

ORIGINAL

Decision No. 92233 SEP 16 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

GAYNOR TELEPHONE & ELECTRONICS,

Complainant,

vs.

PACIFIC TELEPHONE,

Defendant.

Case No. 10284
(Filed March 14, 1977;
amended May 20, 1977)

William L. Knecht, Attorney at Law, for complainant.
Juane G. Henry, Attorney at Law, for defendant.
Richard D. Rosenberg, Attorney at Law, and
Ermet Macario, for the Commission staff.

O P I N I O N

By this complaint, as amended, Gaynor Telephone Systems, Inc. (Gaynor)^{1/} requests that the Commission: (1) establish rules governing the transfer and sale of pre-wiring and facilities by telephone utilities; (2) review the practices of The Pacific Telephone and Telegraph Company (Pacific) in regard to its demand that Gaynor purchase more interior wiring than was actually sold to it and fix a fair sale price for the wire involved in this transaction; and (3) direct Pacific to pay damages to and attorney fees of Gaynor. In its answer, as amended, Pacific alleges: (1) although it initially billed Gaynor for more wire than actually sold, this error has been corrected and a commensurate refund has been made to Gaynor; (2) the subject matter of this complaint is beyond the jurisdiction of the Commission; and (3) the Commission,

^{1/} Subsequent to the filing of the complaint, Gaynor Telephone & Electronics was incorporated and is now known as Gaynor Telephone Systems, Inc.

likewise, does not have jurisdiction to award damages or attorney fees. Pacific requests that the complaint be dismissed.

Public hearing was held before Administrative Law Judge Arthur M. Mooney in San Francisco on October 28, 1977, and March 8, 1978, and the matter was submitted upon the filing of concurrent briefs which have been received. Evidence was presented by Gaynor and Pacific. Representatives of the Commission staff assisted in the development of the record.

Background

The Shasta Lodge, a 37-room motel, was built in Redding in 1962. While it was being constructed, Pacific pre-wired the building to provide telephone service for each of the 37 rooms through central switching equipment in the office. The wiring was placed in the framing before it was sealed. No conduit was used. Once the walls were closed, the wire for each room was no longer accessible except at the connecting blocks. All telephone communication equipment and service at the Shasta Lodge was provided by Pacific for a number of years.

Gaynor is engaged in the County of Shasta in providing communications terminal equipment for customers under contract, and is a competitor of Pacific. The owner, Mr. Gaynor, has had considerable experience in the communications field. It services the equipment it installs, and it has five full-time employees and hires part-time help as needed.

In January 1977, Gaynor secured a contract to provide communication terminal equipment for the Shasta Lodge. It thereupon contacted Pacific to purchase the pre-wired facilities at the motel from the utility.

There were several meetings and exchanges of correspondence between Mr. Gaynor and representatives of Pacific regarding the price for the pre-wiring, which consisted of six pair E wire and 37 42A

connecting blocks. Pacific has no record of the actual amount of wire that had been used. Its original book cost for the pre-wiring, including labor and material, was \$187. Pacific drew up a purchase and sale agreement for the wiring and connecting blocks, and the price stated therein was \$1,675 plus 36 prorated personal property tax.

Pacific bases its selling price of inside wiring on what it describes as the structural value to the buyer. This it defines as the cost the buyer would expect to assume if he were to install the facilities himself under current conditions. With the Shasta Lodge, Gaynor would not open the walls to install concealed wiring as had been done when the initial installation was made. Instead, if Pacific's original wiring were not used, it would install exposed surface wire. Pacific estimated that Gaynor would need 7,060 feet of wire for the surface installation and that the time required to complete the job would be 81 man-hours. Generally, it uses the average labor cost in the area where the facilities to be sold are located or the labor cost of the purchaser and the current cost of materials. Here, because Pacific was of the opinion that the hourly labor cost of \$10.07 an hour, which did not include any allowance for overhead or profit, furnished to it by Gaynor was so low, it declined to use it and used its own labor rates, which, including overhead and profit, exceeded \$20 an hour. This hourly labor cost was comparable to those of several other electrical contractors in the area that Pacific had contacted. Also, it is Pacific's procedure in determining the sale price to take into account observed depreciation of the facilities to be sold. For the facilities at issue, it determined the depreciation factor to be 20 percent and took this into account in the price.

Gaynor's witness believes: (1) the sale price was substantially overstated by Pacific; (2) the price should be somewhere in the neighborhood of \$498.74, exclusive of overhead and profit; and (3) to allow Pacific a fair profit and recovery of overhead expense, a price in the amount of \$800 might be appropriate.

Because it was of the opinion that surface wiring would be unsightly in the motel rooms, Gaynor signed the purchase and sale agreement under protest and noted thereon that it would seek a formal ruling from the Commission regarding this. The bill of sale for the wiring was executed by Pacific on February 3, 1977. Shortly thereafter, Gaynor took over the facilities and installed its equipment. ✓

Gaynor thereupon filed the instant complaint. A short time thereafter, Pacific contacted Gaynor and informed it that there had been an error in the amount of wire that had been estimated and that this should have been 4,740 feet. Pacific thereupon refunded \$196 to Gaynor. Gaynor, however, is still of the opinion that the adjusted price is substantially excessive. In its answers to the complaint and the amendment thereto, and in its separately filed motion to dismiss, Pacific pointed out that the Commission heretofore in its Decision No. 79654 dated February 1, 1972, in Case No. 9300, Universal Communication Systems, Inc. v. General Telephone Company of California (which involved substantially similar facts involving the sale of inside wiring and terminals by a telephone utility to an interconnect company) had concluded "that it does not have jurisdiction to require defendant to publish rates or prices for the sale of equipment no longer necessary or useful in the performance of its duties to the public" and dismissed the complaint. Pacific also pointed out that Section 851 of the Public Utilities Code provides in part that: ✓

"Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value;..."

Discussion

The first issue for our determination is whether the sale of inside wiring and related material by a telephone utility to a competitor

interconnect company is subject to our jurisdiction. We are of the opinion that it is. As pointed out by Pacific we did in 1972 (Decision No. 79654) decline to assume jurisdiction in a complaint similar to the one now before us. However, in that matter, the complainant was requested to respond to the defendant's answer which challenged our jurisdiction on the grounds of Section 851 of the Code. Complainant failed to respond and did not further prosecute its complaint. After a period of time, the dismissal order, which was based exclusively on the pleadings, was issued. Since that matter was never litigated, and the complainant essentially withdrew, it cannot be considered as precedent for future similar complaints that are actively litigated. It would be patently unjust to Gaynor to dismiss its complaint on the basis of our ex parte Decision No. 79654.

We recognize that, as Pacific has pointed out, Section 851 of the Code states in essence that the sale by a public utility of any of its property which is not necessary or useful in the performance of its duties to the public is not subject to our jurisdiction and that any disposition of property by a public utility shall be conclusively presumed to be a property no longer useful or necessary in the performance of its duties to the public as to any purchaser dealing with such property in good faith for value. Obviously, the sale by a telephone utility of old or surplus trucks, wire, and other equipment which are no longer necessary or useful in the performance of its utility obligation to the public would be covered by this section and not subject to our jurisdiction. There is a distinction between the sale of such old or surplus property and the sale of useful inside wiring and connectors, such as we have here. The inside wiring and connectors will continue to facilitate the same type of communication service for Shasta Lodge, irrespective of whether it is being provided by Gaynor or Pacific. There is no change in the use of any of these facilities. While they are no longer strictly a part of Pacific's plant and service, they certainly are a complement useful to interconnect to the telecommunications

network. Furthermore, Paragraph 7 of Pacific's purchase and sale agreement provides that:

"If Purchaser discontinues its use of the Purchased Property and any applicant requests Seller to furnish communications services of a character for which the Purchased Property or any part thereof is, in Seller's opinion, useful to Seller in furnishing such requested services, Seller shall have the right, but not the obligation, to repurchase the Purchased Property or any part thereof at a purchase price mutually agreed upon, which purchase price, in any event, shall not exceed the price at which it was sold to Purchaser."

The agreement further provides that this provision is binding upon any successors or assigns of seller. This certainly indicates that in Pacific's opinion the property in issue is not old surplus property which is no longer useful in serving the public. It is under the control of Gaynor only for as long as it has a contract with Shasta Lodge, and it could conceivably in the future return to Pacific's control.

Having determined that we have jurisdiction, the next issue for our consideration is whether we should determine the price to be paid by Gaynor to Pacific for the property in issue. Based on a review of the cost and price data presented by the parties, there is no evidence of record on which we could make a precise determination as to the exact price that is reasonable and which should be paid. Pacific's adjusted price is \$1,485, including the \$6 prorated personal property tax. This is based on its so-called structural value less observed deterioration. With an 80 percent deterioration factor, the structural value advocated by Gaynor's witness is \$398, and based on his judgment a fair value, including an allowance for profit and overhead, would be \$800. Based on Pacific's work-unit value of \$18.58 per work unit for the installation of a main keyless telephone station, the cost for 37 room telephones would be \$687 (late-filed Exhibit 16), and with the 80 percent deterioration factor, this would be \$550. The original book cost of the inside wiring was

\$187. In its brief, Gaynor recommends a price of \$148. We have, on the one hand, Gaynor alleging that the man-hours and labor and material costs used by Pacific in determining its price were substantially excessive, and, on the other hand, Pacific asserting that the man-hours and labor and material costs used by Gaynor in arriving at its price were excessively low. While it does appear that there is some merit to the assertions by each party, there is no realistic basis in the record, as we have stated, by which we could adjust the estimate by either party with any degree of accuracy. The Exhibit 16 work-unit cost for the complete installation of a main keyless telephone station is an average cost for such installations. Such an average cost does not appear to be an appropriate basis for determining a fair price to be charged by Pacific because of the unique circumstances involved herein. The actual 1962 cost and the price advocated in Gaynor's brief appear too low. The statement by Gaynor's witness that he felt \$800 is a fair price is, likewise, of no help. This, apparently, is the maximum price that his company would have been willing to pay without filing a complaint with the Commission. As we have indicated, it does appear that Pacific's price is somewhat high. We will, therefore, for the purposes of this proceeding, conclude that a price not exceeding \$1,100 would be reasonable.

Our determination to state a maximum fair price to be charged by Pacific applies only to the facts and circumstances of the particular case now before us and does not establish a precedent for any future complaint involving the pricing of inside wiring that might be filed.

We do not have jurisdiction to award damages to Gaynor or to require Pacific to pay Gaynor's attorney fees. Gaynor's requests that the Commission establish rules for the transfer and sale of inside wiring and that it institute an investigation into the practices

of telephone utilities in the sale of such facilities will not be acted on now. If in the future it appears such activity is warranted, we can institute the necessary investigatory proceeding.

Findings of Fact

1. Pacific pre-wired the 37-room Shasta Lodge in Redding during its construction in 1962, and provided all telephone communication equipment and service for it for a number of years. The wiring is in the walls, is not in conduit, and is accessible only at the connecting blocks in each of the 37 guest rooms.

2. To rewire the 37 guest rooms at the Shasta Lodge would require either opening the walls to install new interior wiring or the installation of surface wiring. To open the walls would be expensive, and surface wiring would be unsightly.

3. In January 1977, Gaynor entered a contract with Shasta Lodge to provide terminal equipment and communication service for it on its premises and, for the reasons stated above in Finding 2, contacted Pacific to purchase the existing interior wiring and terminal blocks. The wiring is six pair E wire and there are 37-42A connecting blocks. Pacific no longer had records of the amount of wire it had used; however, its records did disclose that the original book cost for the installation was \$187.

4. Pacific's final sale price for the wiring was \$1,485, which included \$6 prorated personal property tax. It based the price on the structural value to the buyer less observed deterioration. This is its estimated replacement cost for 4,740 feet of wire under current conditions less 20 percent.

5. In early 1977, Gaynor purchased the wiring and terminals from Pacific at the price stated in Finding 4 under protest and noted on the purchase and sale agreement that it would seek a formal decision from the Commission regarding a fair price to be paid.

6. The property in issue is useful for the performance of telecommunications service and included in the class of property for which the Commission can approve safe conditions and price.

7. Under the circumstances presented herein a price of \$1,100 (plus \$6 for prorated personal property tax) is reasonable.

Conclusions of Law

1. The Commission has jurisdiction over the sale of useful inside wiring and connections by telephone utilities.

2. The reasonable price that should have been charged by Pacific for the sale of the inside wiring and connections in issue at the Shasta Lodge to Gaynor is \$1,100 plus \$6 prorated personal property taxes.

3. Pacific has heretofore refunded \$196 of the original purchase price of \$1,675 to Gaynor, and should refund an additional \$379 of the adjusted \$1,479 sales price plus \$6 prorated personal property tax. Gaynor's request that the Commission establish rules governing the sale and pricing of inside wiring by utilities, and that the Commission should investigate this matter, need not be acted on at this time.

O R D E R

IT IS ORDERED that:

1. The Pacific Telephone and Telegraph Company (Pacific) shall refund to Gaynor Telephone Systems, Inc. \$379 of the adjusted price of \$1,479 plus \$6 prorated personal property tax paid by Gaynor Telephone Systems, Inc. to Pacific for the purchase of inside wiring and connections at the Shasta Lodge, 1245 Pine Street, Redding.

2. All other relief requested by Gaynor Telephone Systems, Inc. in Case No. 10284 is denied.

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

Dated SEP 16 1980, at San Francisco, California.

John E. Guyon
President
Gregory L. Thompson
Richard D. Howell
Clair J. Pedrie
Donald W. James
Commissioners