Decision 83 05 007 MAY 4 1983 ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DANIEL M. ELDRIDGE, et al.,
Complainants,
vs.
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

Case 11043
(Filed October 28, 1981; amended November 9, 1981)

Graham & James, by Thomas J. MacBride, Jr., Attorney at Law, for Daniel M. Eldridge, complainant.
Daniel J. McCarthy, Attorney at Law, for The Pacific Telephone and Telegraph Company, defendant.
David M. Shantz, for the Commission staff.

OPINION ON REHEARING OF DECISION 82-04-084

I. Summary

Rehearing of Decision 82-04-084 was granted by the Commission on July 7, 1982 in order to determine whether the Pacific Telephone and Telegraph Company (Pacific) should be ordered to cease charging Centrex service charges to all dormitory residents within its service area and instead ordered to apply the residential charges as set forth in Schedule Cal. P.U.C. No. 28-T, Section IV, Multi-Element Service Charges and, further, whether reparations should be paid to complainant and other dormitory residents who received Centrex service from Pacific in the fall of 1981. Since the grant of rehearing, Pacific has voluntarily modified its Centrex charges, reducing the Centrex installation and in-place connection charge to conform to that paid by other residential customers. This issue of the proceeding is thereby moot.

Pacific filed a Motion to Dismiss on September 20, 1982 with respect to the remaining issue of reparations. This motion requests that those portions of the complaint which "seek refunds of any monies collected for the installation and service connection of Centrex dormitory service" be stricken. By this order, Pacific's Motion to Dismiss is granted. As discussed herein, because reparations are precluded as a matter of law in the instant case, complainants' request for such must be denied. Since no factual issues remain to be resolved upon rehearing, this proceeding is hereby terminated.

II. Background

The primary issue in this case is whether the Commission has authority to order partial refunds of payments collected by Pacific under its filed tariffs.

Complainant, Daniel M. Eldridge, is a dormitory resident at UC Berkeley. He and other dormitory residents filed a complaint against Pacific alleging that Pacific's charge in the fall 1981 for the reconnection of telephones already installed at the dormitories was excessive.

In its answer, Pacific asserted that its $33.16 installation charge is set forth in its filed tariffs for Centrex service at the dormitories. Pacific further asserted that it could not provide service at any rate other than its tariffed rates.

A hearing was held at Berkeley on January 27, 1982 under the Commission's Expedited Complaint Procedure. The Commission issued Decision (D.) 82-04-084 on April 21, 1982, finding that dormitory residents should pay the residential multi-element service establishment charge of $23 rather than the Centrex tariff charge of $33.16. Pacific was ordered to refund the difference between these two rates.

On May 11, 1982, Pacific filed an application for rehearing of D.82-04-084. Rehearing was granted in D.82-07-043 on July 7,

1982. The rehearing is held under the Commission's formal complaint procedure.

A prehearing conference was held on August 27, 1982 at which time Pacific indicated its intent to file a motion to dismiss. The motion was filed on September 20, 1982. Complainant filed a response on October 18, 1982. Pacific then filed a reply on October 22, 1982.

On August 26, 1982, Pacific filed Advice Letter 14326 reducing the Centrex installation and in-place connection charge of $33.16 to $23; accordingly, the dormitory residents paid the same fee that residential customers did in the fall of 1982.

III. Motion to Dismiss

Pacific argues in its motion that this complaint should be dismissed since the Commission already has found the Centrex dormitory service rates to be just and reasonable.

Pacific notes that the Commission issued Order Instituting Investigation (OII) in Case 10191 on October 13, 1976 to determine the cost basis of Centrex service and to establish appropriate rates. Pacific presented allocated cost results, and the Commission staff (staff) recommended adjustments to these results. The cost study using Pacific's GE-100 methodology was adopted as a reasonable basis for setting Centrex rates.

On May 22, 1979 the Commission issued D.90309, finding that:

> "27. The increases in Centrex rates and charges authorized herein are justified; the rates and charges authorized herein are reasonable; and the present Centrex rates and charges insofar as they differ from those prescribed herein, are for the future unjust and unreasonable."

The Commission then authorized Pacific to file revised tariffs with a $17 installation charge. This charge was increased to $20.50 in D.91495 and then again increased to $21.61 in D.93367. This $21.61

installation rate is part of the $33.16 charge which was collected from complainant in October 1981.

The other part of the $33.16 charge is the in-place connection charge of $11.55. This rate was first set at $1.75 in 1964 and has been increased to $11.55 in seven general rate cases.

Pacific submits that both components of the $33.16 fee for reconnecting Centrex service at UC Berkeley have been previously found just and reasonable by the Commission. Pacific then argues that the Commission cannot order refunds of rates which have been found to be just and reasonable. Pacific asserts that such a refund order would be unlawful retroactive ratemaking.

Pacific relies upon Public Utilities (PU) Code §§ 728 and 734 which provide:

> "Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force. (Emphasis added.)

> "When complaint has been made to the commission concerning any rate for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an unreasonable, excessive, or discriminatory amount therefor in violation of any of the provisions of this part, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection if no discrimination would result from such reparation. No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable, and no

assignment of a reparation claim shall be recognized by the commission except assignments by operation of law as in cases of death, insanity, bankruptcy, receivership or order of court." (Emphasis added.)

Pacific argues that the above sections of the PU Code show that refunds are improper when the tariffs or rates had been approved by the Commission. In Pacific's opinion, a refund order would violate the longstanding rule against retroactive ratemaking. (See Pacific Tel. & Tel. Co. v Public Util. Comm. (1965) 62 Cal 2d 634; City of Los Angeles v Public Util. Comm. (1972) 7 Cal 3d 331.)

IV. Complainant's Response

Complainant responds that PU Code § 734 permits the Commission to order reparation of discriminatory charges collected from utility customers. Complainant points out that the Commission found in D.82-04-084 that it was "discriminatory to charge dormitory residents a greater amount than other residential customers for equivalent service establishment functions." (D.82-04-084, page 8.) If the Commission should affirm this finding on rehearing, complainant asserts that an award of reparations is proper.

Complainant argues that Pacific fails to distinguish the legislative ratemaking function of the Commission from its judicial function of awarding reparations. Complainant asserts that the refunds sought would not violate the bar against retroactive ratemaking but would be lawful reparations because the Commission would be acting in its quasi-judicial and not its quasi-legislative role. While the fixing of a rate is prospective in nature and quasi-legislative in character, reparation looks to the past with a view toward remedying private injury and is quasi-judicial. (Consumer's Lobby Against Monopolies, et al. v Public Utilities Commission (1979) 25 Cal 3d 891.) Complainant contends this is a case of discrimination which requires the Commission to examine a particular factual situation and to determine if a past "partiality" in the charges for installation and reconnection of residential telephone

service existed. Complainant emphasizes that they merely seek reparation for the injury they and other dormitory residents have suffered from past discrimination; a reevaluation of Pacific's general rates is not required.

Complainant argues that PU Code § 734 permits an award of reparations on any of three grounds, that is where the "utility has charged an unreasonable, excessive or discriminatory amount." Complainant then points out that PU Code § 734 prohibits an order for payment of reparations only on the ground of unreasonableness. In complainant's opinion, this distinction prevents the Commission from finding approved rates to be unreasonable on a retroactive basis. Complainant contends that reparations based on a factual finding of discrimination are not barred even if the amount charged was approved through a tariff filing.

Complainant asserts that the prohibition against retroactive ratemaking prevents the Commission from exercising its quasi-legislative power to hold a second ratemaking proceeding, formulate new policies, reduce rates, and order retroactive refunds. However, complainant urges that the Commission is not precluded from exercising its quasi-judicial power to find an approved tariff to be discriminatory. Otherwise, complainant argues that the reparations provisions would be substantially emasculated. Complainant submits that denying reparations in these types of cases will prevent customers from raising valid claims about an inequity in Pacific's tariffs.

V. Pacific's Reply

Pacific asserts that complainant is attempting to evade the prohibition in PU Code § 734 barring reparations from rates previously found to be reasonable by the Commission.

Pacific claims this case does not present an issue of discrimination. Pacific recognizes that dormitory residents receiving Centrex service and residential customers paid different

installation charges in the fall 1981. However, Pacific maintains that the two customer groups are different and receive different services. Pacific asserts that the two groups are not in like circumstances, and, therefore, the different rates are justified and nondiscriminatory.

Pacific also argues that the different rates were approved by the Commission and that Pacific is bound to follow its filed tariffs. In Pacific's view, a finding of discrimination would be appropriate only if Pacific had not applied its tariffs equally among all dormitory residents receiving Centrex service.

Pacific asserts that the reparations provisions of PU Code § 734 were never intended to be applied when tariffed rates were charged. Pacific states that reparations are appropriate only if service is disrupted or if a utility applied the wrong tariff or incorrectly applied the right tariff.

VI. Discussion

The installation rates at issue were established in ratemaking proceedings in which cost of service studies were reviewed and ratemaking policies were adopted. Once these rates were established by Pacific in a ratemaking proceeding and then approved by the Commission, they could be adjusted only on a prospective basis. The Commission cannot retroactively adjust these rates, and we do not intend to do so in this case.

We further conclude that the requested order for payment of reparations is not permitted under P.U. Code §734. Where the properly applicable rate is charged and where that rate has by formal finding been declared by the Commission to be reasonable, an award of reparations on the ground of unreasonableness is prohibited by Section 734. We reject complainant's interpretation of Section 734 and agree with Pacific that complainant's construction of the statute is an attempt to evade the statutory prohibition barring reparations from rates previously found to be reasonable by the Commission.

Complainant's interpretation of the statute would require the Commission to draw a critical distinction between approved rates that are later found unreasonable and those that are later found to be excessive or discriminatory, a distinction that we do not believe comports with the Legislature's intent in enacting the prohibition of Section 734. This distinction is, moreover, virtually impossible to establish from a practical perspective. Indeed such a distinction in the instant case is illusory. In the complaint before us, we are not concerned with the application of rates in an alleged discriminatory manner but rather with the establishment and maintenance of rates. P.U. Code §453(c), as set forth below, is thereby applicable:

> "(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." (Emphasis supplied.)

The claim of discrimination now at issue is, therefore, statutorily defined in terms of unreasonableness. The substance of the complaint is clearly that the rates established for dormitory students were unreasonable. A subtle difference in the label of a complaint from unreasonable to discriminatory changes neither its substance nor the meaning of Section 734. We conclude that the distinction complainant urges should be rejected and that the prohibition against an order for payment of reparations is applicable.

While we commend the efforts by complainant in this proceeding and acknowledge the utility's voluntary modification which has resulted from complainant's initiative in this regard, the power of the Commission is limited by its statutory authority. Since the rate in question has by formal finding been declared by the Commission to be reasonable, the award of reparations requested in the instant case is precluded by P.U. Code §734.

We further determine that it is unnecessary to hold further hearings in this proceeding. The utility has voluntarily modified its Centrex charges reducing the Centrex installation and in-place

connection charge to conform to that paid by other residential customers. Since the fall of 1982, the service charges for dormitory students and residential customers have been the same. The only remaining issue is whether the Commission should award reparations to complainant and other dormitory residents who received Centrex from Pacific in the fall of 1981. Since we conclude that such an award is precluded by law, no factual issues remain to be resolved upon rehearing. Accordingly, Pacific's Motion to Dismiss is granted and these proceedings are terminated.

If complainant elects to pursue judicial review of this decision, his appropriate remedy is to first exhaust administrative remedies by filing an Application for Rehearing pursuant to P.U. Code Section 1731.

Findings of Fact

1. Pacific charged an installation and reconnection fee of $33.16 in the fall of 1981 to dormitory residents receiving Centrex service.

2. Pacific charged an installation and reconnection fee of $23 in the fall of 1981 to other residential customers.

3. The different installation and reconnection fees charged by Pacific in the fall 1981 were authorized by approved tariff schedules.

4. By Advice Letter 14326 filed August 26, 1982, Pacific has voluntarily modified its Centrex charges reducing the Centrex installation and in-place connection charge of $33.16 to $23.

Conclusions of Law

1. Once the installation and reconnection rates were established by Pacific in a ratemaking proceeding and then approved by the Commission, the Commission may adjust these rates only on a prospective basis.

2. Since the rate in question has by formal finding been declared by the Commission to be reasonable, an award of reparations is precluded by P.U. Code §734.

3. Because the relief sought is precluded by law, it is unnecessary to hold further hearings in this proceeding.

ORDER

IT IS HEREBY ORDERED that:

1. The motion of Pacific Telephone and Telegraph Company filed September 20, 1982 requesting that C.11043 be dismissed is granted.
2. The proceedings in C.11043 are hereby terminated.

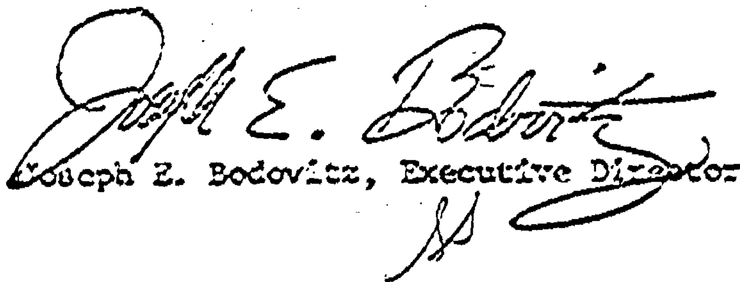
This order becomes effective 30 days from today.

Dated MAY 4 1983, at San Francisco, California.

I will file a written dissent.
/s/ VICTOR CALVO
Commissioner

LEONARD M. GRIMES, JR.
President
PRISCILLA C. GREW
DONALD VIAL
Commissioners

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



Joseph E. Bodovitz, Executive Director

H-3a

C.11043

COMMISSIONER VICTOR CALVO

I dissent.

Section 734 sets forth three specific grounds upon which the Commission may award reparation to a complainant after investigation of a utility's rates. These grounds are unreasonableness, excessiveness or discrimination. Only upon the ground of unreasonableness does Section 734 expressly prohibit an award of reparation where the rate in question has been declared reasonable by formal finding of the Commission. Had the Legislature intended to prohibit reparation in like circumstances on the basis of discrimination, as alleged by complainant, it would have plainly said so.

My concern is that the complainant in this case has made a prima facie showing that no rational basis existed in the fall of 1981 for charging dormitory residential customers a larger amount for installation and reconnection of telephone service than that charged for other residential customers. Indeed since the fall of 1983 Pacific has charged both types of residential customers the same rate for these services. Assuming that Pacific provides no further justification to support the difference in charges previously in effect, I believe that the law permits the Commission to remedy the past discrimination by an award of reparation to complainant.

May 4, 1983
San Francisco, California

VICTOR CALVO, Commissioner