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Decision 89 01 041 JAN 27 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Adolf Loeb and Ann Loeb, Complainant, vs. General Telephone Company of California, Defendant. (U-1002-C)	(ECP) Case 88-02-008 (Filed February 3, 1988)

O P I N I O N

Summary of Complaint

Adolf Loeb and Ann Loeb (complainants) filed this complaint on February 3, 1988. Complainants allege that GTE California Incorporated (defendant) did not inform complainants' that there is a connection charge for restoring complainants foreign exchange (FX) service.[1] Complainants do not dispute the validity of defendant's tariff which authorizes defendant to impose a FX connection charge. However, complainants allege that defendant misrepresented a material fact because defendant did not inform complainants that a connection charge is required to be paid for FX service.

Complainants request that their FX connection charge, paid on February 1, 1988, be declared void. Complainants also request that the FX connection charge be refunded with interest.

1 FX service is a service which enables a customer to dial prefixes contiguous to a customer's local prefix area.

Answer to Complaint

Defendant acknowledges that complainants paid a $215 connection charge to restore FX service. Defendant asserts that if complainants are provided FX service without a connection charge, defendant would be in violation of Tariff Schedule Nos. A-19 and A-41.

Hearing

A hearing was scheduled for April 19, 1988. However, at complainants request, the hearing was postponed until May 13, 1988 at Sacramento. Complainants testified on their behalf and Mr. Duffy testified on defendant's behalf. The matter was submitted at the conclusion of the hearing.

Discussion

Complainants established FX service in Sacramento on December 15, 1978. From May 1984 through October 1987, Mrs. Loeb resided outside of Sacramento because of poor health. Mr. Loeb's principal need for telephone service in Sacramento while his wife resided outside of Sacramento was to call his wife.

In January 1986, Mrs. Loeb asked defendant, at defendant's Lancaster office, whether defendant offered an alternative service which had a monthly charge which was lower than the monthly FX charge. Defendant informed Mrs. Loeb that a residential flat rate (basic) service was available at a lower monthly charge. However, the basic service provides access to fewer local calls than the FX service. Defendant testified that the monthly charge for basic service was approximately $6.00, or $24 lower than the $30.00 monthly charge for FX service.

Mrs. Loeb told defendant that complainants wished to restore FX service in the future, when her health stabilized and she returned to Sacramento. Defendant replied that complainants' FX service could be restored. On June 12, 1986, complainants' Sacramento FX service was converted to basic service.

In the latter part of 1987 Mrs. Loeb returned to Sacramento and asked defendant to restore complainants' Sacramento FX service. Defendant acknowledged that FX service could be obtained upon the payment of a connection charge. Defendant also informed complainants that the monthly charge would be higher than complainants' monthly charge for basic service.

Complainants believe that they should have been told of the connection charge when they inquired about alternate service in 1986. Complainants testified that they relied on information provided by defendant to decide which service was most economical for their needs. According to complainants, defendant's silence about the connection charge is nondisclosure of a material fact which precluded complainants from making an economical decision. Complainants assert that had they been told about the connection charge, they would not have converted their FX service to basic service in 1986.

Conclusion

The broad issue in this complaint case is the amount of information defendant is required to provide when a customer seeks information about service options. A narrower issue is whether defendant is required to inform complainants about FX connection charges when complainants request an alternative service but note their intent to return to FX service in the future.

Complainants provided specific criteria to defendant. They sought to determine whether defendant offered a service which had a lower monthly charge than the FX service. Defendant responded fully to complainants' specific inquiry. Although complainants told defendant that they intended to return to FX service at a later date, complainants asked only what the monthly charges would be.

Defendant's tariffs do not require defendant to tell complainants about costs associated with a service which complainants want replaced for an alternative service which has a

complainants had basic service and could have saved more had they converted their service sooner.

The fact that complainants did save money by switching to basic service despite the FX connection charge is irrelevant to the determination of defendant's duty to inform complainants of the existence of the connection charge. We note that if the period during which alternative service was utilized was shorter, then the benefits to complainants flowing from the cheaper monthly cost of the basic exchange alternative could well have been negated by the high connection charge for FX service. For example, if complainants had used basic exchange service for 8 months, they would have saved $192 in monthly charges. This savings would have been negated by the $215 connection charge for return to FX service. Even if basic exchange service had been used for a longer period of time, the reduction in overall savings that results from factoring in the connection charge may well have tipped the balance in favor of retaining FX service all along, since FX service has a much greater number of local calling prefixes than does basic exchange service, and thus might have been more attractive to complainants. Because the connection charge cost could have played a significant role in complainants' decision making, it should have been disclosed when defendants were consulted about service options.

Although defendant's tariffs may not specify that inquiring customers be told of connection charges as well as monthly charges associated with service options, defendant nonetheless had a legal obligation to do so. In H.V. Welker, Inc. v. Pacific Tel. & Tel. Co., 69 CPUC 579 (1969) (Welker), Scan-A-Pad, Inc. v. General Tel. Co. of California, 79 CPUC 124 (1975) (Scan-A-Pad), and National Communications Center Corporation v. Pacific Tel. & Tel. Co. (NCC), 2 CPUC 2d 533, 546 (1979), the Commission awarded reparations for the adverse results of poor recommendations or service option information provided by telephone

CORRECTION

THIS DOCUMENT HAS

BEEN REPHOTOGRAPHED

TO ASSURE

LEGIBILITY

lower monthly cost. Therefore, defendant is not in violation of its tariffs. However, complainants assert that defendant is required to tell customers about all material facts that defendant is aware of.

We agree with complainants that defendant should have informed complaints of the current connection charge for FX service when they were consulting about alternative services and asking about the possibility of returning to FX service in the future. Although they specifically asked only about the monthly service charge associated with FX service, it is obvious that information regarding the connection charges associated with returning to FX service would have been useful to complainants in determining which service would ultimately be most economical.[2] The absence of a specific inquiry about connection charges is not persuasive, since the telephone company, and not the customers, was in the best position to know all the factors relevant to a choice between FX and basic service. Complainants were entitled to expect that when they consulted defendant about service options they would be given complete information necessary for making an informed, economical, choice.

Defendant argues that complainants were not misled to their detriment. Defendant calculated that complainants saved approximately $400 in monthly charges during the period that

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2 We understand that even if defendant provided complainants with information about FX connection charges, defendant would have been able to tell complainants only what the tariffs in place at the time of the request required. Since tariffs are routinely changed through advice letter filings and rate change applications, the information provided might have been outdated by the time complainants were ready to return to FX service. Nonetheless, we feel that some information regarding the existence and amount of FX connection charges would have helped complainants more than no information at all.

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The fact that complainants did save money by switching to basic service despite the FX connection charge is irrelevant to the determination of defendant's duty to inform complainants of the existence of the connection charge. We note that if the period during which alternative service was utilized was shorter, then the benefits to complainants flowing from the cheaper monthly cost of the basic exchange alternative could well have been negated by the high connection charge for FX service. For example, if complainants had used basic exchange service for 8 months, they would have saved $192 in monthly charges. This savings would have been negated by the $215 connection charge for return to FX service. Even if basic exchange service had been used for a longer period of time, the reduction in overall savings that results from factoring in the connection charge may well have tipped the balance in favor of retaining FX service all along, since FX service has a much greater number of local calling prefixes than does basic exchange service, and thus might have been more attractive to complainants. Because the connection charge cost could have played a significant role in complainants' decision making, it should have been disclosed when defendants were consulted about service options.

Although defendant's tariffs may not specify that inquiring customers be told of connection charges as well as monthly charges associated with service options, defendant nonetheless had a legal obligation to do so. In H.V. Welker, Inc. v. Pacific Tel. & Tel. Co., 69 CPUC 579 (1969) (Welker), Scan-A-Pad, Inc. v. General Tel. Co. of California, 79 CPUC 124 (1975) (Scan-A-Pad), and National Communications Center Corporation v. Pacific Tel. & Tel. Co. (NCC), 2 CPUC 2d 533, 546 (1979), the Commission awarded reparations for the adverse results of poor recommendations or service option information provided by telephone

utilities. These cases concluded that defendant utilities had breached their duty to properly inform customers of available service options and to, if requested, recommend the most economical service available. This duty is based on the Public Utilities (PU) Code Section 451 requirement that every utility provide adequate, efficient, just, and reasonable service. (NCC, supra, 2 CPUC 2d at 546.)

For example, in Welker (supra, 69 CPUC at 582) the Commission found that:

> "In the complex field of communications, no laymen can be expected to understand the innumerable offerings under defendant's filed tariffs. When defendant sends out one of its communications consultants to a customer's place of business for the explicit purpose of discussing telephone service, the consultant should point out all alternative communications 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 bases of monthly charges (flat, measured, foreign exchange and wide area service) were explained, the consultant discussed the key strip system only with complainant's president. . . . The president would have selected an alternative to the key strip system installed by defendant had the various alternatives been brought to his attention."

We also note that PU Code Section 489 was recently enacted to give telephone customers complete information when they establish or change telephone service. Section 489(b) requires the Commission to "by rule or order, require every telephone company operation within a service area, on first contact by a prospective subscriber and in subsequent contacts by the subscriber for the purpose of changing service, to fully inform the subscriber of the basic services available to the class of subscribers to which the subscriber belongs..." We believe that "fully informing" customers would require explanation of both nonrecurring connection

charges and recurring monthly bills. Since neither party briefed the issue of whether FX service is a basic service available to residential customers within the meaning of Section 489, we will refrain from deciding that issue here.

Reparations may be appropriate where a utility breaches its duty to properly inform customers of available service options. In Scan-A-Pad, for example, the Commission first noted that while it did not have jurisdiction to award damages, it could award reparations pursuant to PU Code Sections 735, 736, and 737. Finding that complainant had justifiably relied on defendant's representations as to the available service configurations, and that defendant should have provided complainant with information regarding the most economical service the Commission ordered refunds of those charges paid to defendant over and above those charges which complainant would have paid if it had been properly informed about the most economical service; it also ordered a refund of installation charges and made an additional adjustment to account for the diminution in the value of the services received by complainant during the disputed period of service.

While we agree with complainant that defendant breached its duty to inform complainant fully of the service options available, we do not agree that this breach entitles complainant to a refund of the FX connection charge. Complainants lost no money as the result of defendant's misrepresentation, indeed, defendant calculated that complainants saved approximately $400 in monthly charges during the period that complainants had basic service. Since complainants saved money as the result of their switch to basic exchange service even when the connection charge is taken into account, we have no basis for awarding reparations to make complainants whole for difference between what they actually paid for telephone service and what they would have paid if they had had an opportunity to make a fully informed choice.

Nor do we have any way to calculate the possible loss in the value of telephone service that may have resulted from complainants' use of basic exchange rather than FX service. Complainants evidently placed less value on FX service than the $24 per month they thought they were saving by switching from that service. We acknowledge the possibility that complainants would have valued FX service more than the amount that complainants actually saved, taking the connection charge into account. But the present record lacks a basis for assessing the value of the loss of FX service under these circumstances. We therefore decline to award such reparations.

We are, however, grateful to complainants for pointing out a deficiency in defendant's current tariffs. We will order defendant to adopt an information disclosure tariff identical to Pacific Bell's Rule 2.1.12, which requires full itemization of the charges associated with services applied for. Rule 2.1.12 provides in pertinent part that:

> "At the time when a customer requests a move, change or addition to an existing residence service, the Utility, or its authorized employees, must provide a full explanation of available residence exchange access service options and optional services in a manner consistent with the provisions of this Rule and must also provide a quotation of the applicable recurring rates and nonrecurring charges applicable to each service requested by the customer."

This should help prevent recurrences of the type of situation presented in this case. While defendant's new rule should perhaps refer to "services discussed with the customer," not simply "services requested by the customer" or "services designated by the customer," as does the Pacific Bell rule, we will not order defendant to do so since we prefer consistency between the tariff rules of defendant and Pacific Bell. We will in any event interpret these information disclosure rules broadly, to make sure

customers have sufficient information to allow them to choose the most economical and appropriate services.

This complaint should be dismissed because complainants have not met their burden of proof in demonstrating entitlement to reparations in the amount of the FX connection charge.

Since this complaint is filed under our expedited complaint procedure, no findings of fact or conclusions of law will be made.

O R D E R

IT IS ORDERED that:

1. The complaint in Case 88-02-008 is denied.
2. Defendant is ordered to, within 90 days, file with the Commission an information disclosure tariff rule identical to Pacific Bell Tariff Rule 2.1.12.

This order becomes effective 30 days from today.

Dated January 27, 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

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

Victor Weisser, Executive Director

APPENDIX A

Where facts are peculiarly within the knowledge of the person making the misrepresentation, and not within the knowledge of the person to whom made, the latter has the right to rely thereon.

Bank of America v. Greenbach, 98 CA 2d 220, 234

Nondisclosure of fact is actionable as where a person has no duty to speak, nevertheless does so, and in such a case he is bound to speak the whole truth.

Zinn v. Ex-Cell-O Corp., 148 CA 2d 56, 68, 69

A misrepresentation must be of a material fact.

Greenwalt v. Rogers, 115 CA 2d 630

A misrepresentation of fact is material if the person to whom it is made relies upon it to his damage.

Agnew v. Parlis, 172 CA 2d 756, 768

Suppression of a fact is material if it relates to a matter of substance and affects the purpose of the party deceived in entering into the contract.

Thomas v. Hawkins, 96 CA 2d 377, 379

(END OF APPENDIX A)

In the latter part of 1987 Mrs. Loeb returned to Sacramento and asked defendant to restore complainants' Sacramento FX service. Defendant acknowledged that FX service could be obtained upon the payment of a connection charge. Defendant also informed complainants that the monthly charge would be higher than complainants' monthly charge for basic service.

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We are, however, grateful to complainants for pointing out a deficiency in defendant's current tariffs. We will order defendant to adopt an information disclosure tariff substantially the same as Pacific Bell's Rule 2.1.12, which requires full itemization of the charges associated with services applied for. Rule 2.1.12 provides in pertinent part that:

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Defendant's new rule should refer to "services discussed with the customer," not simply "services requested by the customer" or "services designated by the customer," as does the Pacific Bell rule. This should help prevent recurrences of the type of situation presented in this case.

This complaint should be dismissed because complainants have not met their burden of proof in demonstrating entitlement to reparations in the amount of the FX connection charge.

Since this complaint is filed under our expedited complaint procedure, no findings of fact or conclusions of law will be made.

O R D E R

IT IS ORDERED that the complaint in Case 88-02-008 is denied.

Defendant is order to, within 90 days, file with the Commission an information disclosure tariff rule substantially similar to Pacific Bell Tariff Rule 2.1.12, consistent with the discussion in the text of this decision.

This order becomes effective 30 days from today.

Dated JAN 27 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners