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ORIGINAL

Decision No. 85142

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

SCAN-A-PAD INCORPORATED,
Complainant,
vs.
GENERAL TELEPHONE COMPANY OF CALIFORNIA,
Defendant.

Case No. 9892
(Filed March 31, 1975)

Bennett B. Cohon, Attorney at Law, for Scan-A-Pad Incorporated, complainant.
Mary L. Sullivan, Attorney at Law, for General Telephone Company of California, defendant.

O P I N I O N

By its complaint filed March 31, 1975, Scan-A-Pad Incorporated requests an order of the Commission directing General Telephone Company of California to make refunds for message unit and foreign exchange costs, loss of business, and installation costs.

A public hearing was held before Examiner Daly on September 5, 1975 at Los Angeles.

The record indicates that complainant specializes in apartment rentals for several hundred apartments in Los Angeles; that with the use of a computer clients are provided with information relating to available rentals in accordance with their particular needs and requirements; that the service provided is almost entirely dependent upon the use of the telephone; that as of April 1972 complainant operated and maintained an office in West Los Angeles, which was served by four lines (477) provided by defendant, and

an office in Sherman Oaks, which was serviced by three lines (986) provided by Pacific Telephone and Telegraph Company; that during April 1972 complainant's president, Stephen Shapiro, decided to close the Sherman Oaks office; that Mr. Shapiro called defendant and requested the service of one of its communication consultants; that shortly thereafter a communication consultant for defendant visited Mr. Shapiro at the West Los Angeles office; that according to Mr. Shapiro, he explained the nature of his business to the consultant and told him that he wanted to consolidate the company's operations into the West Los Angeles office and was interested in a telephone service that would cover the same areas served by the two offices; that the consultant suggested the possibility of having the 986 brought in from Sherman Oaks; that after checking with Pacific Telephone and Telegraph Company and determining the mileage fee, the consultant informed Mr. Shapiro that 986 could be brought in as a foreign exchange service; that thereafter the change was made and complainant operated its West Los Angeles office with 477 and 986 services; that sometime after the 986 line was brought over Mr. Shapiro was advised by a friend that the entire area wherein complainant did business could be served by a single number; that Mr. Shapiro thereupon again contacted defendant and on July 10, 1973 was visited by another of defendant's communication consultants; that after explaining his telephone requirements Mr. Shapiro asked the second consultant how he could cover the area in the most economical way; that he was informed that the use of Los Angeles Foreign Exchange Service 879 would cover complainant's entire area at a lower cost; that the change to 879 service was thereafter made; and that according to complainant, if it had been using the 879 service instead of 986 the total avoidance in message unit and foreign exchange cost for the period October 1972 to September 1973 would have amounted to $1,414.85.

The first consultant testified that at the time he visited Mr. Shapiro he did not suggest the 879 service because he was under the impression that Mr. Shapiro was more interested in retaining the 986 number for business reasons; that at the time he considered himself more as an order taker rather than as an adviser; and that he did not consider the economics of the service.

In response thereto Mr. Shapiro testified that he was not interested in preserving the 986 number because complainant's operation primarily consists of one time customers and does not depend upon repeat business; that if he merely wanted the 986 line brought over he could have accomplished this by calling defendant and placing the order for the change without seeking the advice of one of defendant's communication consultants; and that he relied upon the first consultant to recommend not only the most efficient telephone service to meet his business needs and requirements, but in addition thereto the most economical telephone service.

In addition to a refund of $1,414.85 complainant requests a refund of $250 for additional installation charges and $4 a day for loss of business because of the toll charge required of customers calling in on 986, which is not required on 879. Complainant receives about 24,000 calls a year, and with an annual gross income of approximately $100,000 estimates that each call is worth $4.

Tariff Provisions

The applicable tariff provisions of defendant, as set forth in Exhibit 6, are as follows:

Rule No. 26

Limitation of Liability

A. Liability

1. The provisions of this rule do not apply to errors and omissions of law.

2. In the event an error or omission is caused by the gross negligence of the Utility, the liability of the Utility shall be limited to and in no event exceed the sum of $10,000.

3. Except as provided in Sections 1 and 2 of this rule, the liability of the Utility for damages arising out of mistakes, omissions, interruptions, delays, errors, or defects in any of the services or facilities furnished by the Utility (including exchange, toll, private line, supplemental equipment, directory, and all other services) shall in no event exceed 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, provided, however, that where any mistake, omission, interruption, delay, error, or defect in any one service or facility affects or diminishes the value of any other service said liability shall include such diminution, but in no event shall the liability exceed the total amount of the charges to the customer for all services or facilities for the period affected by the mistake, omission, interruption, delay, error, or defect.

Jurisdiction to Award Damages

Although the Commission has repeatedly held that it has no jurisdiction to award damages (Jones v P.T.&T., 61 CPUC 674; Horwitz v P.T.&T., Decision No. 79124, Case No. 8647) the Commission can award reparations pursuant to Sections 735, 736, and 737 of the Public Utilities Code.

In affirming this position the Commission in the Horwitz decision stated as follows:

> "We again hold that only a court and not the Commission has the power to award consequential damages as opposed to reparations. Reparatory relief is limited to a refund or adjustment of part or all of the utility charge for a service or group of related services. Consequential damages on the other hand is an amount of money sufficient to compensate an injured party for all the injury proximately caused by a tortious act, or to replace the value of performance of a breached obligation (Civil Code §§ 3300, 3333)."

In this proceeding complainant is not seeking damages, but does request refunds for: (a) charges paid over and above that which it would have paid if it had been provided with the 879 service; (b) reduction in incoming calls from potential customers attributable to the toll requirements on the 986 service; and (c) unnecessary installation costs.

The only question is whether these are situations for which this Commission can award refunds or reparations.

In H. V. Welber Inc. v P.T.&T. Co. (69 CPUC 579), the Commission in absolving the complainant from the obligation to pay $835 in installation charges found as follows:

> "In the complex field of communications, no layman can be expected to understand the innumerable offerings under defendant's filed tariffs. When defendant sends out one of its communication consultants to a customer's place of business for the explicit purpose of discussing telephone service, the consultant should point out all alternative communication systems available to meet the customer's needs. This is a duty owed by defendant to its customers. Here, this was not done. Although various basis of monthly charges (flat, measured, foreign exchange, and wide area service) were explained, the consultant discussed the key system only with complainant's president."

In the Horwitz case, supra, where defendant omitted a classified advertisement from its directory, the Commission found that:

> "Defendant has not attempted to collect for the service directly affected by the act complained of, i.e., the domestic division advertisement.
>
> "Thus, the only question concerning reparation is whether the value of any other of the services provided by defendant to complainant has been diminished (Faia v P.T.&T., Decision No. 75379, Case No. 8647).

> "The record demonstrates a substantial reduction in incoming calls from potential customers attributable to the omission. While complainant's telephone is still useful for maintaining contacts with established customers and for other general business purposes, we estimate that the value has been diminished by at least two-thirds. Therefore, we will order a refund of such proportion of the base charges collected for the business telephone for number (714) 541-3323 for the period between the date of publication of the present directory and the publication of the next directory."

It would appear that complainant's refund requests are similar in nature to those previously granted by this Commission.

After consideration the Commission finds that:

1. During April 1972 complainant was interested in achieving certain economies by closing its Sherman Oaks office and conducting its entire operations from its West Los Angeles office.

2. The success of this venture was dependent upon obtaining a telephone service that would assure no loss of business coverage.

3. Before making the change complainant sought and received the advice of one of defendant's communication consultants, whose recommendation to have the Sherman Oaks number brought over to the Los Angeles office as foreign exchange was followed.

4. Approximately a year after the change was made complainant's president, acting on information from a friend, made a second request upon defendant for advice and during the meeting with another of defendant's communication consultants was informed that Los Angeles Foreign Exchange Service 879 would adequately meet complainant's business needs and requirements at a lower cost, and shortly thereafter 879 servicewas installed.

5. At the time of the meeting with the first consultant complainant's president fully explained the operations of the business and the economies that the company was trying to achieve through a consolidation of its operations. Expert advice was being sought and complainant relied on the consultant's taking into consideration in his recommendation not only the most efficient means of providing the service required, but the most economical means as well.

6. Being fully informed, defendant's first consultant, as an expert, should have known that complainant had no business reason to retain the 986 number because complainant did not depend upon repeat calls, but was primarily concerned with a telephone service that would cover the same business areas then being served in the most economical way.

7. Complainant is entitled to a refund for those charges paid to defendant over and above that which complainant would have paid if the 879 service had been provided during the period that the 986 service was in use.

8. It is reasonable to believe that complainant lost incoming calls during this period because of the toll charges required of customers calling in on 986, and that the value of this service was diminished. Defendant will be ordered to refund one-fourth of the charges collected for basic service provided on 986 lines during the period in use.

9. Because complainant's requested refund for installation charges of $250 also includes equipment charges, the actual installation charges amount to $54.

The Commission concludes that defendant should make refunds to complainant as hereinafter set forth.

O R D E R

IT IS ORDERED that defendant shall make refunds to complainant as follows:

1. Those charges paid by complainant to defendant over and above those charges which complainant would have paid if the 879 service had been provided during the period that the 986 service was in use.
2. One-fourth of the charges collected for basic service provided on the 986 lines during the period in use.
3. Installation charges in the amount of $54.

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

Dated at San Francisco, California, this 18th day of NOVEMBER, 1975.

President

I abstain

Vernon L. Sturgeon

Commissioners