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ORIGINAL

Decision No. 89323 SEP 6 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA HOTEL AND MOTEL ASSOCIATION, Complainant, vs. PACIFIC TELEPHONE & TELEGRAPH COMPANY, Defendant.	Case No. 10127 (Filed June 22, 1976; amended August 30, 1976)
CALIFORNIA HOTEL AND MOTEL ASSOCIATION, Complainant, vs. GENERAL TELEPHONE COMPANY OF CALIFORNIA, Defendant.	Case No. 10128 (Filed June 22, 1976)
CALIFORNIA HOTEL & MOTEL ASSOCIATION, Complainant, vs. PACIFIC TELEPHONE & TELEGRAPH COMPANY, Defendant.	Case No. 10256 (Filed February 9, 1977)

Boris H. Lakusta and William K. Coblentz, Attorneys at Law, for California Hotel and Motel Association, complainant.
Milton J. Morris, Christopher L. Rasmussen, and B. Haven Walling, Attorneys at Law, for The Pacific Telephone and Telegraph Company, defendant.
Edward D. Schoch, Attorney at Law, for General Telegraph Company of California, and Sylvia M. Siegel, for Toward Utility Rate Normalization, interested parties.
Thomas F. Grant, Attorney at Law, and Vladislav Bevc, P.E., for the Commission staff.

O P I N I O N

The proposed report of Administrative Law Judge Donald C. Meaney, filed on June 20, 1978 in these matters (and attached hereto), finds essentially (1) that hotels (including "motels") have not acquired public utility status by virtue of providing certain telephone services for guests; (2) that we may (as we have since 1953) engage in certain indirect regulation of hotel telephone surcharges by way of provisions in telephone company tariffs; and (3) that we should discontinue such regulation and, instead, recommend to the Legislature that it enact a statute which makes it a misdemeanor for any hotel owner or manager to collect, or to attempt to collect, any surcharges without first posting a notice of such surcharges on, or in, the immediate vicinity of the telephone to be surcharged.

The California Hotel and Motel Association (Association) was the only party filing exceptions to the report. The Association recommends that the Commission should retain "positive, albeit indirect" jurisdiction over posting requirements by adopting the type of tariff it originally recommended, that is, one which would require hotels to post surcharges on or near the phones. Our attention is invited to the Association's briefs on this point.[1/]

We believe the ALJ's report (pp. 22-25, mimeo.) answers this argument. We are in particular agreement with his comments concerning enforcement problems if we retain jurisdiction, via tariff provision, versus the kind of enforcement which may be expected under statute or ordinance.

> "If we adopt an open-ended tariff, we must ourselves enforce the 'posting' provisions for 6,500 widely scattered hotels and deal with disputes over charges as part of our regulatory system, or delegate the responsibility to the telephone companies. We have no statewide field staff to perform such enforcement duties,

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1/ Although the staff filed a pleading entitled "exceptions", its sole purpose was to urge the adoption of the report, provided that the Commission seeks the legislation requiring the posting of surcharges which the report recommends. The Pacific Telephone and Telegraph Company (Pacific) filed a reply stating that the Commission should either deregulate as the ALJ proposes or require a specific level of surcharge in the tariffs, rather than allow an open-ended tariff.

> and we doubt if effective dispute settling could result from making the telephone companies the arbitrators." (p. 24.)

On the other hand, as he points out, if there is a governing statute (or, in the absence of a statute, an ordinance) police can investigate and, when necessary, bring the matter before the local court as a misdemeanor.

The Association states in its exceptions that the Commission should retain control over the posting of surcharges because this will mean a "uniform program" to insure that guests receive adequate notice of such surcharges. The only "uniform program" likely to result from the Association's proposal is a "uniform" lack of meaningful enforcement, considering the absence of any Commission field staff which could undertake such regulation, and the inadvisability of making the telephone companies the middlemen in settling disputes over surcharges.

As for the Association's comment that the system would essentially be self-policing: self-regulation, while admirable, is never enough for the very few who are eager and willing to kick a toothless dog.

Nor do we think the Association's remark about legislative inertia to be well taken. We are not proposing to the Legislature a complex statutory scheme which must be the subject of a detailed investigation, but only a straightforward and brief law simply aimed at preventing "surprise" charges, and possible petty fraud.

Lastly, the Association states that arguments have been advanced[2/] for the proposition that Ambassador, Inc. v United States (1945) 325 U.S. 317, reh. den. 325 U.S. 896 (see proposed report, footnote 2) holds hotel telephone surcharges to be unlawful when the telephone company tariffs are silent on the subject. Therefore, according to the Association, we should adopt a tariff to prevent a legal challenge on that basis.

2/ The Association's pleading does not indicate by whom, where, when, or for what purpose such supposed arguments have been made, or that any court or regulatory agency has ever been persuaded by them.

The Association candidly states that it does not agree with such an interpretation of the Ambassador case. Neither do we. A reading of the entire Ambassador opinion does not disclose any language which, in our opinion, can fairly or reasonably be interpreted as standing for such a proposition. Adoption of a tariff as a mere precaution against a possible legal challenge on tenuous grounds is unwarranted.

We will overrule the exceptions of the Association and adopt the proposed report of the ALJ. In furtherance of our desire to have a statute enacted which will require the posting of hotel telephone surcharges, we will add an Ordering Paragraph 5 which will direct the Executive Director to serve by mail a copy of this opinion and the adopted proposed report on the appropriate members of the Legislature.

Findings and Conclusions

1. The proposed report of ALJ Donald C. Meaney was filed in this proceeding on June 20, 1978.

2. The Association filed exceptions to the proposed report on July 10, 1978.

3. Pacific and the Association filed replies to the exceptions on July 26, 1978.

4. The exceptions to the proposed report should be overruled.

5. The ALJ's proposed report should be adopted as our decision, with the addition of an ordering paragraph directing the Executive Director of this Commission to serve by mail copies of this opinion and the approved proposed report on the appropriate members of the Legislature.

O R D E R

IT IS ORDERED that:

1. The exceptions to the proposed report of Administrative Law Judge Donald C. Meaney are overruled.

2. The proposed report of Administrative Law Judge Donald C. Meaney, attached hereto, is adopted as our decision in this proceeding with the addition of the following ordering paragraph:

> "5. The Executive Director shall serve by mail a copy of this decision on the Speaker of the Assembly and the President Pro Tem of the Senate, the Chairman of the Assembly Finance, Insurance, and Commerce Committee, and the Chairman of the Senate Public Utilities, Transit, and Energy Committee."

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

Dated at San Francisco, California, this 6th day of SEPTEMBER, 1978.

Labstain.
Robert Batinovich

President
William Symons Jr.
Vernon L. Sharp
Richard D. Gravelle

Commissioners

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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PROPOSED REPORT OF
ADMINISTRATIVE LAW JUDGE DONALD C. MEANEY

In this opinion we resolve the issues raised in Case No. 10256. The parties agreed that the issue in Cases Nos. 10127 and 10128, complaints against Pacific Telephone and Telegraph Company (Pacific) and General Telephone Company of California, respectively,

relative to the availability and cost of equipment for billing hotel[1/] guests for local calls under single message rate timing (SMRT), would be heard at a later time and that these matters would be placed off calendar.

Case No. 10256, filed by the California Hotel and Motel Association (Association) against Pacific on March 14, 1977, is a complaint in form. All of the substantive allegations, however, are actually directed against the Commission itself, and the "complaint" is therefore really a petition, addressed to the Commission's discretion, which seeks to have the Commission's present method of establishing telephone charges made by hotels to guests drastically modified or terminated. We choose to entertain such a petition at this time because of serious questions relating to the Commission's jurisdiction over hotels and whether the present regulatory program regarding hotel telephone charges, or anything which might substitute for it, is likely to result in any substantial protection for the public, or in any reasonable rate structure.

We note in this connection that research of all the Commission's decisions on this subject (cited below) shows that there has never been a discussion of the Commission's constitutional or statutory basis for such regulation; the decisions simply proceed as if such matters are well settled, and discuss the technical evidence presented for rate-setting purposes.

History of the
Commission's Regulatory Program

Actually, the Commission had no regulatory program for hotel telephone charges for the first forty years of its existence. The

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1/ For conciseness, the term "hotels" as used in the decision shall include motels.

first order on the subject appears in Telephone Surcharges by Hotels (1953) 52 CPUC 363 (Case No. 5338, Decision No. 48171). This proceeding started in 1951, when the Commission ordered each telephone corporation to file the following rule (or to show cause why such rule should not be filed):

> "Telephone exchange, message unit, and message toll telephone services are furnished to hotels, apartment houses, and clubs upon condition that the use of the services by guests, tenants, members, and others shall not be made subject to any charge by any hotel, apartment house, or club in addition to the telephone exchange, message unit, and message toll telephone rates and charges of the telephone company, except as specifically provided for in the tariff schedules of the telephone company." (52 CPUC 363-364.)

The telephone companies filed such a rule, and the Commission, in Case No. 5338, determined hotel charges for the first time, on the basis of 23 "test hotels", consisting of 3 "large" (more than 500 rooms), 7 "medium large" (250 to 500 rooms), 8 "medium" (125 to 250 rooms), and 5 "small" (125 rooms or less) hotels.2/

2/ The complaint in the case now before us states, and it is apparently uncontested that the Commission was prompted to begin regulating hotel telephone charges as a result of litigation during World War II concerning surcharges placed by hotels on interstate long distance calls, which resulted in the decision in Ambassador, Inc. v. United States (1944) 325 U.S. 317, reh. den. 325 U.S. 896. The FCC had allowed to go into effect a tariff provision of the Chesapeake and Potomac Telephone Company almost identical to (and no doubt the model for) the Commission's rule quoted above. Without passing on the justness and reasonableness of the tariff (which was being considered by the FCC in a proceeding then pending) the Federal District Court sustained the tariff's validity. Upon direct appeal to the Supreme Court pursuant to statutes then in effect, the Supreme Court affirmed such validity, holding, inter alia, that the Communications Act of 1934 "recognizes that tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible

(Continued)

Decision No. 69491[3/] is the result of a major investigation into hotel telephone surcharges. Appendix B to that decision (discussed in detail, infra) laid out detailed cost methodology for future rate increases and established (based on a similar sampling of hotels of various sizes) a maximum surcharge of 18¢.

No proceeding since that time has awarded any general surcharge rate relief. In Decision No. 84492, Case No. 9880 (1975; 78 CPUC 355), complainant requested rate relief based upon what it claimed to be known cost increases since 1965, and relief was denied on the basis that it had not complied with Appendix B of Decision No. 69491.

Subsequently, the Commission permitted an advice letter tariff filing to go into effect to offset the effect of SMRT (Advice Letter No. 11989 filed May 14, 1976, authorized by Resolution No. T-9381 dated June 8, 1976). This permits either a 19¢ total charge or, for hotels with equipment that can detail SMRT units, 18¢ plus 6¢ for each additional five minutes. (The availability of such equipment is the subject of the two proceedings which are off calendar.)

2/ (Continued)

use of the rented communications facilities". (325 U.S. 323.) The litigation did not result in a surcharge system for long distance calls to compensate hotels for their investment in equipment and costs of operating such equipment, but rather in a system of agreements between telephone companies and hotels by which the hotel receives from the telephone company a percentage of the amount billed for long distance calls. (See discussion in the Association's complaint, pp. 4-5.)

3/ Case No. 7864, entitled California Hotel and Motel Association v. California Interstate Telephone Company, et al. (1965) 64 CPUC 567. As is true with many of these proceedings, the motel interests proceed by way of complaint against one or more telephone companies alleging unreasonableness of the charges then in effect. Actually, the "complaints" are really applications by hotels for increases in their own charges, which are part of the telephone company tariffs.

In this present proceeding, hearing was held before Administrative Law Judge Meaney on August 23 and 24, 1977, and submitted subject to briefs on the legal issues. Much of the hearings were devoted to a showing by the Association that the hotel business is not monopolistic and therefore competition could be expected to keep telephone charges down without a rigid tariff structure, and to evidence introduced by the Association outlining the complexity and diversity of modern PBX equipment (which, in the Association's opinion, makes cost-averaging meaningless).

Questions Presented

Because of the issues raised by the parties, we must consider:

1. Are hotels telephone utilities under the California Constitution, Article XII Section 3, and Public Utilities Code Section 234 thus requiring us to regulate them as public utilities (which would include rate regulation under Section 454)?4/

4/ Unless otherwise stated, reference to code sections are to the Public Utilities Code.

2. If hotels are not public utilities, is there any other basis for regulating hotel telephone charges?

3. Assuming the answer to question 1 is "no" but the answer to question 2 is "yes", should the Commission continue to engage in such regulation?

Public Utility Status of Hotels

If hotels, because of the use of their telephone systems[5/] by guests, are public utilities, we are required to regulate them as such.

There are no specific statutes relating to hotels and their telephone systems. The Commission staff takes the position that under constitutional and statutory provisions referring to telephone utilities generally, hotels are public utilities. Article XII, Section 3 of the California constitution states, in pertinent part:

> "Private corporations and persons that own, operate, control, or manage a line, plant, or system for...the transmission of telephone and telegraph messages...directly or indirectly to or for the public...are public utilities subject to control by the Legislature."

Under this constitutional provision, the Legislature has enacted the following:

> "'Public utility' includes every...telephone corporation...where the service is performed for...the public or any portion thereof." (Pub. Util. Code § 216a.)
>
> "'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state." (Pub. Util. Code § 234.)

5/ Generally, these are private branch exchanges (PBX) of many sizes and varieties. One hotel, the Fairmont in San Francisco, has a Centrex system. This subject is covered in greater detail, infra.

> "'Public or any portion thereof' means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the commodity is delivered." (Pub. Util. Code § 207.)
>
> "'Telephone line' includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires." (Pub. Util. Code § 233.)

If hotels fall within this category, we must regulate their rates and practices pursuant to Division 1, Chapter 3, Article 1 of the Code (§§ 451-467). Section 454(a) states, in part:

> "No public utility shall raise any rate or so alter any classification, contract, practice, or rule as to result in any increase in any rate except upon a showing before the commission and a finding by the commission that such increase is justified..."

The staff argues that hotels which own or lease telephone equipment so that their guests can make or receive telephone calls are within the constitutional definition of "public utilities".

> "Though very little evidence on the issue appears in the record, it can be generally assumed that hotels are operated under private corporate ownership or by private individuals. Likewise, the extensive variety of PBX and other telephone equipment used by hotels, described by the various witnesses and listed in the three late-filed exhibits fits within the meaning of '...a line, plant, or system for...the transmission of telephone or telegraph messages...' The record shows that this equipment is operated for the convenience of and is in fact used by members of the general public registered as hotel guests. It appears then, after at least a cursory analysis of the

> meaning of Article XII, Section 3, that California hotels owning and operating telephone equipment for their customers' use '...are public utilities subject to control by the Legislature.'" (Staff's opening brief, page 2.)

The staff points out that while hotels no doubt pay for their telephone equipment partly through regular room charges, they also surcharge outgoing calls (to pay for the actual cost of handling calls through a PBX system), thus furnishing telephone service "for compensation" (Section 234).

The Association vigorously contends that hotels are not, and never have been considered telephone utilities.

> "While a superficial reading of the definition of a 'public utility' as set forth in this quoted language [Constitution, Article XII, Section 3, supra] might cause one to conclude that it includes the providing of telephone facilities in hotel-motel guest rooms, the history of the adoption of Article XII reveals no hint that such was intended, and no California court has imposed such an interpretation. The Constitution was concerned with those entities which are customarily called 'telephone companies', i.e., those primarily engaged in the business of providing telephone service, whether in a home, an office, a factory, a pay station, a hotel, or other establishment. The fact that a hotel may place telephones in guest rooms and may service calls made therefrom through a PBX switchboard was never contemplated as converting the hotel into a telephone company and therefore a 'public utility'. Hotels in California have been treated from the beginning as subject to the basic innkeeper laws which had their origin in early English common law. California, having adopted the common law, has always regarded hotels as 'inn keepers', not 'public utilities', and its various legislative acts have consistently made this distinction. Thus, to categorize a hotel or motel, because

of incidental participation in a telephone company's public utility telephone service, as a 'public utility', stretches the meaning of the California Constitutional language far beyond its intent.

"The incidental participation in question consists of placing telephones conveniently at the disposal of guests in guest rooms and servicing calls made therefrom through a PBX board. Many hotels and motels also place additional facilities conveniently at the disposal of their guests and visitors by having pay telephones in the lobby. In neither instance can this accommodation reasonably lead to the conclusion that the hotel-motel is, to the extent of providing such accommodation, a 'public utility' within the meaning of the California Constitution." (Associations' opening brief, pp. 4-5.)

The Association further argues (1) that the Legislature never intended by any of its enactments respecting public utilities to classify hotels as public utilities; (2) that a legislative enactment imposing public utility status on hotels for making telephone service available would contravene the California Constitution (citing Marin Water & Power Co. v. Sausalito (1914) 168 Cal. 587, 143 Pac. 767 and Richfield Oil Corp. v. PUC (1960) 54 Cal. 2d 491, 354 P. 2d 4); and (3) that the Commission has recognized that it has no authority to regulate hotels directly, pointing out that the Commission has never attempted to do so (regulating only the conditions in the appropriate telephone company tariffs), and that for forty years the Commission did not regulate hotel charges even by this indirect method. The Association lastly points out:

"If the Commission were to accept the Staff's argument that the providing of guest room telephone services converts hotels and motels into public utilities, it would be compelled by the provisions of the Public Utilities Code to enter upon detailed regulation of all aspects of hotel and motel telephone services.

> For example, the provision of §761 would lead to a multiplicity of proceedings stemming from complaints concerning telephone equipment, practices, and facilities of hotels and motels; §454(a) would require each hotel and motel desiring to increase its rates to make a separate showing before the Commission before such an increase could be implemented; §616 would allow hotels and motels, as telephone corporation public utilities, to condemn property; Article 5 would require Commission regulation of hotel and motel financing; and §1001 would require a hotel or motel to seek a certificate of public convenience and necessity before it could construct a new telephone system or extend an existing system." (Association's closing brief, page 3.)

We agree with the arguments of the Association. While a hotel "holds itself out" to the public, or a segment thereof, this "holding out" is simply as a hotel (or, at common law, an "inn") and not as a telephone utility. Logic and common sense dictate that telephone equipment is provided for guests as an incidental part of the hotel or innkeeping business, and not vice versa. Other types of institutions such as hospitals, convalescent homes, and dormitories provide telephone systems, usually of the PBX variety, for persons staying upon the premises. If hotels are telephone utilities, so are these types of facilities, and they are also subject to the direct regulation of their rates and charges, and to regulation of expansion and financing of their systems. It is clear that nothing of the sort was intended by any constitutional or statutory provision.

Certainly if hotels are public utilities, we have an a fortiori case for holding telephone answering services to be public utilities. We have held the opposite in Lauria v. Pacific Telephone and Telegraph Company (1966) 56 CPUC 316, in which we said:

> "Telephone answering bureaus are independent private businesses which are not regulated by this Commission. They are subscribers to public utility telephone service and they use telephone circuits, switchboards and other services and facilities generally as provided by the telephone utility."

Cases cited by the staff in support of its public utility status arguments[6/] are not in point since they do not concern facts similar to those presented here.

If the staff were correct in its assumptions, there would be many other "public utilities" in other areas never thought of as such before. Many apartment houses sub-meter electricity and gas to their tenants and collect amounts due directly from the tenants. While we have protected the tenants by requiring certain conditions and limitations in the electric or gas utility's sub-metering tariffs, we have never held such apartment houses to be public utilities, nor should we. Apartment houses are in the business of renting to tenants, and the furnishing of electricity and gas is simply a part of such rental business.

The Commission, in the recent past, has taken care not to extend itself into areas where no true public utility status is present. In Boehrs v. Squaw Valley Development Company (1974) 76 CPUC 267,[7/] the Commission considered whether ski lifts are common carriers under various sections of the Public Utilities Code, and held they are not. The decision comments (76 CPUC 272):

6/ Cudahy Packing Co. v. Johnson (1939) 12 Cal. 2d 583; Yucaipa Water Co. v. PUC (1960) 54 Cal. 2d 823; California Water & Tel. Co. v. PUC (1959) 51 Cal. 2d 478; Calif. Community Television Assn. v. General Tel. Co. (1972) 73 CPUC 507; Richfield Oil Corp. v. PUC (1960) 54 Cal. 2d 419; Camp Rincon Resort Co. v. Eshelman (1916) 172 Cal. 561. Camp Rincon is distinguishable on the basis that it dealt with one telephone line into a rural canyon area, the only line available for anyone in the area. The holding in the case should be restricted to its own facts. If it is not, it will lead to the conclusion that anyone having a public coin telephone on his premises is a public utility.

7/ Petition for writ of review by the California Supreme Court denied June 27, 1974 (S.F. No. 23123).

> "Chair lifts are not ordinarily considered similar to railroad corporations, street railroad corporations, or passenger stage corporations. The use of ski lifts is an integral part of participating in the sport of skiing. To enlarge the definition of common carrier to include ski lifts would lead the way to public utility regulation of sports and other recreational activities. White water raft trips, pack trains, trail rides, certain amusement park rides, etc. would seem to meet the same criteria as ski lifts. We do not believe that the Legislature intended that the Commission regulate sport and recreational activity."

We conclude that there is no reasonable basis for holding that hotels which provide telephone service to guests and others upon their premises are public utilities.

Other Bases for
Regulating Hotel Telephone Charges

Whether there is a proper legal basis for indirect regulation of hotel telephone charges is swiftly answered.

We need not indulge in the legal fiction (which, in our opinion, lacks a factual basis) that hotels, in handling calls for guests, are the "agents" of the telephone utilities (cf. Public Service Commission v. New York Tel. Co. (1941) 262 N.Y. App. Div. 440; affirmed (memorandum decision) 287 N.Y. 803, 40 NE 2d 1020).[8/] Regardless of any agency relationship or the lack of it, our statutes grant us such authority. Section 454(b) reads, in part:

> "The Commission may establish such rules as it considers reasonable and proper for each class of public utility..."

and Section 455 states, in part:

8/ According to the Association's complaint (p. 14) California and New York are in the minority in choosing to set rates for hotel telephone charges. Surveys completed by the Hotel Association of Washington, D.C. and the American Hotel and Motel Association indicated that of 38 states surveyed, 30 do not regulate such charges. New York and California are apparently the only states which set specific rates; other jurisdictions which regulate hotel rates at all simply require tariff filings (transcript p. 20).

> ". . . The Commission shall establish the... practices, or rules...which it finds to be just and reasonable."

Lastly, Section 701 reads:

> "The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

It is thus clear that just as the U.S. Supreme Court recognized that under the Communications Act of 1934, "...tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible use of the rented communications facilities" (Ambassador, Inc. v. United States, supra, footnote 2) this Commission, under the Public Utilities Code, may also accept for filing, or require, tariff provisions binding on subscribers or customers of utilities and regulating the use of utility services on the part of the subscribers or customers. This has been the basis for our regulation of hotel telephone charges up to this time.

Should the Commission Continue to Engage in Regulating Hotel Telephone Charges?

A much more difficult question is how - or whether - the Commission should continue to regulate hotel telephone charges. There are three basic alternatives: (1) continue the present rate-setting system; (2) devise some flexible system which allows tariff filings, or perhaps which simply requires, under our tariffs, the posting of such charges on the telephone instruments; or (3) terminate our regulatory program entirely, in the belief that enforcement of any "posting" requirements is best left to local law enforcement authorities, pursuant to local ordinance or legislative enactment, and in the further belief that competition among hotels will make the possibility of unreasonable charges remote.

Problems with the Present System

The underlying reason for the existence of surcharges of local calls is the necessity for hotels to recover, in some manner, the cost of their telephone installations. The great majority of hotel owners consider it fairer to surcharge local calls than to "bury" all of the cost in the room rent, since telephone usage varies highly from one type of guest to another. Generally, vacationers and tourists do not use their room phones much, while persons on business trips use the phones for scheduling appointments, making reservations, conference calls, etc. Phone use can be particularly heavy, for both incoming and outgoing calls, with a "V.I.P." guest.

As a matter of practice, hotels do not attempt to recover one hundred percent of the cost of telephone services through surcharges because competition tends to discourage high surcharges, and because, as the testimony made clear, the costs associated with handling incoming calls and calls to the hotel desk and to other hotel services are considered part of the service paid for in the room rent. It should be well noted that since we have no jurisdiction over a hotel's room rates, nothing prevents a hotel from recovering all or part of its telephone overhead associated with outgoing calls by way of room rates.[9/] In fact, testimony indicated that some small motels do not surcharge at all, because the cost of equipment to meter outgoing calls (or the labor cost to do so manually) is too great when measured against the amount to be recovered.

9/ Our previous orders have determined the maximum level for surcharges. We have never required their collection. Testimony of the hotel managers indicates that surcharges are not always collected because of last-minute telephone charges which do not show up on the billing at checkout time, mass checkouts of tour groups, and the desire to avoid arguments over charges when guests claim they did not make the calls attributed to them. The record demonstrates that an absolute requirement that surcharges must be collected would be unenforceable.

The Association introduced twelve witnesses, all of whom were critical of the Commission's present ratemaking methods.[10/] The witnesses consisted of the president of the Association, nine hotel owners, managers, or officers of hotel management companies with experience in a wide variety of hotels (varying not only in size but in location and type of clientele)[11/] and two certified public accountants with hotel background. These latter two witnesses were Mr. John C. Love, Director of the School of Hotel Management at Golden Gate College, San Francisco, and Mr. David S. Kopp, of Kerr, Forster Co. Mr. Kopp performed research on the subject of the time and money involved to complete a cost study for a surcharge rate increase according to the Commission's prescribed methods.

The criticism by all of the witnesses may be summarized as follows: (1) the Commission's burden-of-proof requirements for an increase in surcharges are oppressive and unreasonable; (2) the Commission's cost methodology produces a meaningless average cost per call which should not be imposed on all hotels; and (3) hotel guests do not materially benefit from the present system.

Present methodology. The final evolutionary step in the Commission's rate-setting methodology for intrastate hotel telephone surcharges was the case of California Hotel and Motel Telephone Committee v. California Interstate Telephone Company, et al. (1965)

10/ No other party introduced any rebuttal to this testimony.

11/ Saint Francis Hotel, San Francisco, 1,200 rooms; Fairmont Hotel, San Francisco, 600 rooms; Cartwright Hotel, San Francisco, 120 rooms; Bedford Hotel, San Francisco, 150 rooms; Woodlake Inn, Sacramento, 300 rooms; Grand Hotel, Anaheim, 240 rooms; Lafayette Hotel, San Diego, 160 rooms; Lafayette Hotel, Long Beach, 310 rooms; Biltmore Hotel, Los Angeles, 1,200 rooms; La Playa Hotel, Carmel, 75 rooms; Sundial Lodge, Carmel, 18 rooms; Disneyland Hotel, Anaheim, 927 rooms; The Inn at the Park, Anaheim, 500 rooms; Towne House, San Francisco, 347 rooms.

64 CPUC 567 (Decision No. 69491, Case No. 7864). Attached to Decision No. 69491 is Appendix B, which, in the official PUC reports (64 CPUC 580-583) consists of three pages of closely set six-point type. This appendix is the Commission's adopted cost methodology and is entitled "Basic Requirements for Any Future Cost Study in Support of a Filing for Increase of Hotel Guest Telephone Surcharge Rates".

For approximately the first page, the appendix, in subparagraphs (a) through (e), sets out extremely detailed cost gathering and cost separation and allocation instructions, including how actual samples of calls are to be compiled. There then appears the following paragraph:

> "(f) Application of the principles outlined in Items (a) through (e) should result in producing adjusted data internally consistent or reconcilable within or between the various tables and schedules of the study. Taking the present study for example, the purpose is to produce consistency between the 'Gross Sales' data and the 'Cost of Calls' data for each category of calls shown in Table IV, between the outgoing guest call data on lines 11 of Schedules 1 and the message charge data on lines 3 and 4 of Schedules 1. It should also provide consistency or reconcilability as between outgoing messages for the test year shown on lines 11 of Schedules 1 and the 'Gross Sales' and 'Cost of Calls' data of Table IV.** In addition, it should provide consistency of reconcilability between outgoing calls for the test year used on lines 11 of Schedules 1 to determine unit costs, and the peg count data of Schedules 3, 4 and 5 used to develop allocation factors.** Such internal consistency or reconcilability should be a minimum requirement for any future cost study, and the steps outlined in Items (a) through (e) are a minimum program for its attainment."

A footnote to this item explains that Table IV refers to Part 1 of Exhibit 1 and Schedules 1, 2, 3, 4, and 5 refer to Parts 2 and 3 of Exhibit 1 in Case No. 7864. Elsewhere in Appendix B there is reference to Exhibit 11. These two exhibits were the cost analyses and separations and allocations methods of the complainant and the staff, respectively. (These documents were recalled from State Archives for inspection by the Administrative Law Judge. Exhibit 1 consists of three bound volumes totaling about 200 pages, mostly of cost and telephone usage patterns for each test motel. Exhibit 11 is a complex document of 106 pages consisting mostly of tables and calculations.)

Appendix B then continues for another page and a half with exacting and detailed requirements for identifying types of calls made by guests, retention of records, requirements for reducing costs of handling calls, and certain other information, most notably detailed room occupancy data for each hotel included in the study. This last requirement is unanimously condemned by the Association's witnesses as requiring production of closely guarded proprietary information of considerable use to competitors in a highly competitive and non-monopolistic industry.

The Association points out that the result of the adoption of Appendix B is that the hotel industry has simply given up trying to raise the maximum surcharge. No successful rate increase proceeding concerning hotel surcharges has ever been concluded since Appendix B has been in effect, and no rate increases have been allowed, except for a small offset dealing with SMRT.[12/]

The owner-manager witnesses testified they did not understand Appendix B and could not study costs based upon its

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12/ See the section of this opinion, supra, entitled "History of the Commission's Regulatory Program".

requirements without expert assistance, and without hiring extra help to perform the counts required. The two CPA witnesses testified that parts of it are ambiguous and that to follow its strictures they would have to make assumptions on what is required.

Mr. Kopp sponsored Exhibit 3, which details what, in his opinion, it would cost to complete the studies required by Appendix B. He concluded that for a sample of about 30 hotels (even though Appendix B in several instances requires all hotels) his CPA firm would perform between 3,500 to 12,400 hours of work at a cost in the range of $108,000 to $295,000. To this would have to be added an unspecified cost associated with between 20,000 to 100,000 hours of time by the participating hotels (mostly for making actual counts of calls as required by Appendix B).

The "average" as a rate. Of equal importance is the Association's assertion that even if all difficulties with Appendix B are overcome, the surcharge based on a statewide average is meaningless and unfair because of extreme diversity in equipment, and the use of such equipment, from one hotel to another.

A small motel catering primarily to vacationers will have the simplest equipment (some such places have no room phones). A large downtown hotel will most likely have one of the many varieties of PBX (in the case of the Fairmont, a Centrex) with elaborate optional features. In a small "mom and pop" motel, "mom" or "pop" will run the switchboard (usually during daytime and early evening hours) with no measurable incremental labor cost. In a large hotel, there can be dozens of operators working in round-the-clock shifts.

The record clearly and overwhelmingly establishes an extreme diversity of equipment configuration and use. Exhibit 1 (sponsored by Mr. Donald J. DePorter of the Hyatt hotels) summarizes equipment types for the Hyatt chain in California and illustrates

the wide disparity in number of outlets, number of trunks, types of phone instruments, number of operators employed, monthly service charge, etc. Late-filed Exhibit 4 shows the great variety of PBX systems and options offered by General Telephone Company. The testimony of Mr. Goldman of the Fairmont Hotel illustrates some of the optional features available to a large hotel which finds it necessary to offer such services:

Room-to-room direct dialing
Room-to-service (e.g., room service, laundry) dialing
Screening of incoming calls by an operator
Message service
Call forwarding
Conference calls
Telephone secretarial service.

Such costs are only half the equation. Since room-occupancy levels and type of clientele vary from hotel to hotel, the per capita cost of telephone service will vary from one hotel to another, even assuming similar equipment.

Finally, our 1965 proceeding, which culminated in Decision No. 69491, understandably did not anticipate the growth in the market for telephone equipment which is purchased from independent suppliers rather than leased from operating telephone companies. The cost configuration for purchased equipment can be radically different from that for leased equipment. (See, for example, the testimony of Jerome Adams, owner and operator of the Cartwright Hotel and the Bedford Hotel in San Francisco, concerning such difference.)

Benefit to the public. As a result of the above problems, the Association contends that the Commission has defeated its own announced intention of having those who use the room phones for outgoing calls pay for them. The Association's brief comments:

> "This is not the result which the Commission hoped to achieve when it embarked upon setting on [sic] maximum surcharge rates. The Commission has wisely adhered to the view that the person who uses the guest room telephone service should bear the cost arising therefrom. The present system is highly inequitable to the large percentage of guests who do not use the telephone in their rooms. Such guests are, through their room rates, subsidizing those guests who do use their guest room telephone."

The Association further contends that such complex regulation is out of proportion to its value considering the competitive and non-monopolistic nature of the hotel industry. While the Association has 500 member hotels, the Association's estimate is that there are 6,500 hotels of all types and sizes in California, based on counting all the hotels listed in the state's yellow page directories. These are widely distributed throughout the state. Therefore, the Association claims, competition will have a major effect in preventing unreasonable surcharges.

Discussion. The present system of rate setting, based upon Appendix B to Decision No. 69491, is unreasonable for any further use for the reasons advanced by the Association, and should be replaced with some other method of protecting the public. Appendix B is labyrinthal in its complexity, especially considering the area of regulation involved. The cost study it requires, even if successfully completed, produces an "average" rate based upon a meaningless conglomeration of approximations. An excessive amount of time and money is necessary to complete the required study, assuming its value.

Additionally, it should be noted that even Appendix B, for all its detail, cannot fairly account for the cost of incoming telephone services by placing the burden on those who make outgoing calls. The testimony in this proceeding showed that the hotel

owners and managers considered the furnishing of incoming telephone services to be a legitimate part of the room rent, and at least for the larger hotels, expense connected therewith is a substantial portion of the total.[13/]

We also agree with the Association that (at least if hotels are required to post their telephone charges; see discussion, infra) competition will play a strong role in preventing unreasonable surcharges. With 6,500 hotels distributed throughout the state, the hotel industry cannot be regarded as other than competitive. Furthermore, any guest, when confronted with surcharges he considers excessive, can use the public telephones on the premises. This may be an inconvenience, but a guest is not a "captive" of the surcharges.

Finally, we believe that resistance on the part of the Association's members (and other non-member hotels) to disclosure of room-occupancy data is understandable. This Commission is accustomed to regulating entities which are either monopolies or which at least are part of a field into which entry is regulated and competition is, therefore, limited. Disclosure of what would ordinarily be confidential data by companies in such protected fields is often essential to protect the public from exorbitant charges, and such disclosure is less likely to be competitively damaging because of the lack of wide-open competition. The hotel industry does not fit this mold.

13/ No specific estimates were offered. In a recent New York proceeding, the New York Public Service Commission's staff noted that 80 percent of the telephone expense incurred by 19 test hotels was related to incoming calls, interior calls, management calls, and interstate toll calls. (Opinion and Order Revising Hotel and Motel Surcharges and Directing Compliance Program, Opinion and Order No. 74-10, issued February 20, 1974.)

What Alternative Method of
Protecting the Public Should be Adopted?

The Association recommends replacing the present "Appendix B" system with a proposed open-ended tariff filing system, coupled with a tariff requirement that a reasonably conspicuous notice of the surcharges to be collected be affixed to the room telephones (or in an otherwise conspicuous manner in the room).

The Commission staff agrees that, at least for the future, compliance with Appendix B as a condition precedent to a rate increase is not feasible. It suggests that future periodic increases in telephone surcharges be allowed based on a "documented increase in the cost of living index" (staff opening brief, page 8). We summarily reject this suggestion. If we are to set rates at all, we should not ignore direct costs associated with a service and substitute general economic trends. We have never adopted such an approach and consider that it would be a dangerous precedent.

Pacific, on brief, states that if the Commission determines it is in the public interest to regulate hotel telephone surcharges, it would violate its constitutional and statutory duties to establish rates via an open-ended system. This contention was not developed in greater detail. Presumably reference is made to the "just and reasonable" rate requirement in Section 451, and the requirement in Section 454(a) that a "showing" of reasonableness be made before the Commission before a rate is increased.[14/]

Pacific's contention might have merit if it is assumed that the system proposed were to require a telephone utility's

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14/ What sort of "showing" is required is left to the Commission, and this statutory language does not call for a formal proceeding and full public hearings in every case. (Wood v. Public Utilities Commission (1971) 4 Cal 3d 288.)

"open-ended" tariff provision to call in turn for each hotel to file its charges with the telephone company,[15] thus perpetuating the system of incorporating them into the tariff system and according them the force of law.

We think it is clear the Association's suggestion does not contemplate such filings. If it did, we would reject it because of the paper blizzard it would generate and because of enforcement problems in keeping up-to-date the filings of some 6,500 hotels. Neither the staff of this Commission nor the telephone companies should be put to the time and expense of enforcing such a system. The Association's recommendation is set forth in the prayer of its complaint in Case No. 10256. It does not request that hotels file their charges with the appropriate telephone company. It simply requests that we direct Pacific:

> "...to provide in its tariffs that hotels and motels may levy on calls made from or to[16] [emphasis added] hotel-motel rooms, whether local, message unit, or intrastate toll, a surcharge above the charge prescribed in the telephone company's tariff, in an amount determined by the hotel or motel, provided the hotel or motel electing to surcharge its guests shall post a schedule of charges in the guest room."

In other words, the tariffs would simply require posting of the surcharges.

15/ We have no jurisdiction to require hotels to file tariffs with us directly, since they are not public utilities and there is no special statute authorizing us to require such filings. Hotel telephone charges, under our present system, are considered part of the telephone company's rate structure, not the independent rates of the hotels. Indeed, this is why, under the present system, the Association has asked for increases in the telephone charges by filing "complaints" alleging that the applicable tariff provisions of a defendant telephone utility are unreasonably low. See discussion, supra, under the heading "Other Bases for Regulating Hotel Telephone Charges".

16/ The Association and its witnesses did not advocate charges for incoming calls at the hearings, and we assume from arguments on brief that this is not desired.

This being the proposal, however, the question is whether there should be any tariff provision on the subject at all. We believe the answer to this question is "no", since, as will be explained, members of the public can actually be better protected if the Commission discontinues regulating hotel telephone surcharges.

If we adopt an open-ended tariff, we must ourselves enforce the "posting" provisions for 6,500 widely scattered hotels and deal with disputes over charges as part of our regulatory system, or delegate the responsibility to the telephone companies. We have no statewide field staff to perform such enforcement duties, and we doubt if effective dispute settling could result from making the telephone companies the arbitrators.

Suppose, for example, a hotel guest in Fresno finds himself billed for surcharges when the hotel has failed to post a notice concerning such surcharges as required by tariff. If he complains to the police, he is told it is a public utility matter and he must either telephone the Public Utilities Commission, long distance, or write to the Commission and hope for a resolution at a later date. Such a system might even work to the advantage of an unscrupulous hotel owner.

If, on the other hand, the Commission discontinues such regulation, the way is open for local authorities to prevent abuses by enacting ordinances providing that it shall be a misdemeanor for any hotel owner or manager to collect or attempt to collect telephone surcharges not posted conspicuously on the telephone to be surcharged, or in the immediate vicinity thereof. When a complaint from a guest appears justifiable, the local police can cite the hotel owner for a misdemeanor violation, or request that the appropriate District Attorney or City Attorney file a misdemeanor complaint, and the matter

will then be before the local court. This is far more likely to result in justice and in compliance with posting requirements than for the Commission or the telephone companies to try to handle such matters.

We emphasize, in this connection, that our administrative records for recent years indicate that complaints addressed to us about hotel telephone charges have been rare. Therefore, to the best of our knowledge, cities and counties which enact such measures need not fear that their police departments or sheriff's offices will be burdened with more than very occasional complaints. In our opinion, and based on the testimony in this proceeding, this results from two factors: (1) the competitive nature of the hotel business, which discourages hotel owners from unfairly charging guests; and (2) the fact that, except possibly in a rare case, hotels have public coin telephones upon their premises, and those who wish to avoid telephone surcharges may make use of them.

We further emphasize that we consider the posting of notices concerning surcharges on the telephone to be surcharged or in its immediate vicinity to be the backbone of public protection. Many hotels do this already, and there appears to be no resistance to such a requirement. Therefore, while we have discussed this matter in terms of clearing the way for local authorities to act via ordinance, we would prefer that the Legislature insure statewide protection for hotel guests by enacting a statute which would prohibit hotel owners or managers from collecting, or attempting to collect, telephone surcharges without first posting such surcharges on or near the telephone to be surcharged. Violation of such a provision should be a misdemeanor. Such a statute could include hospitals, convalescent homes, clubs and dormitories, if the Legislature deems this desirable.

What might the public expect in the way of surcharges for outgoing intrastate telephone calls, upon cancellation of tariffs now holding them at 19¢ (or 18¢ plus 6¢ for every five minutes of a local call subject to SMRT)?[17] Testimony indicated that surcharges for hotels in unregulated jurisdictions ranged from approximately 25¢ to 50¢, with the higher charges at the largest hotels with the most elaborate equipment and the greatest range of telephone services.[18]

We do not anticipate rapid increases in surcharges because of the competitive nature of the industry. The owner-manager witnesses testified that surcharges are unpopular, and, as Mr. Massagli of the Saint Francis Hotel testified, it is better to keep surcharges low even if this means a raise in the basic room rates (transcript page 173).

In closing, it should be pointed out that there is nothing unique or novel about allowing those with non-utility telephone equipment to charge for services without regulation. It is done in many other states. In California, we have never regulated surcharges for outgoing calls from room telephones in hospitals or convalescent homes. Moreover, in this state we have never required the filing of tariffs directly or indirectly regulating the rates and charges

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17/ Procedurally, Case No. 10256 is a complaint case with Pacific as the only defendant. Therefore, our order can direct only Pacific to cancel such tariffs. However, such an order should make it clear that our policy favors acceptance of advice letters from other telephone companies cancelling such tariffs, and that we may take other action to treat all hotels the same if such advice letters are not forthcoming.

18/ One witness testified to a 75¢ charge for a Chicago hotel, but apparently part of the charge results from the hotel being outside the Chicago toll-free zone, so every call to Chicago is a toll call (transcript page 210).

of telephone answering services, since they are not public utilities, even though they have nothing to sell but a specialized type of telephone service. (Lauria v. Pacific Tel. & Tel. Co., supra.)

Findings and Conclusions

1. Hotels and their telephone systems are not integral parts of the telephone utility system. The telephone systems of hotels are provided for guests as an incidental part of the hotel business.

2. The providing by hotels of telephone systems for the use of guests and others on the premises does not result in such hotels assuming public utility status, and the Commission has no jurisdiction to regulate hotels as such.

3. The Legislature has not acted under Article XII, Section 5 of the California Constitution to confer additional authority and jurisdiction upon the Commission which would allow the Commission to regulate hotels as public utilities.

4. Sections 454(b), 455, and 701 of the Public Utilities Code afford the Commission a discretionary basis for indirect regulation of hotel telephone surcharges, since under such sections we may accept or require from regulated utilities tariff provisions binding on subscribers or customers of such utilities.

5. Since 1952 the Commission has engaged in such indirect regulation of hotel telephone surcharges for outgoing intrastate calls placed from room telephones.

6. The Commission's presently effective rate-setting system for hotel telephone surcharges is based on Appendix B of Decision No. 69491; 64 CPUC 567, 580-583 (1965).

7. Appendix B's requirements are unreasonably complex and burdensome and establish, for any future setting of hotel telephone surcharges, an unreasonable burden of proof as a condition precedent to an increase in such charges.

8. Even assuming successful completion of the study which Appendix B requires, the "average" costs thus determined are not necessarily a reasonable basis for fixing rates. There is extreme variation in costs from hotel to hotel because of difference in size and location of the hotels, difference in equipment from one hotel to another, difference in telephone usage per guest from one hotel to another because different hotels cater to different types of clientele, difference in the need for optional features to serve guests' needs, and difference in room occupancy levels.

9. Appendix B is at least partially obsolete because it does not take into account that today many hotels purchase their telephone systems from independent manufacturers rather than lease them from the telephone company.

10. No general rate relief regarding hotel telephone charges has been granted since the 1965 effective date of Appendix B, except for a one cent increase to offset SMRT (or in the alternative, 18¢ plus 6¢ for five-minute intervals when equipment to accomplish the timing is available).

11. The continued use of the methodology in Appendix B is not beneficial to the public and should be terminated.

12. The hotel industry is competitive, and such competition will tend to prevent unreasonable telephone surcharges.

13. Continuation of any system of fixed hotel telephone charges based on statewide averages of costs is not justified by the record in this proceeding.

14. The posting of a reasonably conspicuous notice, on or in the immediate vicinity of any hotel telephone to be surcharged, indicating the surcharge or surcharges, should be required.

15. The Commission may adopt a flexible system, as suggested by the Association, in which a telephone utility would file a tariff requiring each hotel to post the amount of the surcharges on or near the telephone to be surcharged.

16. An alternative to the system in Finding 15 is to cancel all telephone utility tariffs on the subject of hotel telephone surcharges. This is a preferable alternative because enforcement of a requirement for the posting of surcharges, on a statewide basis for approximately 6,500 hotels, cannot effectively be undertaken by the staff of this Commission or the telephone utilities, and should be in the hands of local authorities, pursuant to statute or ordinance.

17. The Commission should recommend to the Legislature that it enact a statute providing that it shall be a misdemeanor for any hotel (meaning and including "motel") owner or manager to collect, or attempt to collect, surcharges for the use of room telephones without first posting a reasonably conspicuous notice on or in the immediate vicinity of the telephone to be surcharged, indicating the surcharges.

O R D E R

IT IS ORDERED that:

1. Within thirty days of the effective date hereof, Pacific Telephone and Telegraph Company shall cancel its rates, schedules, and tariff provisions governing the level of surcharges for intrastate calls placed from hotel telephones.

2. Proceedings in Case No. 10256 are terminated.

3. Case No. 10127 and Case No. 10128 shall remain off calendar.

4. The Executive Director shall serve by mail a copy of this decision on each telephone utility under our jurisdiction.

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

Dated at San Francisco, California, this 20th day of June, 1978.

Respectfully submitted,

/s/ DONALD C. MEANEY
DONALD C. MEANEY
Administrative Law Judge