, claimed that cuts and fills exist along portions of Spotted Fawn Lane as well.

We think that to avoid granting a preference to the customer on Golden Doe Lane and disadvantaging Maeder, the same criteria should be applied to trenching on both roads, and in the same manner as well. Pacific Bell offered nothing to show that there was any difference between Spotted Fawn Lane and Golden Doe Lane with respect to safety, local government requirements or traditional public utility easement design.<sup>8</sup> Wherever cuts or fills exist on Spotted Fawn Lane equal in height or depth to those on Golden Doe Lane where trenching near the road was permitted, Maeder should also be allowed to trench to the edge of the travelled roadway.<sup>9</sup>

As to the question of whether a customer-furnished line extension must be entirely over- or underground, we would apply the same test of reasonableness. We note that Evans initially proposed that Maeder's extension be entirely aerial (Tr., p. 88, l. 5-7). Maeder elected to pay for a different type of service and to furnish the trench himself under Tariff Rule 2A, 2.1.15A.1 and 2. The record does not show any basis for Evans' refusal to allow Maeder to be served by an aerial extension along a short portion of Golden Meadow Trail between the end of the Reed extension and the

<sup>8</sup> At the hearing, Evans denied ever telling Maeder that his road was more heavily travelled than Golden Doe. Maeder maintained that Golden Doe is the more heavily travelled of the two roads.

<sup>9</sup> The precise locations of cuts and fills on Spotted Fawn Lane were not established by the parties. The example of the trench on Golden Doe Lane, however, shall serve as a guideline to the parties to indicate where Maeder's trench may be allowed to approach the edge of the road.

intersection with Spotted Fawn Lane and then to proceed along either Spotted Fawn Lane underground. Clearly, the tariff itself does not require that an applicant choose between an all-underground and an all-aerial line extension. Pacific Bell offered nothing to show that Maeder's proposal for some 150 feet of aerial extension would be any less desirable than Evans' proposal that the entire extension be made overhead. Maeder, on the other hand, proved that his proposal would avoid high trenching costs under Golden Meadow Trail.

We, therefore, conclude that Pacific Bell's refusal to accept a part-aerial, part-underground extension was unreasonable and unjust, contrary to the provisions of PU Code §451.<sup>10</sup>

**Conclusion**

We find that Maeder should be allowed to obtain Pacific Bell service through a line extension which may be partially aerial and partially underground and that he may construct a trench for the underground portion of the extension along the travelled surface of Spotted Fawn Lane wherever that roadway crosses through road cuts or over filled embankments.

We note in addition that since the original dispute arose between Maeder and Pacific Bell, Maeder acquired all of the

10 Even if we were to assume that Pacific Bell's all-overhead or all-underground requirement was reasonable as to line extensions, there is nothing in the record to show why Maeder could not establish service by way of a 2,000 foot service connection across his three parcels. In such a case, we believe Maeder could place an underground trench for the service extension to his residence wherever he wishes, subject to his granting of a valid and suitable easement by which the utility could access the service extension. This approach appears entirely consistent with the treatment of other customers in the subdivision.

property along the eastern frontage of Spotted Fawn Lane.<sup>11</sup> Additional line extensions have now been constructed along Golden Doe Lane, several hundred feet to the east of his residence, and to his lot at the intersection of Spotted Fawn Lane and Golden Meadow Trail. We strongly urge the parties to review these new developments and to consider whether the costs and options for obtaining a line and/or service extension are different today.

As to Maeder's request that this Commission order Pacific Bell to provide a line extension to his residence free of charge, that request is denied. Maeder is entitled to nothing more and nothing less than a line extension as provided under Pacific Bell's line extension tariffs. Maeder may obtain a line extension without charge only to the extent of the tariff free footage allowance and not as the result of a penalty or damages.

#### Findings of Fact

1. Complainant purchased land on Spotted Fawn Lane in Quail Ridge Estates II, a rural subdivision near Cottonwood, California in 1981.
2. Between 1988 and 1990, Pacific Bell formed five telephone service extension projects within the subdivision.
3. Neither Pacific Bell nor any of the participants in the line extension projects notified complainant or sought to include him in the projects.
4. Complainant's residence was located over one-half mile from two of the five extension projects.
5. If Maeder had been included in any of the five extension projects, the costs of the line extensions to the other participants would have increased.

<sup>11</sup> At the time Pacific Bell determined its preferred trench alignment, it was not aware that Maeder had acquired all three lots along the east frontage of Spotted Fawn Lane.

6. No evidence was presented tending to show that Maeder was excluded from the five line extension projects because of his race, religion, color, physical handicap, medical condition, occupation, sex, marital status, national origin or ancestry.

7. On or about October 26, 1988, Pacific Bell offered to construct a 2,070-foot aerial telephone service extension to Maeder's residence at a cost of \$1,858.56, including contribution for federal taxes.

8. Between November 1988 and February 1989, Maeder and Pacific Bell engineer Evans discussed the alignment and type of line extension Maeder preferred to serve his residence.

9. Evans determined that the line extension should be an overhead wire along the east frontage of Spotted Fawn Lane.

10. Maeder proposed an overhead extension crossing Golden Meadow Trail then continuing south along portions of the edge of Spotted Fawn Lane by way of an underground line.

11. Evans refused to accept a part-aerial, part-underground line extension and refused to allow an underground extension to deviate from the eastern edge of the easement of Spotted Fawn Lane.

12. Spotted Fawn Lane is a 30-foot gravel road within a 50-foot wide road and public utilities easement owned and maintained by the Quail Ridge Estates II homeowners association.

13. Spotted Fawn Lane deviates from the centerline of the easement as required by the terrain it crosses.

14. Installing an underground trench in the manner determined by Evans would result in increased costs to Maeder due to the terrain along the route and the need to cross beneath Golden Meadow Trail.

15. Maeder's neighbor was allowed to construct an underground line extension along the edge of Golden Doe Lane several hundred feet to the northeast of Spotted Fawn Lane where Golden Doe Lane traverses road cuts or filled embankments.

16. Evans determined that Maeder's underground trench should follow the edge of the Spotted Fawn Lane easement because of concerns for safety and to facilitate future service to other lots on Spotted Fawn Lane.

17. The Spotted Fawn Lane and Golden Doe Lane easements are identical in width, purpose, and ownership, and both contain 30-foot gravelled roads and traverse areas of cut banks.

18. Nothing in Pacific Bell's tariff prohibits line extensions which are part-aerial and part-underground so long as the cost of any deviation from the route determined by Pacific Bell is paid by the customer.

Conclusions of Law

1. Pacific Bell did not violate any tariff, rule or order of the Commission or any state statute applicable to public utilities in failing to include the complainant in the five line extension projects it undertook in Quail Ridge Estates II between 1988 and 1990.

2. Pacific Bell's refusal to allow Maeder to furnish a part-aerial, part-underground line and service extension was unreasonable in light of the circumstances in violation of PU Code § 451.

3. Pacific Bell's refusal to allow Maeder to place a trench for underground line extension at the edge of the travel surface of Spotted Fawn Lane at points where the roadway traverses cut bank or filled areas was unreasonable in violation of PU Code § 451.

4. Pacific Bell's refusal to allow Maeder to utilize the edge of the Spotted Fawn Lane roadway over or through fills and cut banks while allowing his neighbor on Golden Doe Lane to do so resulted in the making or granting of a preference or advantage to the neighbor and subjecting Maeder to a prejudice or disadvantage in violation of PU Code § 453(a).

5. Pacific Bell should be ordered to accept a line extension facility furnished by Maeder in lieu of line extension footage

charges. The facility (a) may cross Golden Meadow Trail by way of aerial extension, (b) may be constructed in part within an existing underground trench, and (c) may be located at the eastern edge of the travelled portion of Spotted Fawn Lane along portions of the roadway which traverse cut banks or filled areas, but must otherwise meet utility specifications.

**ORDER**

**IT IS ORDERED that:**

1. Hermann Maeder's complaint is denied insofar as it alleges that he was wrongfully excluded from participation in five line extension projects in Quail Ridge Estates II.

2. Pacific Bell shall not refuse to accept line extension facilities consisting of an aerial extension over Golden Meadow Trail and an underground trench, contributed by Maeder in lieu of footage charges.

3. Pacific Bell shall not refuse to accept an underground trench for an underground line extension located at the edge of the travelled portion of Spotted Fawn Lane along portions of the roadway which traverse cut banks or filled areas, and contributed by Maeder in lieu of line extension charges.



4. This order shall constitute a complete resolution of the complaint, and subject to provisions of law providing for rehearing, modification, and judicial review, the proceeding is closed.

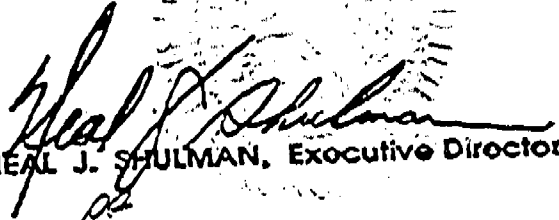
This order becomes effective 30 days from today.

Dated August 7, 1991, at San Francisco, California.

PATRICIA M. ECKERT  
President  
G. MITCHELL WILK  
JOHN B. OHANIAN  
NORMAN D. SHUMWAY  
Commissioners

Commissioner Daniel Wm. Fessler,  
being necessarily absent, did  
not participate.

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

  
NEAL J. SHULMAN, Executive Director