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Decision 01-03-069 March 27, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Flamingo Mobile Lodge, Complainant, vs. Pacific Bell, Defendant.	Case 00-05-055 (Filed May 25, 2000)

Richard D. Ackerman, Attorney at Law, for Flamingo Mobile Lodge, complainant.
Stephanie E. Krapf, Attorney at Law, for Pacific Bell, defendant.

O P I N I O N

1. Summary

In a practice long since discontinued, Pacific Bell (Pacific) in the mid-1950s stapled telephone distribution and service cable to a wooden railing to serve 16 coach spaces at Flamingo Mobile Lodge (Flamingo), a mobile park in Corona. The railing has since deteriorated, and much of the telephone cable has fallen to the ground or is stretched across open space in the railing. Pacific at its own cost has placed the cable underground at five coach spaces, but it has refused to do the same underground work for the 11 other affected coach spaces until Flamingo advances $26,000 to pay for the work. This decision finds that Pacific has erroneously relied on tariffs that are not applicable here, and that in doing so

Pacific has failed to provide service necessary to promote the safety, health, comfort and convenience of its patrons, as required by Pub. Util. Code § 451. Accordingly, pursuant to Pub. Util. Code §§ 761 and 768, this decision directs Pacific to complete the underground installation on the property at Pacific's cost. Pacific's appeal of the Presiding Officer's Decision is denied.

2. Background

Flamingo filed this complaint on May 25, 2000, alleging that it was Pacific's responsibility to remedy an unsightly and unsafe condition caused by the deterioration of the wooden fence (called a utility rail) and the resulting sprawl and tangle of cable. Flamingo alleged that Pacific had installed the utility rail, but failed to maintain it. Since Pacific in August 1999 had placed the cable underground behind units 12 through 16, without charge to the mobile lodge, Flamingo asserted that Pacific should be required to do the same thing for cable and lines serving units 1 through 11.

Pacific was granted an extension of time to investigate the complaint, and it filed a timely answer on July 17, 2000. Pacific asserted that Flamingo had installed the utility rail, and maintenance of the rail was Flamingo's responsibility. Pacific alleged that it had done the work behind units 12 through 16 because of a service outage at one of the units there, while there is no service outage behind units 1 through 11. In the absence of an outage, Pacific states that its tariffs require the property owner to pay the cost of converting "aerial" cable to an underground installation.

On July 21, 2000, the assigned Administrative Law Judge (ALJ) directed the parties to respond to a series of questions, including what tariffs and other provisions of law they relied upon. The parties responded on August 28, 2000. On September 28, 2000, a prehearing conference was conducted by telephone,

and the parties were directed to explore settlement. Settlement efforts were unsuccessful. On October 17, 2000, a hearing was conducted in Corona. The Commission heard from four witnesses, and it received 18 exhibits into evidence. Briefing was completed on December 15, 2000, at which time the case was submitted for decision.

3. Positions of the Parties

Flamingo presented its evidence through witnesses Bob Leeds, a 12-year resident of the park who assists management in various projects, and Todd Fitschen, part owner and manager of the complex.

They testified that Flamingo has spaces for 92 coaches, with 59 of the units created in the mid-1950s and the other 33 units added in 1962. All but the first 16 units were served by underground telephone conduit. The evidence shows that Pacific paid for the cable and service connection wire for those installations, and Flamingo paid for the conduit. For the first 16 units, however, Pacific installed distribution cable and service connection wires by stapling them to a 3-foot-high utility rail that stretched for about 600 feet behind the 16 units.

Fitschen testified that he was not involved in the original installation. Based on conversations with his late father, who had developed the park, Fitschen said that he understood that the utility had installed the rail. On cross-examination, he admitted that Flamingo had removed rotted portions of the rail and had permitted residents to add fence posts to the rail to fence their units. Over time, he said, about 50% of the utility rail has deteriorated, and cable has fallen to the ground or dangles between pieces of the rail, presenting a safety hazard. A number of photographs showing the downed or dangling lines were received into evidence. Both Leeds and Fitschen testified that they had for years sought to have Pacific place the cable underground behind units 1 through 16,

but were always told that Flamingo would have to pay the cost of the conversion.

When a service line at unit 15 or 16 failed in 1999, Pacific put in a temporary line, then later did permanent undergrounding behind units 12 through 16 at no cost to Flamingo.

Larry Signaigo, a Pacific facilities engineer for two years, said that Pacific was required by its tariffs to replace the defective service wire connection at unit 15 or 16, and that the incremental cost of also burying the connections of four nearby units was modest. He said that because there had been a misunderstanding about the scope of the work, Pacific made the decision to bury the service wires for the five units that could be served by a common trench.

In a letter to Leeds dated August 3, 1999 (Exhibit 12), Signaigo made it clear that the work behind the five units was an exception, and that further underground work involving the utility rail would have to be at Flamingo's cost. While underground work for the five units cost about $2,300, he estimated that the cost of burying cable and wire for the other 11 units would be $26,000 because of the more difficult terrain behind those units.

Michael Shortle, a Pacific senior designer with 22 years of experience, testified that he had never encountered a case where distribution cable was attached to a supporting structure like the wooden fence. He said that he had called a retired colleague who told him that new facilities in the mid-1950s were installed from poles or were placed underground in iron pipe. However, Shortle said, he was told that the utility might have agreed to an owner's request to place the lines on a utility rail as an alternative to putting poles on the property. That practice would not be followed today, Shortle said, and to his knowledge has not been followed for many years.

Shortle testified that the utility rail was not likely to have been built by Pacific because, had the utility done so, the wood used would have been injected with creosote, a black tarry substance used on telephone poles and other wood facilities to deter insect damage. Through photos taken at the scene, Shortle demonstrated that the utility rail did not have a creosote injection, since such an application leaves a permanent dark brown stain on the wood.

4. Pacific's Tariffs

Pacific's witnesses testified that a customer's request to replace a structure to which above-ground wiring is attached is governed by Pacific's Tariff Rule 16 (Exhibit 16). A customer's request to convert above-ground wiring to underground is governed by Pacific's Tariff Rule 32 (Exhibit 13).

Tariff Rule 16 (or A2.1.16) states in pertinent part:

"A. SERVICE CONNECTION FACILITIES (Cont'd)

"3. Aerial Service Connection Facilities (Cont'd)

"c. Applicant or customer will provide and maintain a suitable point of attachment on the building housing the premises served to give clearance between the service connection wire or cable and ground and other objects as required by applicable laws, ordinances, rules or regulations of public authorities."

Tariff Rule 32 (or A2.1.32.) states in pertinent part:

"2.1.32 RULE NO. 32 – FACILITIES TO PROVIDE REPLACEMENT OF AERIAL WITH UNDERGROUND FACILITIES (Cont'd)

"A. REPLACEMENT OF AERIAL WITH UNDERGROUND FACILITIES (Cont'd)

...

"3. At the Request of Individual Applicants.

"In circumstances other than those covered by 1. or 2. preceding [requests of government agencies or groups of applicants], 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." (Footnote omitted.)

In other words, according to Pacific, if cable is on the ground because the fence that supported it was removed or had deteriorated, it would be the property owner's responsibility under Tariff Rule 16 to repair and provide the fence, and Pacific would re-install its lines on the fence. However, if an owner wants the entire above-ground facility converted to underground, then that work would be subject to Tariff Rule 32, and the applicant would be responsible for the cost of construction, less any salvage value of the removed structure.

5. Discussion

As Pacific correctly points out, Pub. Util. Code § 1702 places the burden on complainant to prove by a preponderance of evidence that the utility violated a law, rule, Commission order, or tariff in order to prevail on a complaint. Pacific argues that Flamingo has identified no law, rule, Commission order or tariff that has been violated.

However, there is no question that Flamingo has shown that the dropped and hanging lines behind units 1 through 11 present a safety hazard. The evidence shows that a resident tripped over wires behind unit 5 and has brought legal action against both Flamingo and Pacific. Exhibits 1 and 2 show spaghetti-like wires streaming from the ground in an exposed access point behind unit 11. Pacific admits that it installed the access point without encasing it in a metal pedestal, which is the standard practice. Pacific's witness explained that the access point has been left exposed for more than a year because the utility did

not want to spend the money to encase it pending a decision in this case or in the request for conversion.

Flamingo further has shown that many of the exposed lines and cable are present in open walkway areas or in areas where residents and their guests are likely to stroll or garden.

The evidence presented by Flamingo at a minimum states a cause of action under Pub. Util. Code § 451. Section 451 provides, in pertinent part:

> "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, *as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."* (Emphasis added.)

Pacific claims that its tariffs preclude the requested underground installation unless Flamingo pays the cost. As has been shown, however, despite the tariffs, Pacific felt free to exercise its discretion in performing similar work behind units 12 through 16 without charge to the property owner.

Moreover, the tariffs upon which Pacific relies are not dispositive in the situation here. Tariff Rule 16 obviously applies to an aerial connection of a service wire from a telephone pole to the roof or other point of a building, not from a 3-foot-high utility rail. To the extent that Pacific claims that it would reattach its lines to a repaired fence, that assertion contradicts Pacific's testimony that the utility no longer sanctions such an installation.

Tariff Rule 32 applies to replacement of "aerial" with underground facilities. Yet Pacific's witness acknowledged that the accepted meaning of "aerial" is overhead cable and lines, not cable and lines on a 3-foot-high utility rail. The latter, he said, is best described as "above-ground" rather than "aerial."

He added that in 22 years of work in this area, he had never before encountered a situation where telephone lines stretched from a utility rail to a residence in the manner found here.

It is clear from the testimony of Pacific's own witnesses that the utility rail installation at issue here is one that does not fit comfortably in any of the tariffs cited by Pacific as authority for its inaction.

Finally, the evidence establishes that Pacific knew or should have known that telephone cable and lines lying on the ground or stretched at knee level between deteriorating posts constituted an unsafe and unreasonable facility. While it seems likely on this record that Flamingo, not Pacific, installed the utility rail, it nevertheless was Pacific that elected to staple cable and lines to the rail, in a practice long since discontinued. It was Pacific that was statutorily charged then and now with the responsibility of ensuring that its installation was safe and reasonable. Pacific crews and engineers have visited the site many times, observing the deteriorated facility behind units 1 through 16. Yet, Pacific did nothing to correct the situation until 1999, when it placed some of the lines underground at units 12 through 16.

In summary, Pacific has not fulfilled its duty to ensure the safe and adequate installation of telephone lines at units 1 through 11 on Flamingo's property. Accordingly, this decision finds for complainant. Pursuant to Pub. Util. Code §§ 761 and 768, we direct Pacific without charge to the property owner to convert telephone cable and wires behind units 1 through 11 to an underground status in the same manner that Pacific earlier had converted the telephone wires serving units 12 through 16.

The scope of this proceeding is set forth in the complaint and answer. Our order today confirms that ALJ Walker is the presiding officer.

6. Appeal of Presiding Officer's Decision

On February 8, 2001, Pacific filed an appeal of the Presiding Officer's Decision in this matter. Pacific states that the decision contains factual and legal error by concluding that (1) Pacific was responsible for maintaining the utility rail to which Pacific's lines were attached, and (2) Pacific's tariffs did not apply to conversion to buried cable in this case. Pacific misstates the findings of the decision.

The decision does not find that Pacific was responsible for maintaining the utility rail. It finds that Pacific, pursuant to Pub. Util. Code § 451, had the responsibility to "furnish and maintain" its telephone facilities in a safe manner, and that it had not done so here. Pacific does not deny that the sprawl of cable and wires behind mobile units 1 through 11 presented a safety hazard. It argues instead that it has no responsibility to correct the safety hazard because the park owner did not repair a fence. We are aware of no such limitation on a utility's obligation to maintain its facilities in a manner that does not present a safety hazard.

How Pacific was to eliminate the safety hazard is another matter. Pacific suggests that if the park owner fixed the fence, then Pacific would again staple its cable to the fence. That suggestion contradicts Pacific testimony that such juryrigged installations are no longer permitted. Moreover, Pacific does not explain how the park owner could replace the fence without tampering with the cable and lines, which Pacific forbids.

A more sensible solution would have been for Pacific to have placed its facilities underground, and that is what it did (without charge to the park owner) for exposed wires behind units 12 through 16. Pacific could have done the same

thing behind units 1 through 11. If Pacific then felt that it had a claim against the park owner for cost of the work, it could have pursued that claim in court.

Instead, Pacific chose to do nothing. That put it in the awkward position in this complaint case of asking the Commission to find, in effect, that Pacific had no responsibility for maintaining its cable and wire arrangement in a safe manner. Such a finding is not sensible, nor does it conform to Pub. Util. Code § 451.

Pacific also argues that while Tariff Rules 16 and 32 may not be applicable here because they deal with "aerial" facilities, other tariff rules without the aerial connotation require an owner to pay the cost of placing telephone facilities underground. The evidence shows, however, that Rules 16 and 32 were the ones upon which Pacific relied for its inaction in its dealings with the park owner. As the presiding officer found, the facts and circumstances of this case do not fit comfortably within any of the tariff rules cited by Pacific, and none of them excuse Pacific's failure to correct a safety hazard involving its equipment and facilities.

Accordingly, we affirm the decision of the Presiding Officer without change, and our order today denies Pacific's appeal.

Findings of Fact

1. Flamingo has spaces for 92 coaches, with 59 of the units created in the mid-1950s and the other 33 spaces added in 1962.

2. All but the first 16 units are served by underground telephone conduit.

3. For the first 16 units, Pacific in the mid-1950s stapled distribution cable and service connection wire to a 3-foot-high wooden utility rail that stretched for 600 feet behind the 16 units.

4. About 50% of the utility rail has deteriorated, and cable has fallen to the ground or dangles between pieces of the rail.

5. Pacific until 1999 refused to place the cable and wire underground behind units 1 through 16 unless Flamingo paid for the cost of doing so.

6. When a service line at unit 15 or 16 failed in 1999, Pacific put in a temporary line and later did permanent undergrounding of lines serving units 12 through 16 at no cost to Flamingo.

7. Cost of the underground work at units 12 through 16 was approximately $2,300; estimated cost of the underground work for units 1 through 11 is $26,000.

8. The evidence shows that the utility rail at issue most likely was installed by Flamingo at the time the park was originally built.

9. The evidence shows that Pacific elected to staple cable and connection lines to the utility rail rather than install telephone poles or underground pipe.

10. Under Pub. Util. Code § 451, Pacific is required to maintain its installations in a safe and reasonable manner.

Conclusions of Law

1. Pacific knew or should have known that telephone cable and lines lying on the ground or stretched at knee level between deteriorating posts constituted an unsafe and unreasonable facility.

2. Complainant has established a *prima facie* violation by Pacific of Pub. Util. Code § 451.

3. Tariff Rules 16 and 32 apply to aerial installations, not to installations on a 3-foot-high utility rail.

4. Pacific should be directed to place cable and lines at units 1 through 11 underground in the same manner that Pacific has done for lines at units 12 through 16, at no charge to Flamingo.

5. This order should be made effective immediately so that telephone line conditions behind units 1 through 11 can be remedied promptly.

6. The scope of this proceeding is set forth in the complaint and answer; ALJ Walker is designated as the presiding officer.

7. Pacific's appeal of the Presiding Officer's Decision should be denied.

O R D E R

IT IS ORDERED that:

1. The Commission finds for Flamingo Mobile Lodge (Flamingo) in its complaint against Pacific Bell (Pacific) in Case 00-05-055.

2. Within 90 days of the date of this order, without charge to Flamingo, Pacific is directed to place underground its cable and lines behind Flamingo coach units 1 through 11 in the same manner that Pacific earlier had converted the telephone wires serving coach units 12 through 16.

3. Pacific's appeal of the Presiding Officer's Decision is denied.

4. Case 00-05-055 is closed.

This order is effective today.

Dated March 27, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners