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Decision No. 90473

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LUCILLE M. GUNSTON and LEO GUNSTON, aka L. Gunston, individually and for all others similarly situated, Complainants, vs. PACIFIC TELEPHONE & TELEGRAPH CO., DOES ONE THROUGH FIFTY, Defendants.	Case No. 10582 (Filed May 31, 1978; amended September 25, 1978)

ORDER DENYING REHEARING

Lucille M. and Leo Gunston have filed a petition for rehearing of Decision No. 90259 wherein the above-entitled case was dismissed. The Commission has considered each and every allegation raised in that petition and is of the opinion that no good cause for granting rehearing has been shown; therefore,

IT IS ORDERED that rehearing of Decision No. 90259 is hereby denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 14th day of JUNE, 1979.

John E. Bryson
President

Vernon L. Sturgeon

Richard D. Gravelle

Claire T. Dedrick

Edwin A. Reinecke
Commissioners

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Decision No. 90259 May 8, 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LUCILLE M. GUNSTON and LEO GUNSTON, aka L. GUNSTON, individually and for all others similarly situated, Complainants, vs. PACIFIC TELEPHONE & TELEGRAPH CO., DOES ONE THROUGH FIFTY, Defendants.	Case No. 10582 (Filed May 31, 1978; amended September 25, 1978)

ORDER OF DISMISSAL

This is a complaint by Lucille M. Gunston and Leo Gunston (complainants) against The Pacific Telephone and Telegraph Company (defendant).

The original complaint was filed on May 31, 1978. Defendant filed its answer on July 3, 1978, which included a motion to dismiss the complaint. On August 11, 1978, complainants filed a Demand For Trial By Jury. On September 6, 1978, defendant filed an opposition to the Demand For Jury Trial and a motion to dismiss.

A prehearing conference was held on September 22, 1978. At the prehearing conference, complainants challenged the Commission's jurisdiction to proceed in the matter without affording them a jury trial. The Administrative Law Judge who presided at the prehearing conference indicated that the complaint lacked facts sufficient to state a cause of action. Complainants stated that they would file an amended complaint which was filed on September 25, 1978. Defendant filed its answer to the amended complaint and second motion to dismiss on October 25, 1978.

The complaint consists primarily of conclusory allegations unsupported by facts. Where facts are alleged, they are not sufficient to state a cause of action.

Some of the issues raised herein are identical to those which were asserted and decided adversely to complainants in Gunston v PG&E, Decision No. 90057 entered on March 13, 1979. That decision states, inter alia, at pages 2 and 3:

> "The complaint indicates that complainants have an action pending against defendant in the Alameda Superior Court. Complainants seek to offset current utility charges against an anticipated victory in the superior court with an award for damages. Complainants contend that they should not be subjected to the Commission's rules with respect to discontinuance of service because it will deny them the right to a jury trial. There is no merit in this contention.
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> "The Commission clearly has no jurisdiction to determine the inverse condemnation matter which is the subject of the Superior Court action. (Packard v PT&T et al. (1970) 71 CPUC 469, 472.) Defendant has the right to terminate utility service for nonpayment of charges. (Public Utilities Code § 779.) This right is not dependent upon the outcome of collateral litigation between the parties. The procedures for discontinuance of service are within the exclusive jurisdiction of the Commission. (Waters v PT&T (1974) 12 C 3d 1, 6.) Complainants are not entitled to a jury trial before the Commission. (Perry Farms, Inc. v Agricultural Labor Relations Bd. (1978) 86 CA 3d 448, 464-65.)
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> "The Commission has promulgated rules requiring utilities to adopt consonant tariff provisions with respect to discontinuance of service for nonpayment of bills. (General Order No. 96-A, Title II, Section C(4) 10, 11.) The Commission takes official notice that defendant has filed tariff provisions pursuant to the rule. The complaint alleges no facts which would preclude defendant from applying its tariff provisions relating to discontinuance of service for nonpayment of bills.

> "The complaint also seeks an order excluding from defendant's operating expenses monies paid to its attorneys. There is no basis for such an order. A utility is allowed to amortize or deduct as operating expenses prudent expenditures for legal services. (Southern Cal. Water Co. (1968) 69 CPUC 36; Oak Park Heights Land & Water Co. (1919) 16 CRC 798.) The complaint alleges no facts indicating imprudent legal expenditures by defendant."

Complainants complain that they appeared at a hearing in Application No. 58223 and made certain motions in that matter upon which there have been no rulings. That proceeding is pending for decision. Complainants are not entitled to file a separate proceeding to collaterally attack rulings or lack thereof in another proceeding before the Commission. There are adequate remedies within the other proceeding. (Public Utilities Code §§ 1731, 1756, 1759.)

Complainants challenge the disclosure of information practices of defendant. The complaint contains no facts which would indicate that defendant is not complying with its tariff provisions which were mandated by the Commission in Decision No. 88597 entered on March 21, 1978.

Complainants seek to attack various alleged practices or lack thereof by defendant. Paragraph II of the 7th Cause of Action of the complaint is illustrative and states as follows:

> "That Pacific fails in the implied, if not express conditions under which it was granted its franchise, by failing to maintain important security and has to be so informed through a newspaper-reporter's article. To wit:
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> > "The Russian consulate can tap Eastbay telephone calls, including military messages. (Exh. 3.) That the United States, i.e., all taxpayers, including Pacific's ratepayers must stand the expenses of matters which should have been properly done by Pacific in the first place. (Exh. 4.) That the same should be borne by the Pacific 'experts' derelict in their duty and allocated to the former rather than indirectly to the taxpayers/ subscribers."

Neither this allegation nor other similar ones set forth facts sufficient to constitute a cause of action.

Public Utilities Code Section 1702 provides in part that: "Complaint may be made...by any corporation or person...by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission." Rule 10 of the Commission's Rules of Practice and Procedure provides in part that: "The specific act complained of shall be set forth in ordinary and concise language. The complaint shall be so drawn as to completely advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired." Nothing in the complaint sets forth "any act or thing done or omitted to be done...in violation or claimed to be in violation, of any provision of law or of any order or rule of the Commission". In the circumstances the complaint should be dismissed for failure to state a cause of action. (Blincoe v PT&T (1963) 60 CPUC 432, 434.)

Finding of Fact

The complaint fails to state a cause of action because it does not allege any violation or claimed violation of any provision of law or any order or rule of the Commission.

Conclusion of Law

The complaint should be dismissed.

IT IS ORDERED that the complaint in Case No. 10582 is dismissed for failure to state a cause of action.

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

Dated at San Francisco, California, this 8th day of May, 1979.

JOHN E. BRYSON
President
VERNON L. STURGEON
CLAIRE T. DEDRICK
LEONARD M. GRIMES, JR.
Commissioners

Commissioner Richard D. Gravelle, being necessarily absent, did not participate in the disposition of this proceeding.