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Decision No. 87612 JUL 79 1977

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THOMAS W. IRWIN,

Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a corporation,

Defendant.

Case No. 10169
(Filed September 13, 1976)

Thomas W. Irwin, for himself, complainant.
Duane G. Henry, for The Pacific Telephone and
Telegraph Company, defendant.

O P I N I O N

Hearing on this complaint was held before Examiner C. T. Coffey in San Francisco on February 14, 1977 and was submitted upon the receipt of concurrent briefs on May 9, 1977.

Background to Case

By Application No. 55280, filed October 30, 1974, Thomas W. Irwin (Irwin), doing business as the Henness Pass Telephone Company, requested authority to provide telephone service to approximately 182 square miles of unfiled and unassigned territory in Sierra and Nevada Counties. On January 30, 1975, The Pacific Telephone and Telegraph Company (Pacific) filed a protest to Application No. 55280 and also filed Application No. 55463 to serve the disputed territory and certain other contiguous but unassigned territory.

Pacific's serving proposal was to provide service to the territory in two stages:

"Toll stations in areas which have a demand for such service will first be established and then exchange service will be furnished as the area develops and communities of interest can be more clearly defined. Pacific is committed to establishing exchange service no later than 1978." (Consolidated applications of Thomas W. Irwin and The Pacific Telephone and Telegraph Company (1976) Decision No. 85719, p. 3.)

Irwin's proposed serving arrangement was to provide toll station service to the territory for the first two years of operation. Commencing in 1978, the entire disputed territory would receive exchange service as one exchange, to be designated the Graniteville Exchange.

Decision No. 85719 denied both applications without prejudice.

Issues

On September 13, 1976, Irwin filed the present complaint against Pacific. The complaint alleges that Pacific is proceeding to provide telephone service in the area. Irwin alleges that this service was in violation of Decision No. 85719 and requests that Pacific cease and desist from construction to provide telephone service in the area.

Pacific alleges that its proposed construction is solely for the purpose of providing additional toll station service to augment its present toll station service in the area. Pacific alleges that, as part of its statewide franchise, it has an obligation to provide toll station service in unassigned territories for the protection of public health and safety. Pacific further alleges that these toll stations in no way interfered with complainant's right, or the right of any applicant, to apply at any time to provide exchange service in the area.

At the hearing, Irwin also alleged that Pacific, by constructing the proposed new toll stations, was violating Section 1001 of the Public Utilities Code, the Commission's General Order No. 96-A, and Pacific's own tariff, Schedule Cal. P.U.C. No. 54-T. Although these three additional issues are beyond the scope of the complaint, the presiding officer requested that they be discussed in the briefs.

After review of the briefs, it appears that the contention that Section 1001 prohibits Pacific from providing toll station service in unfiled territory without applying for a certificate of public convenience and necessity has been refuted by the California Supreme Court (Pac. Tel v City & County of SF (1959) 51 C 2d 766; Postal Tel v Railroad Comr. (1927) 200 Cal 463.) and that Pacific has not violated General Order No. 96-A or its own tariffs. These allegations will not be further considered.

Violation of Decision No. 85719

The complaint states:

"The complainant believes the defendant's planned construction is in direct violation of Decision No. 85719 and contrary to the Commission's intent."

The language in Decision No. 85719, upon which Irwin bases his complaint, is as follows:

"Considering the lack of pressing immediate need by the public for exchange service in the disputed area, and considering Pacific's announced financial inability or unwillingness to fill service orders in its present service area, it is not appropriate to generate further future commitments of Pacific's capital funds by permitting Pacific to expand its service area into the disputed territory. This decision should not be interpreted that Pacific has established any rights to the disputed area or will be permitted to extend into the area merely because of its existing toll service should a substantial public need for service develop." (Emphasis added.) (Pp. 9-10.)

It was the purpose of Decision No. 85719 to withhold authorization for Pacific to expand its exchange service into the disputed area since this was the issue before the Commission. It was not the purpose of the decision to deny the public such toll service as Pacific desires to provide. At the same time the decision emphasizes that Pacific cannot establish any exchange service rights to the disputed area or will be permitted to extend its exchange service into the area because of any toll service which may exist at the time a substantial need for exchange service evolves and is demonstrated. If it should develop that authorization to render exchange service in the area were granted complainant, and Pacific had installed an extensive toll net in the area, Pacific was put on notice by the decision that it bore all risks of extending any toll service.

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Finding and Conclusion

We find that Pacific's planned construction of toll facilities in the disputed area is not in violation of Decision No. 85719 and conclude that the relief requested should be denied.

O R D E R

IT IS ORDERED that the relief requested is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 19th day of JULY, 1977.

Robert Batzian
 President

William Sproull

Verizon L. Stutzgen

Richard D. Swale

 Commissioners

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Chairman