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ORIGINAL

Decision No. 80702

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ROBERT W. TOWNSLEY,

Complainant,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH
CO.,

Defendant.

Case No. 9348
(Filed March 15, 1972)

Robert W. Townsley, for himself, complainant.
Milton J. Morris, Attorney at Law, for The
Pacific Telephone and Telegraph Company,
defendant.

O P I N I O N

This is a complaint by Robert W. Townsley (hereinafter referred to as the complainant or Townsley) against The Pacific Telephone and Telegraph Company (hereinafter referred to as defendant or PT&T). The complainant asserts that he has sustained poor and undependable service consisting of billing errors with respect to charges for local message unit calls. Secondly, he challenges the validity of the utility users tax charged by the City of Oakland and collected by defendant. Finally, he seeks an award of damages from the Commission for activities of the defendant which are said to have caused monetary losses to the complainant.

A prehearing conference was held before Examiner William N. Foley on July 12, 1972. A duly noticed public hearing was held in San Francisco on July 25 and 26, 1972. The matter was taken under submission.

The essential facts involved in this dispute are as follows: Complainant had received telephone service for many years at his residence in Oakland on a two-party measured rate basis. At the time involved in the dispute the basic monthly service charge was \$2.75 per month. This service included an allowance of 60 local message units, each local call was charged as one message unit. According to Townsley it was his practice to maintain a personal record of all telephone calls, and to record the elapsed time of each call with his own stopwatch. He introduced an exhibit which shows alleged errors by the defendant in the count of local message units as long ago as 1960. The complainant disputed the defendant's count of these message units on a fairly regular basis, and submitted only partial payments to the defendant on an irregular basis. Complainant alleges that defendant's billing for these local message units above the limit of 60 has continuously been erroneous and fraudulent. As a consequence, complainant has consistently refused to render payment to the defendant for any charge he concluded was "erroneous or fraudulent".

This practice on the part of Townsley has continued for a considerable period of time. For instance, during the period from March, 1969 through May, 1971 the complainant was billed each month by the defendant. He would allow the defendant's bills to remain unpaid for several months, and then he would render a partial payment. During this three year period he rendered a partial payment of \$31.94 on a total outstanding bill of \$53.01 in August, 1969. He did not make another payment on his unpaid balance until April, 1970. After this payment, he did not make another payment on his outstanding bill until January, 1971. During this period Townsley would send written notes with his bill complaining of defendant's message unit counts, or he would communicate orally with defendant's service representative about alleged errors in the count.

Defendant conducted tests of complainant's telephone equipment and its own equipment, including the wiring in the central office, between January 28, 1971 and March 1, 1971. (TR. 80.) The defendant found no errors in its billing operation. On March 30, 1971 PT&T made an adjustment to the complainant's bill by allowing a credit of \$2.84, including tax, for 61 message units charged to his telephone over the prior seven months. On May 4, 1971 the defendant sent the complainant a letter of denial, which is a written five-day notice that service may be discontinued for nonpayment. (See Schedule Cal. P.U.C. No. 36-T, Rule No. 11 A2a.) On May 13 PT&T called Townsley, received no answer, and temporarily disconnected his service. This disconnection involved only incoming calls to the Townsley residence. The defendant's manager and supervisor went to the Townsley premises on May 20, 1971 and May 25, 1971 in order to discuss the dispute. The complainant and his wife either were not available or refused to discuss the matter. On May 28, 1971 the defendant issued a disconnect order for the Townsley telephone and the instrument and cord were disconnected and removed on June 4, 1971. A final bill in the amount of \$44.64 was issued at that time.

The complainant also asserts that the defendant's bills are improper because they included amounts due to another, namely, the City of Oakland, for the utility users tax levied by that city. Townsley contends that the defendant cannot collect this local tax because it lacks a collection agency license from the State. Townsley maintains that the defendant must comply with all provisions of State law before it can collect this tax, and he further asserts that the Commission has jurisdiction to determine whether it has done so.

Finally, Townsley alleges that he has suffered monetary damages as a consequence of the defendant's acts over the past few years. The losses attributed to defendant's acts include damages to his automobile in the amount of \$345.00 for repairs to the transmission resulting from a breakdown which occurred while he was looking for his dog after the defendant's repairman permitted it to leave Townsley's premises. He also claims that he lost \$150.00

because he was unavailable by telephone as a result of defendant's disconnection. Furthermore, he asserts that defendant is responsible in the amount of \$500.00 for the delay of the receipt of an overseas telegram which could not be delivered orally by telephone because his service was disconnected at the time. Last, complainant maintains that the continuous dispute with defendant has caused him and his wife considerable worry and anxiety for which monetary damages should be awarded.

Complainant asks that the Commission order the defendant to restore his telephone service on the same basis that existed at the time of the permanent disconnection; that his past-due bill be forgiven in its entirety, and that the Commission award damages in the amount of approximately \$2,000. He also demands that PT&T be required in the future to submit an itemized list of his local message unit calls on his monthly bill.

Defendant denies that it has deliberately or accidentally over-billed the complainant for any message units, or that it has failed to adhere to its tariffs in any manner. In fact, defendant asserts that it has made every reasonable effort to accommodate the complainant with respect to this dispute, including the adjustment of message unit charges above the 60 message unit monthly allowance for a period of about seven months. PT&T also maintains that the statute of limitations set forth in Section 736 of the Public Utilities Code applies to prevent the complainant from raising any alleged errors or activities of the defendant which occurred before three years prior to March 16, 1972, the date on which the complaint was filed with the Commission. PT&T contends that the Commission lacks jurisdiction to determine whether any of its employees' actions constitute negligence and to award damages for such negligent acts. Finally, the defendant argues that the constitutionality of the utility users tax has been established and is well-known, and that any dispute regarding the question whether defendant must have a collection agency license in order to collect this tax rests in the civil courts and not with the Commission.

The material issues presented in this proceeding are as follows: (1) Does the Commission have jurisdiction to consider the claim for damages asserted by the complainant? (2) Does the Commission have jurisdiction to determine whether defendant must acquire a collection agency license before attempting to collect the utility users tax? (3) Has the defendant over-billed the complainant for local message units?

Defendant relies upon the statute of limitations with respect to Townsley's assertion that he was erroneously billed \$7.50 for "Other Services" on two occasions during the mid-1950's. According to the complainant, no such services were performed by the defendant.

This allegation is based on the theory that the defendant has applied charges in its bills different from those specified in the appropriate tariffs on file with the Commission. If proven, this would be a violation of Section 532 of the Public Utilities Code. In such cases, however, the three year statute of limitations provided in Section 736 of the Public Utilities Code is applicable. (White v. So. Calif. Edison Co., 59 Cal. P.U.C. 740 (1962).) This section requires that complaints must be filed with the Commission "within three years from the time the cause of action accrues, and not after". Therefore, since complainant's action was filed on March 15, 1972, he is limited to seeking relief from actions or inactions of the defendant which occurred on or after March 15, 1969. Because the two alleged billing errors occurred in the mid-1950's, the statute of limitation bars Townsley from seeking relief.

The complainant alleges that he has suffered monetary damages as a result of defendant's negligence in several specific instances. Apparently, several of these instances occurred during the period included within the statute of limitations. One allegation relates to the cost of repairs to complainant's auto transmission. This allegation raises the question of possible negligence

by an employee of defendant while on complainant's property. Another item relates to the loss of a business opportunity valued at \$150.00 because complainant was not available by telephone since service had been disconnected. Townsley's third allegation is that because service was disconnected, defendant is liable in the amount of \$500.00 for the delay incurred in receiving a cablegram. Finally, he claims that he and his family have sustained mental suffering as a consequence of defendant's actions related to his telephone service.

Townsley contends that since the Commission has the duty of regulating public utilities it has the jurisdiction to award the damages requested herein. This view is mistaken. The Commission's jurisdiction is limited to the powers conferred upon it by the California Constitution and the statutes enacted by the legislature. Section 2106 of the Public Utilities Code provides that public utilities are liable to persons who suffer loss, damages or injury caused by any utility's unlawful acts or failure to act.^{1/} The section also states that any action for such damages may be brought in any court of competent jurisdiction. Both the courts and the Commission have held that the latter has no authority to try a civil action arising out of a tort and to award damages. (Vila v.

1/ Section 2106 reads as follows:

"2106. Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

"No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt."

Tahoe Southside Water Utility, 233 Cal. App. 2d 469 (1965); Schumacher v. P.T.&T. Co., 64 Cal. P.U.C. 295 (1965); Crow v. P.G.&E. 65 Cal. P.U.C. 174 (1965); see also Cal. Constit., Art. VI, Sections 1, 5; Public Utilities Code Sections 734, 2106; Code Civ. Proc. Sections 20, 21, 22, 24, 25, 27, 28, 29, 30, 338.)

Moreover, the Commission has established rules which limit the liability of telephone and other utility companies. These rules for defendant are set forth in Schedule Cal. P.U.C. No. 36-T, Rule No. 14. This rule provides that defendant is liable for errors and omissions in any of the services or facilities furnished by it if such error is caused by willful misconduct, fraudulent conduct or violations of law. If the error is caused by gross negligence of the defendant, the Commission has limited its liability to a sum not greater than \$10,000. In all other instances the liability of the defendant for errors or defects in any of its services is limited to the reparation of an amount equal to the pro rata charges to the customer for the period during which the services or facilities are affected by the mistake, omission, interruption, delay, error or defect. (Rule No. 14 (3).)

The limitation of liability rules have frequently been challenged by customers of the defendant in the courts. In Cole v. Pacific Tel. & Tel. Co., 112 Cal. App. 2d 416, a customer of Pacific sued for damages for alleged negligence in failing to include the plaintiff's advertisement in the telephone directory. The court, in upholding the rule, explained the reason for the limitation of liability as follows:

"The theory underlying these decisions is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, its liability is and should be defined and limited. (Citation.) There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the commission are established with the rule of limitation in mind. Reasonable rates are in part dependent upon such a rule." (112 Cal. App. 2d 416, 419.)

Generally speaking, the courts have upheld and followed this limitation of liability rule. (See e.g., Cole v. Pacific Tel. & Tel. Co., supra; Davidian v. Pacific Tel. & Tel. Co., 16 C.A. 3d 750 (1971); but see Product Research Associates v. Pacific Tel. & Tel. Co., 16 Cal. App. 3d 609, at 222 (1971).)

Therefore, the Commission cannot provide any relief to the complainant insofar as awarding monetary damages is concerned. Townsley must go to court rather than the Commission to recover any such damages to which he may be entitled. The Commission is limited to providing refund of all or portions of past telephone bills paid by complainant, if he can show that during the period involved PT&T provided poor service, or failed to follow its tariff rules. The Commission can also order reinstitution of telephone service if it finds that PT&T has unlawfully disconnected Townsley's telephone.

The complainant's next contentions are that the utility users tax levied by the City of Oakland is illegal, and that before PT&T can collect the tax it must acquire a collection agency license in accordance with Sections 6852, 6870 and 6871 of the California Business and Professions Code.

With respect to the first contention, the Supreme Court has upheld the validity of this tax and its collection by the utilities for local governments. (Rivera v. City of Fresno, 6 Cal. 3d 132 (1971).) Furthermore, in Packard v. Pacific Tel. & Tel. Co., and Packard v. Pacific Gas & Electric Co., Decision No. 77800, dated October 6, 1970, in Cases Nos. 8998 and 8999, the Commission reviewed the procedures used by the two utilities in their billing and collecting the City of Vallejo's utility users tax from their customers. We concluded that the Commission did not have jurisdiction to determine the legality of the particular ordinance, but that it did have jurisdiction to review the billing procedures utilized by the utilities. The Commission held that the utilities are prohibited by law from discontinuing, or threatening to

discontinue the service of a customer who pays for the utility service furnished, but who refuses to pay the utility users tax. The Commission further concluded that the two utilities should do no more than be a billing and remitting conduit in connection with collecting the tax for the local community, and that they should not take any collection agency or court action against a customer for failure to pay the tax. Therefore, if Townsley believes that the tax is invalid for any reason, he can refuse to pay it by so informing PT&T when he pays his bill, and he will not have his telephone service adversely affected in any manner.

As for the question whether PT&T must secure a collection agency license pursuant to the Business and Professions Code, the Commission cannot resolve this issue. Since the Commission is not empowered with authority to enforce the statutes respecting collection agencies, Townsley must pursue this matter with the appropriate State agency or in the civil courts.

We now turn to the matters properly within our jurisdiction, namely, the alleged billing errors of PT&T with respect to local message unit charges, and the alleged wrongful discontinuance of Townsley's telephone service for nonpayment of his bills.

During the period from March, 1969 through May, 1971, Townsley had two-party measured message unit service in which he paid a basic monthly service charge for 60 message units each month. If he used more than 60 message units, he was billed separately for those message units above the allowance. The essence of Townsley's complaint is that according to his count made with a stopwatch, the company frequently charged him for excess message units above his allowance of 60, when in fact he had not once exceeded the allowance. He insists that he did not exceed the monthly allowance at any time during the period. Indeed, according to his exhibit, he has never exceeded the 60 message unit allowance in the period from December, 1966 through May, 1971.

Townsley also wants the defendant to include with its bill each month a detailed statement of his local message unit calls in addition to the detailed statement of multi-message unit calls. If it is not possible to receive a monthly accounting of both local and multi-message unit calls, he wants this billing information available to him on demand. He insists that measured message unit service be reestablished to him at no cost and that the monthly service charge be the rate in effect when his service was discontinued; i.e., \$2.75 per month.

The complainant introduced an exhibit showing his calculation of the number of message units accounted for by his calls each month for several years, including the period that we are limited by the statute of limitations to consider in this proceeding. During the twenty-seven month period from March, 1969 through May, 1971, Townsley's count shows that he never exceeded the 60 message units allowed with the basic monthly service charge of \$2.75. According to PT&T's records introduced in the proceeding, however, the complainant went over the limit of 60 message units per month in 18 of these twenty-seven months. Under the company's presentation the total amount billed to the complainant for these additional message units was \$7.75, excluding tax. However, as a result of the continuous dispute with Townsley about this matter, the defendant adjusted its bill and credited the sum of \$2.46, excluding tax. This reduces the disputed sum to a mere \$5.29. Nevertheless, complainant continues to insist that he should not be charged for these message units because under his method of clocking his own telephone calls, he never exceeded the 60 message unit monthly limitation. He steadfastly maintains that his method of clocking his calls is infallible, and that neither he nor any other member of the family placed an unclocked call.

Defendant responds that its call recording equipment is accurate and deliberately set to work in the customer's favor. PT&T presented a witness who explained how its automatic call recording equipment works in recording information on telephone calls, such as the calling number, the answer entry, and the disconnect entry. (Tr. 160-169.) This witness is the general plant operations manager for the defendant, and he is familiar with Mr. Townsley's telephone. He explained that call information is taken from the recorder and punched on a paper tape. Periodically the paper tape is sent to an accounting computer center where the customer's bill is rendered after the calling data is processed. He also stated that there is a two to five second delay before the entry is placed on the paper tape after the distant subscriber answers the telephone. The time counting apparatus of the automatic counting system is controlled by two master timers which are synchronized together in order to check each other. If one of these timers becomes unsynchronized, an alarm is activated. When this occurs, the recording operation is switched to a standby emergency recorder while the main recorder is repaired. Finally, he testified that upon receiving a request from the commercial department to run a check on the recording equipment connected to complainant's telephone, the plant department conducted a check on February 19, 1971. The equipment was found to be working properly.

The Commission rejects complainant's contention that PT&T charged him for calls he did not make, or that PT&T's recording equipment is defective. Complainant's position is based upon suppositions and remote possibilities. It requires that we accept his count of the telephone calls without any question. In our judgment, the probabilities are far greater that Townsley's personal clocking system was erroneous. More likely than not, these differences

resulted from some member of the complainant's family placing a call which was not clocked by him. Based upon the testimony introduced about defendant's equipment for recording and billing telephone calls, it is reasonable to conclude that the chance of human error by Townsley is far greater than the likelihood of unnoticed or unreported mechanical error by PT&T's equipment.

Nor does the record show that defendant violated any of its tariffs in discontinuing the complainant's service for nonpayment.

Townsley's last partial payment to PT&T was made on January 20, 1971 after PT&T called the complainant and explained that his service would be disconnected. This payment reduced Townsley's balance due to \$28.08. Subsequently, the plant department conducted the check of the call recording equipment. On March 30, 1971 defendant made the credit adjustment of \$2.84, including tax.

On May 4, 1971, complainant was sent a letter of denial for the unpaid balance of \$35.58 set forth in the bill dated April 16, 1971. On May 14, Townsley was sent a written notice of temporary disconnection. This disconnection involved only incoming calls. PT&T's local office manager and service supervisor visited the complainant's premises on May 20 and 25, but complainant's wife refused to discuss the matter. On May 28, defendant issued a nonpayment disconnect order, and the permanent disconnection was made on June 4, 1971.

This record does not indicate a violation of PT&T's tariffs. In fact, it shows that PT&T went to considerable effort to settle this dispute, but that it could not do so in the face of complainant's adamant attitude.

Finally, complainant demands that his telephone service be restored on the same basis, i.e., two-party measured rate service; and at the same rate as in effect as of June, 1971. In addition, Townsley wants the option of applying his monthly message unit allowance to either local or multi-message unit calls.

Neither of these requests could be granted even if the Commission determined this matter favorably for the complainant. Two-party service was eliminated as of December 31, 1971 by Commission order, and the charging of multi-message unit calls against a monthly message rate allowance was eliminated in Decision No. 74917, dated November 6, 1968, in Application No. 49142.

No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. Two allegations set forth in Townsley's complaint concern asserted overcharges made during the mid-1950's. Section 736 of the Public Utilities Code establishes a three-year statute of limitations for complaint actions against a utility.
2. Various paragraphs in Townsley's complaint allege causes of action in negligence and seek the award of monetary damages from the Commission.
3. Townsley's complaint also asserts that the utility users tax is illegal, and he requests that the Commission determine the question whether PT&T is in violation of provisions of the California Business and Professions Code regarding the need for a collection agency license.
4. Townsley's complaint seeks restoration of two-party measured rate telephone service which has been eliminated by a prior Commission decision.
5. Townsley seeks the right to charge multi-message unit calls against a monthly message unit allowance contrary to our order in Decision No. 74917, supra.
6. Townsley presented a record of his monthly telephone calls derived by clocking his calls with a stopwatch. Defendant presented testimony which explained how its automatic recording equipment records the elapsed time of Townsley's telephone calls, and how the equipment checks itself. Defendant conducted a test and check on

its equipment serving Townsley's telephone, and this test found no error in the recording equipment. Based upon this testimony, it is reasonable to conclude that defendant's equipment is far less likely to make errors in recording Townsley's calling time than his human method.

Conclusions of Law

1. The complainant is barred by the statute of limitations from raising alleged billing errors which occurred more than three years prior to the date his complaint was filed.
2. The Commission does not have jurisdiction to award damages for negligence or any other tort.
3. The utility users tax has been held to be a legally valid tax by the California Supreme Court.
4. The Commission does not have jurisdiction to determine whether PT&T is required to secure a collection agency license pursuant to provisions of the Business and Professions Code.
5. Complainant has not presented convincing evidence that his method of recording the elapsed time of his telephone calls with a stopwatch is more reliable than defendant's recording equipment for billing purposes.
6. Townsley is not entitled to any relief in this proceeding.

O R D E R

IT IS ORDERED that complainant is not entitled to any relief in this proceeding and the complaint is denied.

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

Dated at San Francisco, California, this 8th day of NOVEMBER, 1972.

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Thomas Moran, being necessarily absent, did not participate in the disposition of this proceeding.

James L. Shugart
President

William J. Quinlan
Commissioners