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Decision No. 88145 NOV 22 1977

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for telephone service rate increases to offset increased wage, salary, and associated expenses.	Application No. 55214
Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, costs, separations, inter-company settlements, contracts, service, and facilities of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California corporation; and of all the telephone corporations listed in Appendix A, attached hereto.	Case No. 9832

ORDER DENYING REHEARING

The Pacific Telephone and Telegraph Company (Pacific) filed its petition for rehearing and stay of Decision No. 87827 on September 16, 1977. On September 29, 1977, the City of San Diego filed its petition for rehearing or reconsideration of Decision No. 87827. The Commission has considered each and every allegation of the petitions and concludes that no good cause for rehearing or reconsideration has been shown. The petition of Pacific for a stay of Decision No. 87827 pending judicial review was granted by Decision No. 88104, dated November 8, 1977. This order denying rehearing shall have no effect upon Decision No. 88104, which continues in full force and effect.

A.55214, C.9832 Alt. ns

IT IS ORDERED that the petitions of The Pacific Telephone and Telegraph Company and of the City of San Diego for rehearing and reconsideration of Decision No. 87827 are denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 22nd day of November, 1977.

I will file a dissent.
William Symons, Jr.

Robert Batinovich
President

I abstain
Vernon L. Sturgeon

Richard D. Gravelle

Leonard M. Grimes, Jr.

Commissioners

A. 55214)
C. 9832) D. 88145
Pacific Telephone & Telegraph Company
Order Denying Rehearing of D. 87827

COMMISSIONER WILLIAM SYMONS, JR., Dissenting

The refund order in Decision No. 87827 constitutes unlawful retroactive ratemaking. For that reason the Commission should modify D. 87827 to delete the refund provision.

Background. A brief recounting of the procedural history of Application No. 55214 might prove helpful prior to discussion of the retroactive ratemaking problem. Pacific Telephone and Telegraph Company (PT&T) filed A. 55214 September 30, 1974. PT&T sought a rate increase of $97.9 million. Fifteen months later, December 30, 1975, the Commission issued D. 85287 which granted rate increases totalling $65.2 million.

Decision No. 85287 was based on cost and revenue data submitted for a twelve month test period ending June 30, 1975. In adopting the estimate of revenues for the test year, the Commission stated, at page 6 of the opinion:

> "Effects of increased advertising rates effective January 1, 1975, and the timing of local calls, which will start in selected areas in the second quarter of 1976, are insignificant for this test period. These items will be analyzed in future proceedings."

On January 9, 1976, City of San Diego (City) filed a petition for rehearing of D. 85287, alleging that the Commission had erred in failing to consider the revenues for single message rate timing (SMRT) and for increased directory advertising revenues. On March 9, 1976, by D. 85557, the Commission granted rehearing of D. 85287 and the matter was heard on April 19, 1976.

By D. 86541, on October 26, 1976, the Commission issued its opinion after rehearing and denied the requested relief. The Commission affirmed its position taken in D. 85287 that the effects of increased directory advertising rates and the institution of SMRT were insignificant for the test period used in that decision and should not be considered in determining the amount of rate increase allowed PT&T.

On November 24, 1976, City filed its petition in the California Supreme Court for writ of review as to D. 85287 and D. 86541. The Commission's answer was filed January 17, 1977.

While the City's petition was pending before the Court, the Commission, in D. 86953, dated February 8, 1977, reopened A. 55214 and C. 9832 pursuant to Section 1708. One day of public hearing was held April 19, 1977, and briefs were filed. On September 7, 1977, in D. 87827 the Commission issued its opinion after reopening. In this decision the Commission ordered the refunds that are the subject of controversy. PT&T filed its petition for rehearing of D. 87827 on September 16, 1977, thus invoking the automatic stay provision of Section 1733. In today's decision, the majority affirms its refund order.

Rewrite Question. The nub of the question before us is the power of the Commission to reach back into prior decisions and rewrite their ordering paragraphs effective the date of the original decision. This is retroactive rather than prospective modification. Only in the recent past has the Commission asserted this power: D. 87620 dated July 19, 1977 and decision under petition before

us today. These decisions find such power under a new interpretation of Public Utilities Code Section 1708. The revised ordering paragraphs in D. 87827 (dated September 7, 1977) order a refund dating back to the December 30, 1975, date of D. 85287.

The Commission did not retain the power to order refunds on the issue of Classified Directory Advertising Revenue.

In the last several years more and more decisions of the Commission have contained contingencies for refund regarding specific issues. Since such provisions depress the quality of earnings of any regulated company to which they are applied, such provisions are used sparingly.

At the time D. 85287 was issued, the Commission had just received instructions from the California Supreme Court in two earlier PT&T cases to correct erroneous treatment of tax expenses. The Commission was instructed to provide for refunds on the tax question. Specifically, the court had said, on December 12, 1975, in City of Los Angeles v. Public Utilities Commission, 15 C.3d 680, 708, that:

> "In order, therefore, not to interfere with those portions of the tariff in which we find no reversible error, we affirm the commission's order except insofar as it depends upon the erroneous treatment of tax expenses set forth above; as to that portion of the rate we annul. The commission, on remand of this matter for further proceedings consistent with this opinion, shall expeditiously determine what position it will adopt with respect to the tax expense issue. (See City and County of San Francisco v. Public Utilities Com., supra, 6 Cal.3d 119, 130-131.) Having ascertained this position, be it annual adjustment or some other alternative, including the possibility of a commensurate adjustment in the rate of return, the Commission shall provide for refunds, if appropriate, to the ratepayers of the difference between such a rate and the tariff reviewed herein."

Appropriately, when D. 85287 was issued on December 30, 1977, only 18 days after the Court's opinion had been filed, the Commission's decision contained ordering paragraphs which provided for refunds as to the issue of deferred tax reserve treatment. D. 85287 provided:

> "2. The rates established by this order shall be subject to refund pending consideration of the Supreme Court's directive in City of Los Angeles v. PUC (December 12, 1975, S.F. No. 23215) as it may pertain to this proceeding. Pacific shall maintain such books and records as are necessary to determine the difference between the rates established herein and any other rates, if any, which may be established by further order.
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> "3. The issue of appropriate regulatory treatment of the deferred tax reserve in this proceeding shall be consolidated with the remand of Decisions Nos. 83162, 83540, 83778, and 83779, and heard on a common record with the same issues in those proceedings. Refunds, if appropriate, will thereafter be handled in one Commission order."
> (D.85287, pp. 72-73.)"

These ordering paragraphs clearly limit the refundability of the rates established by D. 85287. Only refunds attributable to the "regulatory treatment of the deferred tax reserve" may be required pursuant to ordering paragraphs 2 and 3 of D. 85287.

The Commission could have expanded the refund provision prior to final determination on the petition for rehearing, but did not. The Commission's jurisdiction to order refunds as to other aspects of D. 85287 ended on October 26, 1976, when the Commission by D. 86541 affirmed after rehearing its original position as to the SMRT and directory advertising issues raised by the City. At that point D. 85287 was final as to those issues. The Commission, which

had jurisdiction to order refunds retroactive to January 5, 1976, so long as the rehearing process was pending before it, lost that jurisdiction in this instance when D. 86541 terminated the rehearing process without granting the refunds sought by the City. At that point the Commission only retained its jurisdiction under Section 1708 to rescind, alter, or amend D. 85287 and D. 86541 prospectively.

The filing for a writ of review did not expand the Commission's jurisdiction to amend orders retroactive to the original effective date. The filing of a timely petition for writ of review by the City preserved the jurisdiction of the Court to review, amend and refund rates established by D. 85287. However, it has no such effect upon the Commission's jurisdiction. The Commission's opportunity to refund rates established by D. 85287 had passed away and could not be resuscitated by the Section 1708 expedient. Thus, D. 87827 was not issued, as the Commission argues, "in the course of review", but was issued rather in the course of reopening. The difference is significant, as the Court pointed out in City of Los Angeles v. Public Utilities Com. (1975) 15 C.3d 680, 705-707. (See also City of Los Angeles v. Public Utilities Com. (1972) 7 C.3d 331, 337-338.)

The analogous rule in the civil courts is that:

> "... the taking or 'perfecting' of an appeal ... deprives the court of jurisdiction of the cause. It may not vacate or amend a judgment or order valid on its face, nor do any other act which would affect the rights of the parties or the condition of the subject matter." (6 Witkin, California Procedure, 2nd Ed., p. 4021; Code of Civil Procedure Section 916.)

Of course, the Commission's powers differ in that the Legislature has specifically authorized the Commission to rescind, alter, or amend its orders at any time (Section 1708). However, the Commission has in the past correctly construed this power to operate prospectively only. (Golconda Utilities Co. (1968) 68 CPUC 296, 305.) This interpreation is consistent with language in many cases regarding the nature of the Commission's ratemaking authority:

> "The fixing of a rate in the first instance is prospective in its application and legislative in its character. Likewise the reducing of that rate would be prospective in its application and legislative in its character." (Southern Pac. Co. v. Railroad Com. (1924) 194 C. 734, 739. See also People v. Western Air Lines, Inc. (1954) 42 C.2d 621, 630; Pacific Tel. & Tel. Co. v. Public Util. Com. (1965) 62 C.2d 634, 652.)

The Commission's interpretation of Section 1708 in the Golconda case is also consistent with the Court's adherence to the rule against retroactive ratemaking, which is derived from Section 728. (Pacific Tel. & Tel. Co. v. Public Util. Com. (1965) 62 C.2d 634, 650; City of Los Angeles v. Public Util. Com. (1972) 7 C.3d 331, 355-357.)

Ironically, it is apparently from language in the first of the above cited cases that the Commission majority derives the theory upon which it bases its refund order in the instant D. 87827. In that case the Court holds:

> "... the Legislature has not undertaken to bestow on the commission the power to roll back general rates already approved by it under an order which has become final ..." (62 C.2d 634 at 650.) (Emphasis added.)

The core issue then is what did the Court intend by "final". The Commission majority interprets "final" to indicate that point in time when a Commission decision is no longer subject to judicial review. In the context of the instant proceeding the Commission majority argues that D. 85287 and D. 86541 are not final because the City filed a timely petition for writ of review and the matter is still pending before the Court. It may be conceded that this usage of the word is one of several correct senses in which "final" can be used. However, the issue is not whether the Commission's decision is final from the point of view of the Court or the appealing party. The issue is what are the powers of the Commission after the rehearing process is completed and the matter is pending before the Court. Merely seizing upon one correct usage of "final" does not settle the matter, since the Court has used the term in several senses.

Admittedly, the Court has not directly decided the question presented. However, the Court has commented upon the powers of the Commission and of the Court in a situation almost identical to the instant case. Before citing those comments, some background information would be useful. In City & County of San Francisco v. Public Util. Com. (1971) 6 C.2d 119, the Court annulled interim D. 77984, which related to the calculation of Pacific's federal income tax expense for ratemaking purposes. Prior to the filing of the Court's decision in 6 C.3d 119 the Commission issued D. 78851, which authorized a rate increase to Pacific of $143 million annually. In issuing D. 78851 the Commission relied upon D. 77984. The Court reviewed D. 78851 in City of Los Angeles v. Public Util. Com. (1972) 7 C.3d 331, holding that since it had annulled D. 77984, it must also annul D. 78851, and stating in explanation:

> "The fact that the commission reopened the proceeding with respect to the question of federal income tax expense after our decision /in 6 C.3d 1197 does not militate against this conclusion. In Pacific Tel. & Tel. Co. v. Public Util. Com., supra, 62 Cal.2d 634, 649-659, the commission commenced an investigation into the lawfulness of Pacific's rates, /and/ after lengthy hearings it concluded that the rates were excessive, it ordered new, lower rates, and it ordered a refund of excessive rates in the amount of $80 million collected by Pacific during the pendency of the rate proceedings. We annulled the refund order on the ground that general rate making is legislative and looks to the future, that the Legislature has authorized rate changes only for the future, and that the commission did not have power to order refunds on the ground of unreasonableness where the rate had been previously found to be reasonable. It follows that, unless the rate order now before us /D.78851/ is annulled, it will become a lawful rate and that all funds collected pursuant to it would belong to Pacific and not be subject to refund.
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> "In other words, we must annul the rate order now before us /D78851/, because otherwise the rates therein, which are based in part on the annulled tax expense decision /D.77984/, will become lawful rates for the future and will preclude refunds." (City of Los Angels v. Public Util. Com. (1972) 7 C.3d 331, 338.)

Note from the above quotation that the Commission's reopening of the proceeding would not allow refunds to be made. Only the Court retained power to grant refunds. If it had failed to annul D. 78851, refunds would have been precluded. The Court concluded that the reopening by the Commission would not allow it to make refunds because "the commission did not have power to order refunds on the ground of unreasonableness where the rate had been previously found to be reasonable", as had the rates in D. 78851. (Emphasis added.) Here, D. 78851 was not final in the sense that review was completed, but it was final with respect to the power of the Commission to affect it retrospectively.

The last quoted language of the Court is dispositive of the issue of the Commission's power on reopening. The Commission does not have the power to grant refunds on reopening, as distinguished from rehearing, unless it has reserved jurisdiction of an issue by making its order subject to refund with respect to that issue. The order in D. 85287 was made subject to refund only with respect to income tax issues, and not as to the SMRT and directory advertising issues.

San Francisco, California
November 22, 1977

William Symons Jr

WILLIAM SYMONS, JR.
Commissioner