

Decision 88 11 028 NOV 9 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

GEORGE M. SAWAYA,)
)
 Complainant,)
)
 vs.)
)
 PACIFIC BELL,)
)
 Defendant.)
 (U 1001 C))

Case 86-07-013
(Filed July 7, 1986)

George M. Sawaya, for himself,
 complainant.
Theresa Cabral, Attorney at Law, for
 Pacific Bell, defendant.

O P I N I O N

Complainant charges that Pacific Bell (Pacific) misrepresents its Touch-Tone service by claiming that it permits faster dialing. Complainant also alleges that this statement is untrue in territories served by step-by-step central offices, such as in Pollock Pines where he resides. Complainant asserts that he relied on the statement and became a Touch-Tone subscriber. He claims to have discovered that Touch-Tone is not worth subscribing to. On behalf of all Touch-Tone subscribers in such territories, he seeks an order requiring corrective advertising and the payment of refunds.

Pacific's first pleading combines an answer and a motion to dismiss. In its motion Pacific argues that the complainant challenges the reasonableness of a rate, a cause of action that may be pled only by 25 customers or by one of the elected officials specified in Public Utilities (PU) Code § 1702. It also argues that the Commission has no jurisdiction to entertain a class

action, because it has no specific statutory authority. Finally, Pacific contends that it has done nothing unlawful. It alleges in its answer that Touch-Tone dialing is faster than dialing with a rotary instrument and that the complaint is frivolous and should be dismissed without hearing.

The Hearing

Hearing was held in Placerville on November 12, 1986 before Administrative Law Judge Gilman. Complainant testified for himself. Pacific called an engineering and a marketing witness.

Complainant testified that he read a pamphlet describing defendant's services. It stated that Touch-Tone service would enable him to place calls faster than with a rotary dial service. Relying on that representation, he subscribed, paying the \$5.00 connection charge. When he was unable to sense any difference in service, he consulted Pacific's service representatives. They led him to believe that there had been a delay in connecting him to the new service. After allowing sufficient additional time for Pacific to complete any installation procedure, he again complained that there was no improvement in service. He then realized that installing the service did not involve any physical change to his dialing path but merely a change in billing. At his request, Pacific cancelled his service and refunded all he had paid for it, including the connection charge.

Complainant's instrument is manufactured and sold by a non-utility. As with most modern instruments, it offers both tone and pulse modes. In the pulse mode the telephone simulates the pulses of a standard rotary dial instrument. Even though his subscription to Touch-Tone service is cancelled, he frequently dials using the tone, rather than the pulse, mode.

Pacific's engineering witness testified that complainant and other residents of Pollock Pines are served by the Cedar Grove central office, a step-by-step office. Since such central offices are not designed to respond to Touch-Tone dialing, an additional

mechanism (Convert-A-Pak) has been added to deal with Touch-Tone dialers. Convert-A-Pak converts tones to simulated pulses that step-by-step equipment can use to establish a calling path.

He stated that Pacific is studying several devices that would allow step-by-step offices to identify a non-subscriber using tone dialing; it has not, however, installed any such devices. (Cedar Grove is scheduled to be upgraded to electronic switching in 1990; such a central office, like all others with modern equipment, will prevent a customer from using tone dialing unless he is a Touch-Tone subscriber.)

The witness conceded that in step-by-step territory: (1) all subscribers may avail themselves of Touch-Tone service, whether they pay for it or not; and (2) there is no physical change to a subscriber's line when he is added to or removed from the list of Touch-Tone subscribers.

The engineer described a test he conducted with a dual mode phone. He found that the instrument in tone mode completed calls somewhat faster than in pulse mode.

Pacific's marketing witness testified that in the next edition of the pamphlet, the statement concerning faster dialing will be qualified by the words "in most areas." She does not believe that the current description is misleading; however, Pacific has decided to make the change to prevent mistakes. She believes that Pacific has no obligation to tell Touch-Tone subscribers in step-by-step territory that they may receive the same service free.

She calculates that 47% of customers in step-by-step offices subscribe to Touch-Tone service; this is about 1.5% of Pacific's total customer base.

Background

In Decision (D.) 84-06-111 in Application (A.) 82-11-07 (et al.), the Commission considered whether to price Touch-Tone service as a part of the basic phone service; in other words, the

question was whether to provide Touch-Tone "free" to all subscribers. The Commission recognized that providing the service would add substantially to Pacific's cost of service. Since free utility service is no freer than the proverbial free lunch, this alternative would have required all customers to help recoup the costs, raising the charge for basic telephone service by over \$1.00 per month. The Commission rejected this proposal, preferring to keep the cost of basic telephone service as low as possible. It decided instead that Touch-Tone should continue as an extra-cost option, with each user bearing a share of the cost of providing the service.

The Commission did not consider in D.84-06-111 how to implement Touch-Tone in territories such as Cedar Grove, where the hardware does not respond to tones or permit Pacific to distinguish between Touch-Tone subscribers and non-subscribers using tone mode phones. Consequently, Pacific implemented D.84-06-111 in those territories without Commission guidance.

Discussion

Reasonableness of the Rate

Even if complainant had expressly asked us to terminate for unreasonableness the Touch-Tone charge in step-by-step territories, we could not entertain his request. PU Code § 1702 provides, in part:

"No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any...telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such...telephone service."

Complainant neither obtained the signatures of 25 customers nor did he obtain the support of any elected officials. We therefore have no authority to entertain his complaint questioning the reasonableness of the existing charge for Touch-Tone service in step-by-step territories.

Furthermore, PU Code § 734 provides, in part:

"No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable..."

Since the rate for Touch-Tone service was declared reasonable in D.84-06-111, the Commission, if it is to comply with § 734, may not order reparation to be paid to complainant. In any event, Pacific has refunded to complainant everything he paid for Touch-Tone service, including the installation charge.

Complainant also seeks an order requiring Pacific to refund Touch-Tone charges to other similarly situated customers. Neither the PU Code nor our rules contain any provisions for class action complaints, beyond the 25 customer rule, supra. Since complainant has not complied with § 1702, he is in no position to represent the interests of anyone but himself. Moreover, § 734 would have prevented us from granting reparations or refunds to similarly situated customers, even if complainant had complied with § 1702.

Advertising

Complainant asserts that Pacific's bill insert was misleading when it promised faster dialing to Touch-Tone customers. Pacific has now corrected the description of Touch-Tone in its "What's Available" pamphlet; it no longer suggests that Touch-Tone will produce faster dialing in all situations. To the extent that complainant seeks a change in this pamphlet, Pacific has satisfied his complaint. As for complainant's demand for corrective advertising, we know of no principle of law that requires a public

utility to inform customers how to obtain service without paying for it.

Touch-Tone Service in Step-by-Step Territories

This complaint proceeding is not an appropriate procedural vehicle for exploring and resolving the concerns raised by complainant. We believe, however, that those concerns require further inquiry. The questions of the charge for Touch-Tone service and the potential modernization of all Pacific's central offices have been raised in I.87-11-033. If the issue of Touch-Tone service in step-by-step territories is unresolved in that proceeding, we may direct further study or testimony on the issue.

Findings of Fact

1. Pacific's advertising no longer suggests that Touch-Tone permits faster dialing in all circumstances.
2. Defendant has satisfied the part of the complaint that alleges that its pamphlet is misleading.
3. The complaint is not signed by an elected official or by 25 customers.
4. Pacific has refunded to complainant all of the charges he paid for Touch-Tone service.
5. The Touch-Tone charge was found reasonable in D.84-06-111.

Conclusions of Law

1. Pacific is not required by law to inform customers how to use Touch-Tone service without paying for it. Pacific should not be required to inform its customers in step-by-step territory how to by-pass Touch-Tone service.
2. The Commission may not entertain this complainant's charge that the rate for Touch-Tone service is unreasonable.
3. Complainant has no standing to pursue reparations for others.

4. Complainant has failed to state a cause of action within the jurisdiction of the Commission.

5. To the extent that Pacific has satisfied complainant's demands the complaint is moot.

6. The complaint should be dismissed.

ORDER

IT IS ORDERED that:

1. Parties are put on notice that the Commission may revisit the issue of Touch-Tone service in step-by-step territories should the outcome of I.87-11-033 leave the issue unresolved.

2. The complaint is dismissed.

This order becomes effective 30 days from today.

Dated November 9, 1988, at San Francisco, California.

STANLEY W. HULETT
President

DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.

Victor Weiss
Victor Weiss, Executive Director

3. Complainant has no standing to pursue reparations for others.
4. Complainant has failed to state a cause of action within the jurisdiction of the Commission.
5. To the extent that Pacific has satisfied complainant's demands the complaint is moot.
6. The Commission staff should be directed to study the issue of Touch-Tone service in step-by-step territories and to raise that issue in a general rate proceeding for Pacific at the earliest opportunity.
7. The complaint should be dismissed.

ORDER

IT IS ORDERED that:

1. The Division of Ratepayer Advocates is directed to study the issue of Touch-Tone service in step-by-step territories and to raise the issue in a general rate proceeding for Pacific at the earliest opportunity.
2. The complaint is dismissed.

This order becomes effective 30 days from today.

Dated _____, at San Francisco, California.

2. The Commission may not entertain this complainant's charge that the rate for Touch-Tone service is unreasonable.
3. Complainant has no standing to pursue reparations for others.
4. Complainant has failed to state a cause of action within the jurisdiction of the Commission.
5. To the extent that Pacific has satisfied complainant's demands the complaint is moot.
6. The complaint should be dismissed.

ORDER

IT IS ORDERED that:

1. Parties are put on notice that the Commission may revisit the issue of Touch-Tone service in step-by-step territories should the outcome of I.87-11-073 leave the issue unresolved.
2. The complaint is dismissed.

This order becomes effective 30 days from today.

Dated NOV 9 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
C. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

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Touch-Tone Service in Step-by-Step Territories

This complaint proceeding is not an appropriate procedural vehicle for exploring and resolving the concerns raised by complainant. We believe, however, that those concerns require further inquiry. In the context of a general rate proceeding the questions of form of service for Touch-Tone customers in step-by-step territories, rate level for such service, rate design, and revenue allocation may be considered together with similar questions raised by other classes of service. We will direct our Division of Ratepayer Advocates to study the issue of Touch-Tone service in step-by-step territories and to raise that issue in a general rate proceeding for Pacific at the earliest opportunity.

Findings of Fact

1. Pacific's advertising no longer suggests that Touch-Tone permits faster dialing in all circumstances.
2. Defendant has satisfied the part of the complaint that alleges that its pamphlet is misleading.
3. The complaint is not signed by an elected official or by 25 customers.
4. Pacific has refunded to complainant all of the charges he paid for Touch-Tone service.
5. The Touch-Tone charge was found reasonable in D.84-06-111.

Conclusions of Law

1. Pacific is not required by law to inform customers how to use Touch-Tone service without paying for it. Pacific should not be required to inform its customers in step-by-step territory how to by-pass Touch-Tone service.
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Findings of Fact

1. Pacific's advertising no longer suggests that Touch-Tone permits faster dialing in all circumstances.
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