

Decision 63 99 008 SEP 7 1983

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

JOSEPH TATE,)
)
 Complainant,)
)
 v.)
)
 Pacific Telephone and Telegraph)
 Company,)
)
 Defendant.)

ORIGINAL

Case 82-06-02
(Filed June 8, 1982)

Carl B. Shapiro, Attorney at Law, for Joseph Tate, complainant.

Margaret deB. Brown, Attorney at Law, for The Pacific Telephone and Telegraph Company, defendant.

O P I N I O N

Joseph Tate¹ seeks an order requiring the Pacific Telephone and Telegraph Company (Pacific) to install telephone service at Pamela Tate's houseboat, Moonshiner, moored on the Sausalito waterfront in the Gate 6 area in a marina leased and operated by Waldo Point Harbor.

Tate alleges that in September 1981, when he tried to have his telephone service in another area of Sausalito transferred to Pamela Tate's houseboat, Pacific refused, because, as Tate explained in his complaint:

1 The caption of the original complaint included Pamela Tate as a complainant. However, her name was stricken by the Docket Office because she did not sign the complaint. (Public Utilities (PU) Code Section 1702; Rules of Practice and Procedure, Rule 4.)

"Access to the premises was refused by the owner of the property through the person of one Ted Rose, who asserted he was the property manager and further asserted that the installer was a trespasser."

Tate allegedly requires telephone service to enhance his employment opportunities, and to provide for his son Sam's medical care. Sam has muscular dystrophy and is confined to a wheelchair.

A public hearing was held before Administrative Law Judge (ALJ) Baer on April 15, 1983, and was submitted subject to the filing of concurrent briefs on April 21, 1983. The briefs have been filed and the case is ready for decision.

Complainant's Testimony

Tate testified that he does not pay any rent to Waldo Point Harbor. The houseboat belongs to Pamela Tate and she has made all the arrangements for its existence at Waldo Point Harbor. Pamela Tate has resided on the houseboat for about four years. Tate claims no right, title, or interest in the tidelands where the houseboat is moored or to the dry land to which the houseboat is connected by walkways. Tate, however, testified that the houseboat is a part of the Gate 6 Co-op which has a special arrangement with the Marin County Housing Authority and Waldo Point Harbor. Tate pays rent to the Gate 6 Co-op. Pamela Tate further testified that the Gate 6 Co-op, Waldo Point Harbor, the Housing Authority, and the Buck Foundation are negotiating leases and funds to be transferred. No agreements have been reached that she knows of.²

Tate admits that the owner of the property has refused Pacific access to such properties through its manager, Ted Rose.

² Yet she also testified that the Co-op leases approved bathrooms.

Tate's testimony regarding all his contacts with Pacific personnel is that they consistently represented to him that they could not provide service to the houseboat because the area was condemned and the Harbormaster would not allow it.

Tate argues that Pacific has discriminated against him by installing service to others, but not to him. The evidence shows that Pacific sends its personnel onto the property to maintain the existing service and that in one case it installed a telephone on a houseboat in the Gate 6 area. In that case the wires were in place.

Pacific's Testimony

Pacific's witness Lamanno corroborated Tate's evidence. Lamanno testified that Ted Rose is the proprietor, manager, and legal owner of Waldo Point Harbor and the Gate 6 property, and that Rose told Lamanno that "they would have the Deputy Sheriff of Marin County there should we attempt to install any more phones on their property without their permission." Lamanno denied service to Tate because "we would be trespassing [on Rose's property] if we tried to install service out there." Lamanno had seen a letter of April 1979, from attorneys for "Waldo Point Harbor putting the phone company on guard that they own the property and that we are not to install any more service out there." Lamanno "was told by the previous [Pacific] supervisor that at one time a sheriff deputy was there and they threatened to have the installer arrested for trespassing." Lamanno knows that Ted Rose has explained his position to the Pacific engineer who now works in the area, to the Pacific engineer who recently retired, and to Pacific managers involved with installation crews. His own contact with Rose is similar to Rose's contact with other Pacific employees.

Lamanno met with Tate on July 6, 1982, to discuss his application for service. On July 7, 1982, Lamanno sent a letter to Tate setting out their agreement as Lamanno understood it. That letter, dated July 7, 1982, emphasized the problem of access. Lamanno's conversation with Ted Rose occurred on July 7 or 8, 1982.

Pacific has interpreted Rose's or Waldo Point Harbor's demands to allow routine service but to forbid the installation of new service wires. Pacific's employees believe that such overt conduct will make them liable to arrest. Thus, they refrain from doing such work.

Discussion

This is the fourth complaint brought to us by a member of the Sausalito houseboat community who resides in the Gate 6 area of the Sausalito waterfront leased by Waldo Point Harbor. As in each of the three prior cases, this complaint exhibits similar characteristics: Each complainant has resided in the houseboat community for several years; each of the complainants does not pay rent to Waldo Point Harbor; and in each case, Waldo Point Harbor has threatened to arrest Pacific for trespass to prevent access to the waterfront to Pacific for the purpose of installing service to non-rent-paying residents.

In the two cases in which the Commission ordered Pacific to establish telephone service, Pacific did so without confrontation with Waldo Point Harbor. In the third case, Pacific installed service without the intervention of the Commission. In each of these cases the houseboat resident paid Pacific for telephone service.

We are now asked to direct Pacific to install service to the instant complainant on the basis that he is similarly situated to the complainants in the prior three cases.

At the outset we reaffirm our policy announced in Rouda et al v. Pacific Decision (D.) 93784 dated December 1, 1981 that "customers be provided utility service without discrimination. We recognize the universal necessity of having telephone service

in health and welfare emergencies, in applying for a job, and in contacting family and friends." (p.7) This policy is consistent with statutory policy embodied in PU Code Section 453 which requires utilities to provide service on a nondiscriminatory basis. ✓

In this circumstance, as was evident in the prior circumstances, the policy to provide a basic utility service without discrimination competes with the property rights of landlords vis à vis tenants. We must therefore consider each of these policies in resolving this matter.

We will address two primary issues. First, is the complainant similarly situated to the complainants in previous cases such that denial of telephone service to him would be unduly discriminatory? Second, if the complainant is similarly situated to others, does the refusal of Waldo Point Harbor to provide access to Pacific to install telephone service excuse Pacific from doing so?

Is Complainant Similarly Situated to Complainants in Previous Cases?

As already discussed, this complaint shares many similarities with each of the prior three complaints. We will focus only on the distinctions presented in the other cases.

In Lyons v. Pacific, D.92057 dated May 3, 1979, two distinguishing factors are apparent. First, complainant was pregnant at the time she requested service and required telephone service for health purposes. The Commission thus found that deprivation of telephone service could endanger the health of complainant or the life of her unborn child. (Finding 4)³ However, subsequent to the birth of her child, the complainant continued to reside on the houseboat with telephone service. Hence, this distinction has disappeared.

Second, the prior tenant's telephone was still on the complainant's houseboat and was connected to the telephone pole next to the boat. In this case, no existing telephone facilities are present on complainant's houseboat.

³ Also, in Lyons we specifically found that deprivation of telephone service to complainant "would unreasonably constitute discrimination in the furnishing of public utility service." (Finding 4)

In Myers v. Pacific D.91794 dated May 20, 1980, Pacific agreed to install service without going to hearing. The only distinction raised by Pacific is that, similar to Lyons, Myers' houseboat already contained certain telephone facilities such that only a modular jack was required. However, it is not clear whether wiring and instruments had already been installed.

Lastly, in Rouda et al v. Pacific the Commission ordered installation of service to complainant on the houseboat of a neighboring resident who was paying rent to Waldo Point Harbor. Complainant had requested service on his neighbor's boat with his neighbor's consent as an option to service on his own houseboat. The Commission adopted this alternative, and service was provided. In the instant case complainant desires service on his own houseboat.

During the hearings in this case Pacific's witness testified that he had seen a letter dated sometime in 1979 from Waldo Point Harbor to Pacific in which Waldo Point Harbor demanded that Pacific not install new services to nonpaying residents of the Gate 6 area. The witness also explained that the manager of the area threatened to call the Marin County Sheriff's Department to prevent access by Pacific's installers engaged in establishing new service. These demands and threats have not been interpreted by Pacific's personnel to forbid their access to the area to maintain existing services nor to attach a telephone to existing wiring. Pacific, however, will not install new lines in the area in the face of the demands and threats of Waldo Point Harbor.

Accordingly, Pacific draws the distinction that since this complainant requires the installation of new telephone facilities, including wires and the construction of a 10 foot pole, Pacific is unable to make the installation in light of the demand and threats cited above.

Our review of each of the prior complaints leads us to conclude that the only apparent distinction in the case before us is that service to complainant requires the stringing of new wires and the construction of a 10 foot pole for telephone service. We question whether this distinction is material when in all other respects this complainant is similarly situated to previous complainants. We think not. Pacific has complied with our orders to install service in two prior cases and voluntarily installed service in the third case.⁴ In none of these cases were Pacific's employees arrested for trespass, notwithstanding the 1979 letter and threats by Waldo Point Harbor against Pacific in establishing new service to nonpaying residents. We therefore conclude that Pacific is treating this complainant in a different manner from previous complainants.

We now must ask whether the refusal of Waldo Point Harbor to provide access to Pacific to install telephone service to complainant excuses Pacific from doing so?

Does Denial of Access to Complainant's Residence Excuse Pacific From Serving Complainant?

While we recognize that the Commission has no authority to regulate landlord-tenant relationships, we believe it necessary to review the facts surrounding this particular relationship and applicable law in evaluating how Waldo Point Harbor's property rights affect the duty of a public utility to provide service on a nondiscriminatory basis.

From this record and the two prior records the following facts can be adduced:

- (1) Waldo Point Harbor has allowed access to its property to Pacific to install new telephone service to nonpaying residents as recently as January 1983.

⁴ In the case of Rouda, a second line was installed in the house-boat of a paying tenant. We would expect that new wiring was required to make the installation for new service.

- (2) Complainant in this case receives electric and water service from Pacific Gas and Electric Company and Marin Municipal Water District, which required the utility to enter the property of Waldo Point Harbor.
- (3) Waldo Point Harbor allows access to Pacific to maintain and repair service to existing residents whether or not they pay rent to Waldo Point Harbor.
- (4) Waldo Point Harbor has never served complainant with a notice to evict the premises.

With respect to the last fact, we are not aware of any unlawful detainer action against this complainant during his continuous residency or against any other nonpaying resident of Waldo Point Harbor. We do know, however, that representatives of the houseboat community who reside in the Gate 6 area, Waldo Point Harbor, and the San Francisco (Buck) Foundation have been trying to negotiate a resolution of the landlord-tenant issues.

All of these facts lead us to conclude that there is a rather unique landlord-tenant relationship between Waldo Point Harbor and the houseboat residents in which no clear or consistent policy by the landlord emerges. The relationship has persisted for many years, which indicates some acquiescence by the landlord, however reluctant, with the status quo.

The relationship is further defined by the following applicable law. First, we observe that Waldo Point Harbor has direct legal remedies available to evict residents who do not pay rent and thereby enforce its property rights. Unlawful detainer actions may be filed pursuant to Section 1161 of the Code of Civil Procedure. Waldo Point Harbor has not filed such action against this complainant.

Next, we are cognizant of California case law which prohibits a landlord from evicting a resident by causing the termination

of utility services. /See Hale v. Morgan, 22 C. 3d 388 (1978) wherein the landlord was assessed punitive fines under Section 789.3 of the Civil Code for depriving non-rent-paying tenants of electric and water service. The only major distinction in Hale v. Morgan is that the tenants, who had never paid rent, had managed to obtain utility service initially. .C. f. Kinny v. Vaccari, 27 C. 3d 348 at 355 (1980).7

Lastly, we note our own decision of Mak v. Pacific (1971) which discusses a property owner's interest in giving access to a utility. In Mak the complainant sought the removal of Pacific's terminal equipment from the roof of her apartment house. Notably, that equipment was serving both her own building and a neighboring building. Mrs. Mak therefore invoked Rule (11) A (8) which applies primarily to situations where a property owner may refuse permission to a utility to cross or use his property to serve another property owner. In Mak we also applied the rule to situations in which a landlord, like Mrs. Mak, refused to allow the utility to install a terminal on her roof to serve her own tenants.

We note, however, two major distinctions between Mak and the instant case. In Mak the landlord refused access to her roof for safety reasons. In this case Pacific testified that there is no safety risk in installing service to this complainant. Secondly, the Commission observed that Mrs. Mak's tenants could be served equally well by an alternate location. In this case, no alternative means of providing service appear to exist.

In addition to the above distinctions, we do not believe that our decision in Mak broadly authorizes a landlord to refuse for any reason access to a utility to provide service to a tenant. For example, if a tenant stops paying rent and subsequently requires a telephone repair at his apartment, we do not believe that a landlord can lawfully deprive the tenant of utility service by denying access to the apartment. The utility should continue to serve the tenant and thereby require the landlord to pursue his legal remedies in court.

Considering all of the facts and applicable law, we can now determine whether Waldo Point Harbor can exercise its property rights in a way that prevents Pacific from carrying out its obligation to serve this resident on a nondiscriminatory basis. We do not intend, nor are we authorized to determine either the property rights of the landlord or the residency claim of this complainant; however, we realize that our action in this case directly affects each of these. If we deny the instant complaint, the resident will have the burden of suing the landlord in court to provide Pacific with access to his houseboat before service can be installed. If we grant the complaint, Pacific, if its employees are arrested, will have the burden of defending its access to complainant's houseboat for the purpose of carrying out its obligation to serve.

Were we to decide this case solely on the basis of prior Commission decisions, we would be hardpressed to deny the instant complaint. However, when we also consider California case law in light of the facts of this case, our course of action is much less clearly defined. Our disposition of this complaint becomes more a matter of policy than a matter of law.

We have carefully weighed all of the factors presented to us and on balance conclude that Pacific should be excused from serving this complainant. Accordingly, the complaint should be denied until Waldo Point Harbor grants access to Pacific to serve this complainant.

We are aware of the long-standing stalemate between Waldo Point Harbor and these particular houseboat residents. We are further aware that negotiations between the two are currently taking place. Our denial of this complaint largely stems from our reluctance to insert this Commission into the broader conflict which exists between these two parties, when to do so might unalterably and adversely affect the pending negotiations between them. The effect of our decision will preserve the status quo and neither enhance the status of the houseboat residents, nor diminish the rights of the landlord.

Our decision today is not made lightly. We realize that it is not entirely consistent with prior decisions. Yet because of the unique circumstances which prevail between Waldo Point Harbor and the houseboat residents, we are hesitant to upset what appears to be a mutual understanding between the two with regard to continued residency on Waldo Point Harbor's property. While we firmly believe that utility service is a basic necessity and in general should not be denied by a landlord to a customer willing to pay for it, the facts of this case warrant such a denial.

Other Issues

Safety

Pacific's witness Lamanno testified that he met with Tate on July 6, 1982 to discuss telephone service. Lamanno testified that Tate agreed with Lamanno's proposal to provide telephone service from a riser pole. The terms of the agreement are embodied in a confirming letter dated July 7, 1982, from Lamanno to Tate, as follows:

"As discussed, we will require that you provide a buried one-inch inside diameter plastic conduit with a minimum of 18 inches cover from our riser pole to the inside of the gate leading to the pier next to which the Moonshiner is moored.

"Further, the conduit should be securely fastened at least 18 inches above ground level at all terminating ends and must contain a pull wire. The distance from the pole to the gate marked Ambient Power is approximately 130 feet.

"In addition, you have agreed to provide a similar one-inch conduit from the gate to the piling closest to the Moonshiner and this conduit is to be securely fastened to the pier in a manner acceptable to Pacific Telephone. You are also required to provide adequate electrical ground in proximity to the piling closest to the Moonshiner, where the conduit terminates.

"One subject we briefly discussed and I must emphasize, is the matter of access. You must secure both permission to place the conduit discussed above, and access for Pacific Telephone to install and establish your telephone service."
(Exhibit 12.)

This proposal would require Tate to dig a trench 18 inches deep and 130 feet long, install conduit in the trench, and backfill the trench. Tate would also be required to install conduit on the pier for 77 feet. The letter also requires Tate to secure permission to install the conduit and telephone service.

No doubt these requirements proved insuperable, for Tate insisted on a hearing, stating through his attorney that Pacific's undergrounding requirement was discriminatory in that Pacific did not require undergrounding for others provided service in the same area.

At the hearing it became clear that Pacific could physically provide aerial service from its clearance pole, which is much nearer to Tate's houseboat than the riser pole. This route would require Tate to erect a 4-inch x 4-inch pole in the ground near the walkway that gives access to the Tate houseboat. Pacific would require the 4 x 4 to be tall enough so that wires strung from its clearance pole would not drop less than 10 feet above the ground. From the 4 x 4 Tate would be required to install conduit to his houseboat.

Pacific's witness testified that this method of providing service was impractical because the clearance pole was draped with two illegal electrical wires which constituted a hazard for any person working on the poles. There is no doubt that this is the case. However, in the past Pacific has negotiated with the leaders of the cooperative to remove such wires so that its employees may work on the clearance pole safely. This appears to be a logical solution to this impasse.

Findings of Fact

1. Tate is a houseboat resident of the Gate 6 area of Sausalito waterfront owned by Waldo Point Harbor.
2. Tate does not pay rent to Waldo Point Harbor. Tate does pay rent to the Gate 6 Co-op.
3. Tate receives and pays for electrical and water service at the houseboat.
4. Ted Rose is the manager of Waldo Point Harbor's Gate 6 area.
5. Ted Rose and Waldo Point Harbor have threatened Pacific employees with trespass to prevent Pacific from entering the Gate 6 area to install new telephone service to non rent-paying residents.
6. Pacific will not install new lines in the area in the face of the demands and threats of Waldo Point Harbor.
7. Pacific's employees in the past have installed telephone service to residents of Gate 6 without arrest for trespass.
8. The Gate 6 Co-op, Waldo Point Harbor, the Housing Authority, and the Buck Foundation are negotiating leases and funds to be transferred with regard to the continued residency of members at Gate 6.
9. Were it not for the access problem, service could be safely provided by overhead wire from Pacific's clearance pole to a 4-inch x 4-inch 10 foot pole erected by Tate, and thence by conduit to Tate's houseboat, if Tate arranged with the unofficial "mayor" of the Gate 6 area for electric wires on Pacific's clearance pole to be temporarily removed.

Conclusions of Law

1. Pacific has an obligation to provide service to customers similarly situated in a nondiscriminatory manner.
2. Waldo Point Harbor as a landlord can sue for unlawful detainer to evict non-rent-paying residents from its property.
3. Until Waldo Point Harbor permits access to Pacific to install telephone service to Tate, Pacific should be excused from doing so.
4. If Tate provides written permission of the property owner to Pacific and arranges for the temporary removal of electric wires from the clearance pole, Pacific should be ordered to install service to Tate's houseboat.

O R D E R

IT IS ORDERED that the Pacific Telephone and Telegraph Company (Pacific) shall install service to Joseph Tate's houseboat if Tate first provides to Pacific written permission of the property owner, Ted Rose or Waldo Point Harbor, to install such service and arranges for the temporary removal of electric wires from Pacific's clearance pole.

This order becomes effective 30 days from today.

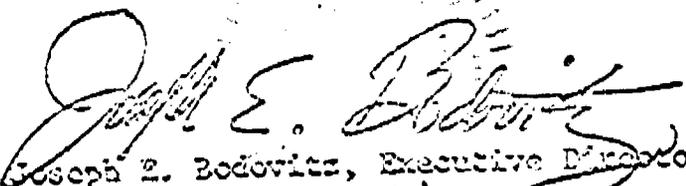
Dated SEP 7 1985, at San Francisco, California.

Commissioner William T. Eogley
being necessarily absent, did
not participate.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

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


Joseph E. Bodovitz, Executive Director

C.82-06-02
D.83-09-008

To all interested parties:

Although I was not present when Decision 83-09-008 in Case 82-06-02 was signed by the majority of the Commission, I wish to go on the record as follows.

/s/ William T. Bagley
WILLIAM T. BAGLEY, Commissioner

September 7, 1983
San Francisco, California

WILLIAM T. BAGLEY, Commissioner, Dissenting in part:

I concur with the result in this case but I must dissent as to the reasoning used. Generally, an applicant for telephone service must provide access to the utility to the property to be served. This is embodied in Rule 16 of Pacific's tariffs which states:

"Note: It is the responsibility of the applicant to provide, or arrange for, the rights necessary for the Utility to place the service connection facilities described in a. above on the parcel of property occupied by the applicant and/or to cross an intervening parcel or parcels of property..."
(Schedule Cal. P.U.C. No. 36-T, 3d Revised Sheet 61-B, Exhibit 13)

In this case the evidence showed that the Tates were unable to provide lawful access to Pacific and for that reason I would deny service.

There is also a second reason for denying service in this case. There are ongoing negotiations among Waldo Point Harbor, the Marin County Housing Authority, the San Francisco (Suck) Foundation, and the Co-op (comprised of non-paying residents in and around Gates 5 and 6 at Waldo Point Harbor) which seek a resolution as to the status of the members of the Co-op and we should not interfere with that process. Once the parties have reached a satisfactory resolution of the issues, then we can decide the merits of cases before us involving these parties. To involve ourselves at this stage only aggravates the problem and unnecessarily places this Commission in the midst of what is in the nature of a landlord-tenant dispute over which we have no authority.

In two earlier cases, we ordered Pacific to provide service to two non-paying residents of the houseboat community in and around Gates 5 and 6 of Waldo Point Harbor. In my opinion those cases were wrongly decided, given Rule 16. Further, if Pacific had

been unable to cross Waldo Point Harbor property, to provide service to the above referenced residents, conceivably this Commission would have required Pacific to take the matter to the civil courts, or to defend trespass charges brought against their employees by Waldo Point Harbor. The costs of litigating these issues would ultimately be borne by the ratepayers of Pacific. This is an unnecessary burden to place on the ratepayers when the problems are due to what is in the nature of a landlord-tenant dispute that should be resolved by the parties to that dispute. We have no jurisdiction over Waldo Point Harbor and there is no legal foundation for this Commission to order Pacific to cross Waldo Point Harbor property when the Harbormaster has refused permission to Pacific to serve those non-paying residents from that property.

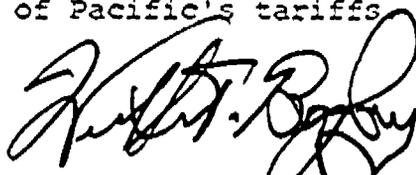
The majority decision incorrectly disposes of one of our own cases in order to support its conclusion. In Mak v. Pacific Telephone (1971) 72 CPUC 735 we discuss a property owner's right to refuse access to a utility to provide service from her property to either her own tenants, or the property of another. At page 9 the majority decision distinguishes Mak on the ground of safety, stating that in Mak the landlord refused access to Pacific to her roof for safety reasons. This is incorrect. Second, the majority opinion distinguishes Mak by stating that Mak's tenants could be served equally well from an alternate location than from Mak's roof. This argument only draws us away from the real issue - that is, may a landlord or property owner deny access to her land to a utility so as to prevent the utility from installing service to the landlord, the landlord's tenants, or some other property. The answer must be yes.

In Mak the landlord of a building contacted Pacific and requested that the terminal and all wires and cable belonging to Pacific be removed from her roof. She made it clear that she did not want any other buildings served from her property. She was advised that the terminal was necessary to provide her tenants with service. In the decision, at page 740, we state: "Under the law, Mak cannot be required to give permission for PT&T to place

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a terminal and other facilities on her property." We go on to point out, "However, such refusal can result in the termination of telephone service for her tenants." Ultimately the decision ordered Pacific to place a terminal in the sidewalk and, we stated, after an initial installation, it would not be necessary for Pacific repairmen to enter Mak's building to work on the terminal. If Mak refused to give Pacific permission to make the initial installation, Pacific would be authorized to terminate service to her tenants. We also said, "It is not disputed that PT&T has no right to serve other premises from Mak's building without her consent." Finding of Fact No. 6 states: "PT&T should be ordered to provide no service to other premises from Mak's property unless she gives consent thereto." Clearly this case is on point here. Waldo Point Harbor is the landlord and they have refused access to Pacific to serve non-paying residents from Waldo Point Harbor property. The Mak case did not discuss safety, therefore the distinction in the majority opinion is inappropriate. In the Mak case we acknowledged the right of a landlord to refuse access to the utility to provide service to either, her own tenants, or the property of another.

The present case is not one in which we should deviate from the holding in Mak or Rule 16 of Pacific's tariffs.



/s/ William T. Bagley
WILLIAM T. BAGLEY, Commissioner

September 7, 1983
San Francisco, California