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Decision No. 89819 JAN 4 1979

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

QANTAS DEVELOPMENT CORPORATION, a California corporation, Complainant, vs. PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Defendant.	Case No. 10485 (Filed January 11, 1978)

Bram Bevis, Attorney at Law, for Qantas Development Corporation, complainant.
Duane G. Henry, Attorney at Law, for The Pacific Telephone and Telegraph Company, defendant.

O P I N I O N

This complaint by Qantas Development Corporation (complainant) requests the Commission to order defendant The Pacific Telephone and Telegraph Company (Pacific) to refund $12,463 paid by complainant to the city of Santa Rosa (Santa Rosa) for the underground conversion of communication facilities located adjacent to complainant's development along West College Avenue in Santa Rosa. Complainant states that the $12,463 is the difference between the amount agreed upon between Pacific and Santa Rosa and the amount initially estimated by Pacific as Santa Rosa's cost for undergrounding Phases II and III of complainant's development.[1/]

Hearing was held June 29, 1978 at Santa Rosa before Administrative Law Judge Banks.

1/ Phase I of complainant's development was considered in Decision No. 87278 dated May 3, 1977 in Case No. 10144, City of Santa Rosa v Pacific Telephone and Telegraph Co. That decision ordered that Pacific underground at its expense those aerial facilities represented by the four poles required to be relocated by reason of the widening of West College Avenue. Phases II and III are the further expansion of West College Avenue which results in the need to relocate an additional seven communication poles.

Complainant alleges that because it was not a party to the negotiations between Santa Rosa and Pacific, and when faced with the alternative of paying the $17,463 demanded by Santa Rosa or refrain from continuing construction, it was determined that no alternative really existed and the $17,463 was paid. Complainant also alleges that this is the same situation that existed in Case No. 10144 except that, in this instance, there are seven telephone poles to be removed and the pertinent facilities placed underground, while Case No. 10144 involved only four telephone poles and the pertinent facilities. Further, it is alleged that, from a cost standpoint, it is far more feasible to underground facilities involving seven telephone poles than it is for four poles. Finally, complainant states that Pacific's determination that Category 1.C of its Rule 32[2/] applied to Phase III was arbitrary and without explanation.

Answering the complaint, Pacific denies that complainant is entitled to the relief requested and prays that the complaint be dismissed.

Pacific asserts that Santa Rosa and not complainant is the proper party-complainant in that Pacific has received no money or payment from complainant with respect to the matter at issue and that it was complying with its tariff and Decision No. 87278. Further, according to Pacific the Commission made clear in Decision No. 87278 that the remainder of the aerial underground conversion of communication facilities along West College Avenue was to be completed pursuant to Categories 1.B and/or 1.C of Rule 32.

Finally, Pacific alleges that there is a substantial difference between the cost of relocating aerial facilities where those facilities remain aerial and the cost of relocating aerial facilities underground.

Mr. John D. Joslyn, an officer of complainant, testified that it was his understanding that pursuant to Decision No. 87278, Pacific was to incur the entire cost of undergrounding the communication

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2/ The text of Pacific's Tariff Schedule Cal. PUC No. 36-T, Rule 32 appears in Appendix A.

facilities along West College Avenue and that when Santa Rosa agreed to the Rule 32.1.B-type costing approach, complainant acquiesced as a compromise to keep its development moving and that complainant paid the $17,463 to Santa Rosa under protest with the hope of recovering a portion thereof from Pacific.

Also testifying on behalf of complainant was Mr. Allen H. Petrie, Assistant Director of Public Works for Santa Rosa. Mr. Petrie stated that he discussed the undergrounding project with Pacific; that Santa Rosa was concerned with the cost; that it was Santa Rosa's view that Section 32 1-B of Rule 32 would apply to Phases II and III; that several cost estimates were received from Pacific ranging from $4,000 to the ultimate $17,463; and that Santa Rosa paid Pacific with money received from complainant. On cross-examination Mr. Petrie stated it was his understanding that the approximate cost of the project would be about $5,000 and that he did not have, nor was he aware of any correspondence from Pacific to confirm his understanding or his belief that Rule 32.1.B would apply to both Phases II and III. He also stated that the only letter from Pacific in his file was one which stated that the cost would be $17,463.

Finally, Mr. William T. Bullard, the attorney representing Santa Rosa in Case No. 10144, testified for complainant. He stated that it was his recollection that part of the cost of the project was to be determined by Rule 32.1.B; that the approximate amount was something like $5,000 or $7,000; and that he believed Pacific "reneged" on their agreement. When asked why Santa Rosa did not file another complaint rather than agree to pay the $17,463, Mr. Bullard stated:

> "Well, the city had undertaken the responsibility to form the district and you know, we felt like it was in the best interest of the community to undertake the responsibility for forming the underground district.
>
> "This city is able to do that as, you know one entity that's entitled to create, or to apply for the creation of an underground district, and so, then, the tariff came into dispute and we went to bat to get this straightened out, and it was just such an expenditure of time and money that, by the time we had gone through

that hearing, we just decided, well, we're just going to have to let the subdivider take any further action that they deem necessary, because we were up against the wall.

"We either had to go by the rates that they had given us or, you know, we couldn't underground."

On cross-examination Mr. Bullard admitted that he did not have a clear recollection of the details of his conversations with Pacific.

Testifying on behalf of Pacific was Mr. James J. Hagarty, District Staff Manager, Local Government Relations. Mr. Hagarty traced the development of Pacific's Rule 32 through the Commission's investigation in Case No. 8209 to its adoption. He stated that in Decision No. 87278 the Commission supported Pacific's position that Santa Rosa had failed to create an undergrounding district conforming to the requirements of Pacific's Rule 32 and that any future conversion of communication aerial facilities on West College Avenue must be accomplished under Categories 1.B or 1.C of Rule 32. He stated that Pacific applied Rule 32.1.B for Phase II but in Phase III there are aerial electric facilities on the north side of West College Avenue requiring the application of Rule 32.1.C. (This section requires that the applicant for undergrounding pay in advance the amount equal to the estimated cost of construction less any salvage value.) Mr. Hagarty sponsored Exhibit 8, the letter agreement between Pacific and Santa Rosa for the underground conversion of West College Avenue, which contains the cost estimate of $17,463 for Phases II and III as determined by the application of Rule 32.1.B and Rule 32.1.C. The letter is signed by J. E. Wear for Pacific and accepted by B. J. Riha for Santa Rosa.[3/]

Mr. Hagarty also stated that while Decision No. 87278 supported Pacific's position that Santa Rosa had not complied with the provisions of Rule 32 in the formation of its underground district,

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3/ The letter of acceptance contains the following: "NOTE: Foregoing amount stipulated herein is paid under protest by the City of Santa Rosa in the event that the P.U.C. makes a subsequent determination to obligate the City to lesser amount."

it ordered that four communication poles in Phase I be undergrounded at Pacific's expense under the apparent theory that the cost of underground relocation would not substantially exceed the cost of aerial relocation. Mr. Hagarty stated that Pacific disagrees with that portion of the opinion and believes that Decision No. 76394 dated November 4, 1967 acknowledged that the cost of underground conversions are considerably higher than aerial relocations. To illustrate, Mr. Hagarty sponsored Exhibit 9, a comparison of the total cost to relocate aerially vs. underground conversion of the seven poles in Phases II and III of complainant's development. This exhibit shows that the cost to relocate the facilities aerially is $3,325 vs. $39,817 for underground conversion.

Mr. Joslyn's testimony that he understood that Decision No. 87278 required Pacific to incur the total cost of further undergrounding along West College Avenue and that complainant acquiesced as a compromise to keep its development is not convincing. Mr. Petrie's testimony that his understanding was that Category 1.B of Rule 32 would apply to Phases II and III and that he received several cost estimates from Pacific is suspect since he stated on cross-examination that the only correspondence in his file was Pacific's letter of October 5, 1977 to Mr. Riha that Categories 1.B and 1.C apply to Phases II and III, respectively, and that the cost was $17,463. Finally, Mr. Bullard stated that it was his opinion that Category 1.B would apply to Phases II and III, but admitted that he did not have a clear recollection of his many conversations with Pacific.

Mr. Riha's letter of June 13, 1977 to Pacific and attached to the complaint states that Santa Rosa understands that "the undergrounding of the aerial facilities on West College Avenue can proceed under Rule 32 of the Pacific Telephone and Telegraph's tariff-category 1.B" However, Pacific's letter offer of October 5, 1977 (Exhibit 7) to Mr. Riha clearly outlines the terms and conditions including the $17,463

cost for further undergrounding along West College Avenue. As noted above, this offer was accepted by Mr. Riha on behalf of Santa Rosa.

Further, in Decision No. 87278 we determined that Santa Rosa had "intentionally gerrymandered West College Avenue so as to exclude a number of existing electric distribution and joint communication-electric aerial facilities" and thereby failed to create an undergrounding district conforming to the requirements of Pacific's Tariff Rule 32. We also stated that:

> "In the case at bar, if Santa Rosa desires conversion of only the communication aerial facilities on West College Avenue, it must proceed under Category 1.B or 1.C of Rule 32 of PT&T's tariff."

Clearly then, further undergrounding of aerial communication facilities on West College Avenue must be accomplished as provided in Pacific's Tariff Rule 32.1.B or 1.C.

The unrebutted testimony of Pacific's witness was that the two poles in Phase II fall within Category 1.B, and the five poles in Phase III fall within Category 1.C (Exhibit 7); that total charges to Santa Rosa were $17,463 (Exhibit 7); that Santa Rosa accepted Pacific's estimate (Exhibit 8); and that the actual charges for undergrounding under Phase I was $47,766 (Exhibit 9).[4/]

Based on the testimony and evidence, we believe that Pacific correctly interpreted and applied its Tariff Rule 32 and that the relief requested should be denied.

Since we determined that Pacific correctly interpreted and applied its tariffs, it is unnecessary to address the issue of whether complainant is the proper party-complainant as alleged by Pacific.

Findings

1. Complainant seeks reimbursement of $12,463 from Pacific in connection with the underground conversion of Pacific's aerial facilities on West College Avenue in Santa Rosa.

4/ The $47,766 is the actual charge as reported by Pacific's construction forces on its JENG 10 form. It is the cost of underground conversion of the four poles in Phase I that Pacific had relocated aerially.

2. The underground conversion of the aerial facilities in question are Phase II and Phase III of complainant's real estate development along West College Avenue in Santa Rosa.

3. Underground conversion of aerial facilities in complainant's Phase I was at the expense of Pacific pursuant to Decision No. 87278 dated May 3, 1977.

4. In Decision No. 87278 we determined that Santa Rosa had not complied with Pacific's Tariff Rule 32 in forming an undergrounding district and that further underground conversion of aerial facilities along West College Avenue must be accomplished pursuant to Categories 1.B or 1.C (a benefited property owner or individual expense) of Pacific's Rule 32.

5. Phase II of complainant's development required underground conversion of two communication poles while Phase III required underground conversion of five communication poles.

6. Category 1.B of Rule 32 did not apply to Phase III of complainant's development because of aerial electric utility facilities on the north side of West College Avenue.

7. Pacific's undergrounding of complainant's Phase II under Category 1.B of Rule 32 and Phase III under Category 1.C of Rule 32 was proper.

We conclude that Pacific properly applied its Tariff Rule 32 and that the relief requested should be denied.

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O R D E R

IT IS ORDERED that the relief requested in Case No. 10485 is denied.

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

Dated at San Francisco, California, this 4th day of JANUARY, 1971.

Robert Batinovich
President
Peter E. Mitau
William T. Bagley

Commissioners

RULE NO. 32

FACILITIES TO PROVIDE REPLACEMENT OF AERIAL WITH UNDERGROUND FACILITIES

I. Replacement of Aerial with Underground Facilities

A. In Areas Affected By General Public Interest.

The Utility will, at its expense, replace its existing aerial facilities with underground facilities along public streets and roads, and on public lands and private property across which rights-of-way satisfactory to the Utility have been obtained, or may be obtained without cost or condemnation, by the Utility, provided that:

1. The governing body of the city or county in which such facilities are located has

a. Determined, after consultation with the Utility and after holding public hearings on the subject, that undergrounding is in the general public interest in a specified area for one or more of the following reasons:

1. Such undergrounding will avoid or eliminate an unusually heavy concentration of aerial facilities;

2. Said street, or road or right-of-way is in an area extensively used by the general public and carries a heavy volume of pedestrian or vehicular traffic;

3. Said street, road or right-of-way adjoins or passes through a civic area or public recreation area or an area of unusual scenic interest to the general public.

b. Adopted an ordinance creating an underground district in the area requiring, among other things,

1. That all existing and future electric and communication distribution facilities will be placed underground, and

2. That each property owner will provide and maintain the underground supporting structure needed on his

property to furnish service to him from the underground facilities of the Utility when such are available.

2. The Utility will replace its aerial facilities at the time and only to the extent that the overhead electric distribution facilities are replaced.

B. At the Request of Governmental Agencies or Groups of Applicants.

In circumstances other than those covered by A. above, the Utility will replace its aerial facilities located in a specified area with underground facilities along public streets and roads, and on public lands and private property across which rights-of-way satisfactory to the Utility have been obtained, or may be obtained without cost or condemnation, by the Utility upon request by a responsible party representing a governmental agency or group of applicants where all of the following conditions are met:

1. All property owners served by the aerial facilities to be replaced within a specific area designated by the governmental agency or group of applicants first agree in writing, or are required by suitable legislation, to pay the cost or to provide and to transfer ownership to the Utility, of the underground supporting structure along the public way and other utility rights-of-way in the area, and

2. All property owners in the area are required by ordinance or other legislation, or all agree in writing, to provide and maintain the underground supporting structure on their property, and

3. The area to be undergrounded includes both sides of a street for at least one block, and

4. Arrangements are made for the concurrent removal of all electric and communication aerial distribution facilities in the area.

C. At the Request of Individual Applicants.

In circumstances other than those covered by A. or B. above, where mutually agreed upon by the Utility and an applicant, aerial facilities may be replaced with underground facilities, provided the applicant requesting the change pays, in advance, a nonrefundable sum equal to the estimated cost of construction less the estimated net salvage value of the replaced aerial facilities.

D. At Utility Initiative.

The Utility may, from time to time, replace sections of its aerial facilities with underground facilities at Utility expense for structural design considerations or its operating convenience.