ALJ/A.C/jt *

Decision 89 03 011 MAR 8 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Toward Utility Rate Normalization, Complainant, vs. Pacific Bell Telephone Corporation, General Telephone of California, US Sprint Communications Company, Defendants.	Case 88-04-058 (Filed April 22, 1988; amended May 12, 1988)

ORIGINAL

Mark Barmore, Attorney at Law, for Toward Utility Rate Normalization, complainant.
David Discher, Attorney at Law, for Pacific Bell; Kenneth K. Okel and Kathleen S. Blunt, Attorneys at Law, for GTE California Incorporated; and Phyllis A. Whitten, Attorney at Law, for US Sprint Communications Company; defendants.
Randolph Deutsch, Attorney at Law, for AT&T Communications of California, Incorporated; James L. Lewis, Attorney at Law, for MCI Telecommunications Corporation; Messrs. Armour, St. John, Wilcox, Goodin & Schlotz, by Thomas J. MacBride, Jr., Attorney at Law, for California Association of Long Distance Telephone Companies; and Robert C. Schwartz, for Bill Correctors, Inc.; intervenors.
James S. Rood, Attorney at Law, and James Simmons, for the Division of Ratepayer Advocates.

O P I N I O N

Background

This complaint must be viewed in the context of other related actions pending before, or taken by, this Commission. The history of these proceedings began on September 10, 1985 with the

issuance of Order Instituting Rulemaking (OIR) 85-09-008, (R.85-09-008), which, among other things, ordered an investigation of "[b]illing [by telephone corporations] for charges which were incurred during periods prior to the period in which the billing is presented to the customer. This is commonly called 'backbilling'." (R.85-09-008, slip opinion, p. 2.) All telephone utilities doing business in California were made parties to this OIR and it was served upon several interested parties, including Toward Utility Rate Normalization (TURN), the present complainant, as well.

On May 6, 1986, after receiving comments from various interested entities the administrative law judge (ALJ) issued a Proposed Report. After considering exceptions to the report this Commission issued Decision (D.) 86-12-025, dated December 3, 1986. In that decision the Commission set forth a backbilling procedure, which incorporated Pacific Bell's (Pacific) Rule 9.I.1 as an "industrywide standard" for backbilling of services except for a five-month backbilling period to apply to billing of collect calls, credit card calls, and third-party calls, and for interexchange carriers (IECs) for calls which could not be billed due to the unavailability of complete billing information to the IEC ("casual calls,"[1] for example). All respondent telephone utilities were directed to file a backbilling procedure "substantially the same" as that described within 90 days.

Pacific applied for a rehearing of D.86-12-025 on the issue of a backbilling limitation on interLATA access charges. Sprint Communications Company, now US Sprint (Sprint) and MCI Telecommunications Corporation also applied for rehearing. These

---

1 Casual calls are those interexchange long distance calls made over the facilities of a long distance carrier to whose service the caller does not subscribe. These calls are sometimes called "10xxxx calls" because the caller must first dial the interexchange carrier's 6-digit code which begins with the digits 10.

applications triggered an automatic stay of D.86-12-025. By D.87-03-043, dated March 17, 1987, rehearing was granted for two purposes, including the question of access charges. The existing stay was lifted except as to Ordering Paragraph (O.P.) 1, which included the imposition of the three-month backbilling limitation.

Pacific filed a petition for modification of D.87-03-043 asking the Commission to clarify that its stay of O.P. 1 was not meant to extend to those portions of that ordering paragraph regarding backbilling of end users since that was not the subject of any party's application for rehearing and was not to be the subject of further rehearing. (Sprint filed a response opposing Pacific's petition.) By D.87-06-050 dated June 24, 1987 this Commission agreed with Pacific's position, and modified D.87-03-043 to clarify that the stay of D.86-12-025 only remained as to the specific issues about which we had granted rehearing.

The matter was not finished, however, for another party to the proceeding, CALTEL, then filed a petition requesting that D.87-06-050 be stayed pending resolution of the issue of backbilling for access charges because of the unfair impact D.87-06-050 could have on IECs. Pacific opposed CALTEL's position, but this Commission adopted it and thus, by D.87-09-014, dated September 10, 1987, stayed D.87-06-050 thereby staying the three-month limitation (sometimes referred to as the 90-day limitation) on all backbilling, including that for IECs. Complainant, TURN, did not file a pleading in the CALTEL petition matter.

Two further actions have affected this issue since September, 1987. First was the filing of Pacific's Advice Letter (AL) 15388 on May 4, 1988, which was adopted, as supplemented, by Commission Resolution T-12091 on July 8, 1988, effective July 9, 1988. This advice letter revised Pacific's billing and collections services tariff, Schedule Cal. P.U.C. No. 175-T, Section 8, which until then only addressed exchange service, to limit backbilling of interLATA charges billed by Pacific to end users. The second

action was this Commission's issuance of D.88-09-061 in R.85-09-008. This decision resolved the issue of backbilling for access service, and therefore lifted the stay imposed by D.87-09-014 pursuant to CALTEL's petition. This decision was issued September 28, 1988 and had the effect of reimposing the three-month backbilling limitation on all telephone utilities in California, effective October 18, 1988.

TURN's complaint was filed April 22, 1988, about seven months after our stay of D.87-09-014 and about two weeks before Pacific filed AL 15388. It alleges that Sprint (at the time of the complaint) was backbilling residential end users for calls placed up to seven months through Pacific and up to one year through GTE California Incorporated (GTEC), that these "billing windows" exceed the backbilling practices of both Pacific and GTEC for local exchange service, violate Pacific's Rule 9.I.1, and violate deadlines established for local carriers and IECs in D.86-12-025. The complaint seeks (1) a lifting of the stay of D.87-06-050 (this was done in D.88-09-061); (2) an order directing Pacific and GTEC to discontinue terminating or threatening to terminate local service to customers who "refuse, or are unable, to pay for IEC calls beyond the 90-day restriction for subscribers or the 150-day limitation for casual callers"; (3) a reinstitution, at no charge, of telephone service for all residential customers who had their service disconnected "as a result of their inability or refusal to pay for IEC telephone calls backbilled beyond 90 days"; (4) a correction of all outstanding bills which bill beyond the enumerated backbilling periods; and (5) a refund of any charges associated with the termination and reconnection of service to those customers affected by the violations alleged by the complaint.

The Hearing

A hearing was held on the present complaint on August 17 and 18, 1988 at which time TURN presented four witnesses of its own

and presented the testimony of one witness for intervenor, Bill Correctors, Incorporated (Bill Correctors), the Commission's Division of Ratepayer Advocates (DRA) presented one witness, and Pacific presented one. Simultaneous opening and closing post-hearing briefs were filed on September 19, 1988 and October 3, 1988, respectively. The matter was submitted on the latter date. The hearing elicited the following testimony.

1. Bill Correctors

Robert C. Schwartz testified on behalf of Bill Correctors, a specialty auditing company which reviews the telephone bills of business end users for accuracy, requests refunds when errors are found, and charges as its fee for this service, 50% of any amounts it recovers. Counsel for TURN stated that the purpose of Schwartz' testimony was to show that Sprint "does indeed incur a number of billing errors" and that its customers may be "forced to pay under the threat of disconnection [by Pacific], ...for calls that they may not have made." Schwartz testified that for financial reasons Bill Correctors generally seeks clients with telephone billings in excess of $5,000 per month, and therefore Bill Correctors has no residential customers. He also testified in general terms about errors on clients' Sprint bills, some of which were apparently billed through Pacific, involving uncompleted calls, calls that reached a central office recording or were otherwise unanswered, long duration calls for which "the billing mechanism failed to disengage timely, creating a call of exceptionally long duration," misapplication of taxes and surcharges, and misapplication of monthly minimum usage charges.

During the hearing David Discher, counsel for Pacific, moved to strike certain testimony of Schwartz regarding billing by both Sprint and Pacific for the same calls. Schwartz was given two weeks to provide documentation of his testimony, but was unable to do so. Discher has renewed his motion by a letter to the ALJ dated September 8, 1988. Schwartz' testimony violates the best evidence

rule. The motion to strike is well taken, and is granted. The testimony in question shall not be considered in this decision.

2. TURN

a. Singer

TURN's first witness was Sharon Singer, who testified that she was a customer of Sprint and Pacific while residing in Berkeley, but that she called Sprint and told them she wished to cancel its service in September, 1987, after which she received Pacific bills which she claims included long-distance charges from AT&T, although she never called AT&T or any other company in order to establish a new long-distance carrier. In February, 1988 Singer called Pacific to change the billing name for her service to that of one of her roommates because she was moving to San Francisco. She received a final bill under her account name in Berkeley.

In San Francisco Singer used the telephone service of a roommate until April, 1988 when she changed that service into her own name. MCI was her long-distance carrier in San Francisco. Meanwhile, on March 23, 1988 Pacific sent Singer, at the Berkeley address, a "revised final bill" in the amount of $252.06, for Sprint service, mostly for October, November, and December, 1987. The oldest charge was for September 30, 1987, just over six months from the billing date. Singer testified that she contacted Sprint by telephone and was told that she had never cancelled her Sprint service, because she had not specified a new long-distance carrier. She testified that she "didn't take care of [the revised final bill] right away," and added that she was upset with the bill, explaining, "I didn't think that they could validly bill me that far back."

According to Singer, at the end of April, 1988, the same month she instituted service in San Francisco in her own name, Pacific cut off her service, without notice, for nonpayment of the Sprint charges. Pacific claimed, she testified, that it had sent her a notice in the mail and had talked to her husband. She had no

husband. In any case, Singer went to the local Pacific office to make arrangements to reconnect service. There she was given a second revised final bill for Sprint service at the Berkeley residence, now totalling about $490, and told that she must also pay a $20 charge for reconnection. She was asked to pay $50 at once and then to make biweekly payments of $50. She testified that she was not offered a monthly payment plan, and further testified that when she asked to change the plan to pay $50 on a monthly basis Pacific wrote back saying her service would be disconnected. At that point, on June 17, 1988 she took money from her savings and paid off the $340.34 balance.

In July, 1988 Singer received a bill from Sprint, for $118 for current service, sent to her San Francisco address, for her old Berkeley Sprint account, which was now in someone else's name. She called Sprint and was told it was a mistake and it would be taken care of. She threw the bill away. The next month, some two weeks before the date of her testimony, she received another bill from Sprint which contained the unpaid $118 plus current charges. The total was $131.79. Singer testified she called Sprint and was again informed that it was a mistake and her name would be removed from the bill.

b. Mancuso

TURN's next witness was Janice Mancuso. Mancuso testified that from 1984 until early April, 1988 she used, for business purposes, Sprint, but not as her primary long-distance carrier. She testified that it was difficult to reconcile her account because Sprint was very slow in posting payments received and generally showed a past due amount on its monthly bills even though she had paid on time. She regularly received a past-due notice with her bills from Sprint and she occasionally also received notices threatening to terminate service due to her past-due balance. She testified that she called Sprint and was informed

that the problem was due to the fact that Sprint's billing cycle was five weeks but its posting cycle was six weeks.

Mancuso received her first Pacific bill with Sprint charges on it on April 1, 1988, with a March 25 statement date. She never received notice from Sprint or from Pacific that her Sprint billing would be handled by Pacific. That March 25 bill included $205.50 in Sprint charges for service from October 12, 1987 to January 7, 1988. Mancuso was unemployed at this time. Having kept records of the calls she had made, Mancuso was able to verify that the bills she had earlier paid to Sprint for these time periods had excluded certain calls, and these were now being reflected on the Pacific bill. Mancuso testified she called Pacific on the day she received this bill and made arrangements to pay an extra $34 per month until the outstanding Sprint bill was paid off, with no interest accruing.

Mancuso cancelled her Sprint service the week of April 4, 1988, but received further back bills for Sprint in her April 25, May 25, and June 25 Pacific bills. After these bills were received, Mancuso spoke with Pacific and her payment plan was adjusted to $72. She did not pay her June 25 Pacific bill on time and received a notice from Pacific on July 9 that her service could be cut off. She made arrangements to pay the current balance due plus the $72 owing on back bills from Sprint. Mancuso testified that the first written notice she received that she might be backbilled for unbilled Sprint calls was by printed message on her April 25 Pacific bill (the month after Pacific started billing Sprint calls). She stated that that message now appears on each bill.

c. Detlefsen

George Detlefsen testified that he is a Sprint customer with two accounts, one which he just uses for travel purposes and one he uses for long-distance service from his home phone. Like Mancuso, Detlefsen first received a combined bill for Pacific and

Sprint services in his March, 1988 Pacific bill. That bill contained Sprint charges for October, 1987 through January, 1988 totalling $129.94. He testified that he received no prior notice that Pacific would collect for his Sprint service. He testified that when he began to receive these combined bills he paid the amount indicated on the bill for his Pacific service and for his AT&T service, but noted on his check that he was not going to pay the backbilling for Sprint. He stated that after about three months Pacific sent him a disconnection notice. He was disconnected about mid-July, 1988. He stated that he received no prior notice of the exact date when he would be disconnected, but that Pacific left at least one message on his answering machine, which a boarder in his home listened to and erased, leaving no phone number and only a message telling him to call "Karen." His Pacific service was reconnected after he paid one-sixth of the outstanding amount, and agreed to pay one-sixth of another one-sixth of the outstanding amount until the balance is paid off. He testified, however, that there were new backbilled Sprint amounts on subsequent Pacific bills and he was uncertain how much he was to pay, since his bill did not indicate the amount.

d. Siegel

TURN's final witness was Sylvia Siegel, its Executive Director. Siegel testified that her organization has been receiving consumer complaints about Sprint's backbilling for many months, with a surge of complaints in the fall of 1987 and in April of 1988. She stated that TURN met with Sprint officials in Kansas City via a one-hour conference call in February, 1988 to attempt to resolve the billing problems, and that Sprint representatives stated that they thought their billing was improving, but that in fact it did not improve and TURN continued to receive complaints from consumers. Siegel recited a list of the sorts of complaints her organization has received regarding Sprint billing and recommended that the Commission take four actions. First, she

stated that Pacific or any other local exchange company which is going to act as a collection agency for an interexchange company ought to be required to "register with the proper state authorities and be subject to the same rules as any commercial collection agency." Second, citing this Commission's responsibility to protect consumers, she urged the Commission to "assert jurisdiction in some fashion just to avoid these kinds of exploitation tactics of IECs who presently appear to be comforted that nobody's looking at them." Third, she asserted that all customers who have been disconnected because of improper backbilling should receive apologies, reconnection at no cost, and "compensation in the way of credits for the bills improperly collected...." And, fourth, she argued that all backbilling for service beyond three months should stop, asserting that Sprint as a "purveyor of service to captive utility customers" with limited alternatives has an obligation "to perform as a good business practitioner."

3. DRA

DRA called James Simmons, the author of the comments DRA filed regarding TURN's complaint. The comments were marked as Exhibit 1. Simmons' testimony generally supports TURN's position. It is Simmons' opinion that Pacific abuses its monopoly power, i.e. its ability to terminate local service for nonpayment, when it acts as a "common 'collection agency'" for Sprint, and he believes that Pacific should be required to account for that abuse.

Citing the language of the then-stayed D.86-12-025 Simmons asserts that backbilling in excess of 90 days "is unreasonable by AT&T-C and PacBell standards, which, the Commission has ruled, are the standards to be used as a gauge for the reasonableness of customers' expectations." On cross-examination he added that the customers' expectations that they would not be billed for service older than 90 days should not have been "shifted" by Pacific and Sprint without "at least a full warning of some kind." He argues that since the bill was coming from Pacific

it is reasonable for the customer to assume that the "same standards" would apply. He also argues that "[t]he customer's perception...is that there is one phone company and there is an expectation and there are standards for that service from the phone company."

Exhibit 1 suggests that an appropriate remedy for Pacific's making this change is to require, in a final decision in I.85-09-008, "restitution of any ill effects of PacBell's unreasonable backbilling practices on customers," retroactive to the date D.86-12-025 was issued on December 3, 1986. Simmons proposes that Pacific be required to inform its customers by bill insert that "contested" Sprint charges billed in excess of 90 days will no longer be collected by Pacific, and that customers should be able to submit claims to Pacific for credit or refund for "contested amounts" already paid on Sprint bills which were billed in excess of 90 days. He also proposes that Pacific be required to "report the total amount of collections involved and transfer this amount to an escrow account," and that amounts refunded or credited to customers under this plan be charged to Pacific's "accounts payable to Sprint."

4. Pacific

Pacific called its group product manager for billing and collection services, Carolyn Ukena, as its only witness. She explained the billing service which Pacific provides to Sprint, and why she believed Pacific's billing for Sprint was lawful. Ukena interprets Section 8 of Pacific's tariff Schedule Cal. PUC No. 175-T to require Pacific to bill all messages presented by a carrier. She testified that the tariff "does not authorize Pacific to deny billing and collection service due to the age of a message." The relevant portion of that tariff reads:

> "For end users in its operating territory where the customer has ordered bill processing service, the utility will bill all rated messages provided by the customer...."

Ukena testified that Sprint's billing tariff had no 90-day limitation, whereas AT&T-C's did. Thus, she noted that at the same time Pacific was backbilling for Sprint calls older than 90 days, it took the position that it was bound by AT&T-C's tariffs not to bill for AT&T-C service beyond 90 days.

Pacific has provided billing and collection services to US Sprint since its formation in July, 1986 and to its predecessors, GTE Sprint and U.S. Telecom since 1984. Ukena testified that when Pacific became aware, in the fall of 1987, through consumer complaints to its business offices, that it was billing aged messages for Sprint, Pacific was concerned about the effect that might have on end users. She further testified that Pacific "understood that it was a temporary problem that Sprint had," and that Pacific and Sprint reached an agreement on December 30, 1987 that Pacific would edit out messages older than six months from the data on the billing tapes it received from Sprint and return those to Sprint.

Ukena testified that Pacific believed six months to be a reasonable timeframe because most of the messages Sprint was sending Pacific were "casual code dial calls." When questioned, though, she stated that Pacific had no way of determining whether a particular message was casual code dialed or not and that she did not know why Pacific believed the majority of these calls to be casual code dialed. In any case, it is Ukena's position, and was her position at the time, that Pacific did not have the right to deny billing to Sprint based on the age of the message. She added that the six-month limitation was reached by negotiation, not by a unilateral Pacific decision. The six-month limitation agreement was effective on January 27, 1988.

On cross-examination Ukena acknowledged that the screening method Pacific used could permit a call as old as seven months, five days to be included on an end user's bill. However, Ukena added, Pacific was expecting imminent Commission action which

would reinstitute the 90-day limit imposed by the then-stayed D.86-12-025 (and a 150-day limit for casual caller traffic), and require that limitation to be incorporated into the Pacific tariff governing backbilling for IECs.

In the meantime, at Sprint's request, Pacific added a message to its bills to Sprint customers beginning in late August, 1987 explaining the temporary situation and stating that Sprint was in the process of improving its billing system. In January, 1988 Pacific added a paragraph to the message informing customers that if the dollar amount of the bill created a hardship Pacific would be willing to make payment arrangements.

On May 4, 1988 Pacific filed an advice letter to modify its billing and collection tariff to limit Pacific's backbilling of interexchange charges to 90 days. It was supplemented on June 13, 1988, and was approved by the Commission on July 8 and became effective July 9, 1988. Ukena testified that she prepared the first draft of the advice letter in late January, 1988.

When asked about reconnection, Ukena stated that in order to identify end users who have been disconnected as a result of Sprint backbilling, Pacific would have to review every account that had been disconnected, manually determine the cause, and manually process an order to reestablish the end user's line and associated services. Nonetheless she testified on cross-examination that Pacific "know[s] of no one who was permanently disconnected for nonpayment solely because of Sprint charges," however she added that there were temporary disconnections. She also testified that in order to determine which end users had received delayed Sprint billings Pacific would have to review every bill manually for every end user for every month in question. She estimated that such a review would require about two million hours of work for every month in question. This figure is based on an employee spending 15 minutes looking at each of the 8.5 million residence customer bills generated every month.

Ukena added that in her expert opinion Pacific's billing and collection service would be less attractive to carriers and would therefore result in less contribution and ultimately higher local and long-distance rates if Pacific did not have the right to deny local service for nonpayment.

Motions

There are four motions pending in this proceeding. One is for a cease and desist order, and three are motions to dismiss. We address each below.

1. TURN's Motion

TURN's Motion for Ex Parte Order to Cease and Desist was filed May 23, 1988. The Motion asks that we order Pacific, GTEC, and Sprint to temporarily suspend their billing of Sprint calls beyond the timeframe established in the then-stayed D.86-12-025 and to notify their customers of this change. It also asks that we order these utilities to cease and desist from "threatening customers with disconnection of [sic] nonpayment of...aged Sprint calls." These issues were mooted by our issuance of D.88-09-061 on September 28, 1988.

2. Pacific's Motion to Dismiss

Pacific's motion of August 2, 1988 asks that it be dismissed as a defendant because the tariff rule imposing a three-month limit on backbilling which TURN claims it is violating, Schedule Cal. P.U.C. No. A2.1.9.I.1 (Rule 9.I.1), does not apply to interLATA billing, and the 90-day backbilling limitation as it applies to IECs contained in D.86-12-025 was stayed and is therefore inapplicable. Pacific adds that when it acts as a billing agent for Sprint, Sprint's billing limitations are applicable, and there was no backbilling limitation in the then-effective Sprint tariffs. Pacific further adds that Section 8 of its billing and collection tariff was changed effective July 8, 1988 by Commission Resolution No. T-12091 approving AL 15388 (first filed on May 4, 1988), so that it thereafter limited the

backbilling of end users of interLATA charges by Pacific on behalf of interexchange companies (generally to three months).

Pacific's motion also asserts that its disconnection of end user service for failure to pay a backbilled interLATA charge is specifically authorized by Commission decision (D.85-01-010) and its Commission-authorized tariff Schedule Cal. P.U.C. No. 175-T, Section 2.1.8(c). Although the legal basis for Pacific's motion to dismiss goes unstated, it is apparent that Pacific concludes that the reasons enumerated show that TURN has failed to state a cause of action against it.

3. GTEC's Motion to Dismiss

GTEC's motion to dismiss asserts that "TURN alleges no violation of tariffs, of Commission decisions or orders, nor of any statute, ordinance or other law by GTEC or any other defendant...." It makes the same observation Pacific makes regarding the stay of D.86-12-025, and it notes that GTEC did not at that time have any tariff restricting its backbilling of calls made by end users of Sprint service. The motion further states that GTEC backbilled Sprint end users for calls greater than 90 days old from December 1987 through May 1988, but discontinued backbilling for directly dialed Sprint calls over 90 days old as of May 1988. It claims that GTEC has no record of ever disconnecting a customer's telephone service for nonpayment of Sprint calls backbilled for greater than 90 days. GTEC concludes that even if the Commission determines that the complaint should be sustained as to the other defendants, there is no cause of action stated against GTEC.

4. Sprint's Motion to Dismiss

Sprint's motion to dismiss claims that since the complaint does not specify that the bills which TURN complains of were for California intrastate calls, this Commission lacks subject matter jurisdiction, that the complaint is based solely on "unsupported allegations, arguments and contentions," and that any further action in this proceeding would be redundant since the

issue presented by the complaint is identical to the issue in the rehearing in R.85-09-008 then pending before the assigned ALJ. (That rehearing resulted in D.88-09-061 issued in September, 1988.) Sprint's motion also states that insofar as this complaint seeks to lift the stay imposed by D.87-09-014 it constitutes an application for rehearing which fails (by over six months) to meet the deadline for filing such application set forth in Rule 85 of the Commission's Rules of Practice and Procedure. For these reasons Sprint asks that the complaint be dismissed because it fails to allege any "violation of Commission rules, orders or decisions, and because US Sprint's actions have been entirely lawful...."

5. TURN's Response to the Motions to Dismiss

TURN responds to the motions to dismiss by arguing that Pacific and Sprint have violated Pacific's Rule 9.I.1 because they have cited no tariff or decision which grants billing authority in excess of that permitted by that Rule, and because "[t]here is no logical reason for Pacific to assume that its power to bill IEC customers would be any greater than its ability to bill its own customers." TURN asserts that "[t]ariffs are rules of inclusion, not exclusion" and that "a utility's authority is confined to those powers specifically granted by this Commission and the legislature." Thus, it concludes that tariffs must be "strictly construed" and that utilities have an obligation to interpret their tariffs and Commission decisions so as to grant ratepayers "the benefit of any doubt or ambiguity." TURN takes issue with what it sees as an implicit interpretation of the relevant tariffs and decisions which permits Pacific to terminate local service when billing on behalf of an IEC for service of the sort for which Pacific could not terminate service if it were billing on its own behalf. Finally, TURN's response refutes the jurisdictional claim of Sprint by attaching a sample backbill.

Discussion

1. Merits of the Complaint

As we see it, the only issue raised by TURN's complaint is whether it was reasonable for Pacific to interpret its billing and collections tariff Section 8 to either permit or require it to backbill end users for all rated messages provided by the IEC for bill processing service, or whether Pacific had an obligation to interpret this language to imply a three-month limitation on backbilling because of the limitation contained in its exchange service billing rule, and because of the broader three-month backbilling limitation which we imposed in D.86-12-025, even though that decision was stayed at times relevant to this complaint.

It appears that the testimony of the Bill Collectors' witness, TURN's witnesses, and DRA's witness was offered for the purpose of persuading this Commission that there are policy reasons which would make any interpretation which does not imply a three-month limitation to Section 8 unreasonable. What we learned from these witnesses, largely through anecdotes and without careful documentation, is that Sprint had difficulty with timely and accurate billing in 1987 and 1988, that it may have made billing errors in 1987 and 1988 which were then billed by Pacific in 1988 (with an apparent surge of backbilling happening in late March), that neither Pacific nor Sprint provided customers with prior notice that Pacific would be billing on Sprint's behalf, that Pacific apparently temporarily cut off customers' service for failure to pay for backbilled Sprint service, that Pacific may not have given proper notice before cutting off service on some occasions, and that though Pacific had an agreement not to backbill for Sprint service over six months prior to its billing date it did, on at least one occasion, exceed that limit by about one week. We agree with Sprint that "[t]he telephone calls questioned by TURN's witnesses could have resulted from the use of casual 10xxxx access to the network." We would point out that D.86-12-025, after

its provisions were lifted by D.88-09-061, limited the backbilling of casual calls to five months, not three months.

We cannot agree that the course of conduct described by the witnesses or the documentary evidence in this proceeding demonstrate such egregious conduct that it becomes possible and appropriate to reach beyond the normal meaning of the words of the applicable tariffs, rules, statutes, or Commission decisions to provide end users with equitable protection from otherwise unconscionable practices. The plain language of the relevant tariffs, rules, statutes, or decisions does not limit Pacific or any other local exchange carrier to backbilling on behalf of IECs to three months, and we will not impute it. The only decision which imposed such a requirement (and that was imposed only on direct dialed calls from presubscribed customers) was stayed. When Pacific came to this Commission specifically asking that we lift that stay as to backbilling end users, we did so, but then reimposed the stay a short time later. There was thus no tariff, law, or decision in effect which Pacific or any other local exchange carrier reasonably could have been expected to interpret to require them to limit backbilling of IEC calls to three months.

Further, given the wording of Pacific's Section 8, we agree with Pacific's witness Ukena that Pacific could not comply with its tariff and simultaneously refuse to backbill for IEC calls over three months old. The complainant's post-hearing brief does not convince us otherwise. We conclude that Pacific acted in good faith and in compliance with all tariffs, rules, statutes, and Commission decisions in backbilling on Sprint's behalf beyond three months. That being the case, Pacific's motion that it be dismissed should be granted. This determination is consistent with the recently issued D.89-02-022 in Case 88-04-033. In that decision we dismissed a similar complaint against Pacific for backbilling of Sprint charges more than three months old which were accrued prior

to November, 1987, finding that the backbilling was "not prohibited by any tariff, rule, or Commission order." (p. 6.)

While there is no evidence about GTEC's billing and collections tariff language, neither is there any evidence in this record regarding GTEC backbilling practices. Therefore, it is clear that GTEC's motion to be dismissed as a party must also be granted.

Further, while we would be much happier if Sprint had offered to forego backbilling for presubscribed directly dialed service older than three months in light of the direction this Commission was considering in R.85-09-088, the most that can be said about Sprint's behavior based on the evidence presented in this proceeding is that some witnesses experienced aggravating problems and errors in Sprint's billing procedures. Sprint's decision to backbill beyond three months did not violate any then-existing tariff or decision within the jurisdiction of this Commission. There are no allegations of wrongdoing in this complaint which apply to Sprint except to the extent of its participation in Pacific's billing and collections tariff. Since we have found Pacific's interpretation of its tariff to be accurate, there remains no separate allegation against Sprint and therefore its motion to dismiss this complaint in its entirely should be granted.

2. TURN's Request for Finding of Eligibility for Compensation

On October 11, 1988 TURN filed a Request for Finding of Eligibility for Compensation pursuant to Rule 76.54 of this Commission's Rules of Practice and Procedure requesting that we find that it is eligible to seek compensation in this proceeding should it prevail in this complaint. The request states that TURN will seek compensation from the Commission's Advocates Trust Fund. It acknowledges that a request for fees from the Trust Fund is not subject to the Commission's rules for intervenor's fees and

expenses (Article 18.7), but states that "for the sake of clarity and convenience, TURN will generally follow those rules in pursuit of fees for its substantial contribution to C.88-04-058."

We are sympathetic to TURN's difficulty, since there is no clear procedural direction to follow in seeking compensation from the Trust Fund. As we see it, TURN's request has merely put the parties on notice of its intention. It has no legal effect and requires no action by this Commission. The issue is furthermore moot since this decision does not find in TURN's favor.

3. Comments on the Proposed Decision

Several of the active parties filed comments on the ALJ's proposed decision in this matter pursuant to Rule 77.2 of the Commission's Rules of Practice and Procedure. The comments of GTEC were rejected by our Docket Office for not being timely. GTEC then filed a motion requesting authorization to file its comments late. The motion asserts that all parties were served with the comments on February 17, 1989 and that on the same day GTEC sent a copy to the Commission via Airborne Courier for overnight delivery. The Docket Office did not receive it until February 23. The document was due on February 21. Since all the parties were timely served and no prejudice will result, we will allow the late filing.

After careful consideration of all the comments we conclude that the proposed decision contained no substantive factual or legal error.

TURN's briefs and comments cite the case of Parts Locator Inc. v PT&T Co., (1982) 9 CPUC 2d, 262 as precedent for its position in this matter. We find that decision inapplicable. TURN asks that we highlight the "relevant distinctions" between the present case and the facts in Parts Locator. We wish to make it clear that we regard Parts Locator as an extraordinary decision which must be narrowly construed and limited to its particular facts. That case involved an enormously large backbill to a single customer apparently due to a series of telephone company errors in

calculating appropriate billing. Harm to the customer was compounded by the telephone company's misinformation about the magnitude of its monthly charges. The customer relied on that misinformation to great economic detriment.

The facts of the present matter are not analogous. In fact, the very issue of the backbilling which TURN complained of was already before the Commission in another proceeding, R.85-09-008. In that OIR this Commission had specifically addressed the backbilling limitations on long distance carriers, had instituted a backbilling limitation on end user billing, and then had specifically decided to impose a stay on that limitation. TURN and any other party who believed it would be harmed had an opportunity to participate in the proceeding that led up to that stay. TURN did not choose to participate. In fact, only Pacific opposed the petition for stay. Then, some seven months after the stay was imposed TURN filed this separate complaint. We recognize that the OIR has been lengthy and that TURN's resources are limited. Perhaps it simply overlooked its opportunity to participate in the R.85-09-008 proceeding. Whatever the reason, with a rulemaking proceeding already in progress the facts before us in this complaint do not establish a basis for resorting to the extraordinary remedy we invoked in Parts Locator.

Findings of Fact

1. TURN's Motion for Ex Parte Order to Cease and Desist was mooted by the issuance of D.88-09-061.

2. Pacific filed a motion that it be dismissed as a defendant.

3. GTEC filed a motion that it be dismissed as a defendant.

4. Sprint filed a motion to dismiss the complaint.

5. TURN has filed a Request for Finding of Eligibility for Compensation which states that it will seek compensation from the Commission's Advocates Trust Fund.

6. GTEC's comments on the ALJ's proposed decision were not received on time by the Docket Office.

Conclusions of Law

1. Neither Pacific, GTEC, nor Sprint has violated any applicable tariffs, rules, or decisions of this Commission.

2. The motions for dismissal of Pacific, GTEC, and Sprint should be granted for complainant's failure to state a cause of action against any them.

3. TURN's Request for Finding of Eligibility for Compensation has no legal effect and requires no Commission action.

4. Receipt of GTEC's late-filed comments will not prejudice any party, and is reasonable.

O R D E R

IT IS ORDERED that:

1. Pacific Bell's motion that it be dismissed as a defendant in this proceeding is granted.

2. GTE California Incorporated's motion that it be dismissed as a defendant in this proceeding is granted.

3. US Sprint's motion to dismiss the complaint is granted.

4. GTEC's motion to file late-filed comments is granted.

This order becomes effective 30 days from today.

Dated MAR 8 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

pb

ALJ/A.C/jt

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Toward Utility Rate Normalization, Complainant, vs. Pacific Bell Telephone Corporation, General Telephone of California, US Sprint Communications Company, Defendants.	Case 88-04-058 (Filed April 22, 1988; amended May 12, 1988)

Mark Barmore, Attorney at Law, for Toward Utility Rate Normalization, complainant.
David Discher, Attorney at Law, for Pacific Bell; Kenneth K. Okel and Kathleen S. Blunt, Attorneys at Law, for GTE California Incorporated; and Phyllis A. Whitten, Attorney at Law, for US Sprint Communications Company; defendants.
Randolph Deutsch, Attorney at Law, for AT&T Communications of California, Incorporated; James L. Lewis, Attorney at Law, for MCI Telecommunications Corporation; Messrs. Armour, St. John, Wilcox, Goodin & Schlotz, by Thomas J. MacBride, Jr., Attorney at Law, for California Association of Long Distance Telephone Companies; and Robert C. Schwartz, for Bill Correctors, Inc.; intervenors.
James S. Rood, Attorney at Law, and James Simmons, for the Division of Ratepayer Advocates.

O P I N I O N

Background

This complaint must be viewed in the context of other related actions pending before, or taken by, this Commission. The history of these proceedings began on September 10, 1985 with the

Discussion

1. Merits of the Complaint

As we see it, the only issue raised by TURN's complaint is whether it was reasonable for Pacific to interpret its billing and collections tariff Section 8 to either permit or require it to backbill end users for all rated messages provided by the IEC for bill processing service, or whether Pacific had an obligation to interpret this language to imply a three-month limitation on backbilling because of the limitation contained in its exchange service billing rule, and because of the broader three-month backbilling limitation which we imposed in D.86-12-025, even though that decision was stayed at times relevant to this complaint.

It appears that the testimony of the Bill Collectors' witness, TURN's witnesses, and DRA's witness was offered for the purpose of persuading this Commission that there are policy reasons which would make any interpretation which does not imply a three-month limitation to Section 8 unreasonable. What we learned from these witnesses, much of it through anecdotal hearsay and undocumented factual contentions, is that Sprint appears to have had difficulty with timely and accurate billing in 1987 and 1988, that it may have made billing errors in 1987 and 1988 which were then billed by Pacific in 1988 (with an apparent surge of backbilling happening in late March), that neither Pacific nor Sprint provided customers with prior notice that Pacific would be billing on Sprint's behalf, that Pacific apparently temporarily cut off customers' service for failure to pay for backbilled Sprint service, that Pacific may not have given proper notice before cutting off service on some occasions, and that though Pacific had an agreement not to backbill for Sprint service over six months prior to its billing date it did, on at least one occasion, exceed that limit by about one week. We agree with Sprint that "[t]he telephone calls questioned by TURN's witnesses could have resulted from the use of casual 10xxxx access to the network." We would

point out that D.86-12-025, after its provisions were lifted by D.88-09-061, limited the backbilling of casual calls to five months, not three months.

We cannot agree that the course of conduct described by the witnesses in this proceeding demonstrates such egregious conduct that it is necessary to reach beyond the normal meaning of the words of the applicable tariffs, rules, statutes, or Commission decisions to provide end users with equitable protection from otherwise unconscionable practices. The plain language of the relevant tariffs, rules, statutes, or decisions does not limit Pacific or any other local exchange carrier to backbilling on behalf of IECs to three months, and we will not impute it. The only decision which imposed such a requirement (and that was imposed only on direct dialed calls from presubscribed customers) was stayed. When Pacific came to this Commission specifically asking that we lift that stay as to backbilling end users, we did so, but then reimposed the stay a short time later. There was thus no tariff, law, or decision in effect which Pacific or any other local exchange carrier reasonably could have been expected to interpret to require them to limit backbilling of IEC calls to three months.

Further, given the wording of Pacific's Section 8, we agree with Pacific's witness Ukena that Pacific could not comply with its tariff and simultaneously refuse to backbill for IEC calls over three months old. The complainant's post-hearing brief does not convince us otherwise. It is filled with allegations which were never proven by the evidence and inappropriately attaches two documents which are not even a part of the record in this matter. We conclude that Pacific acted in good faith and in compliance with all tariffs, rules, statutes, and Commission decisions in backbilling on Sprint's behalf beyond three months. That being the case, Pacific's motion that it be dismissed should be granted.

While there is no evidence about GTEC's billing and collections tariff language, neither is there any evidence in this record regarding GTEC backbilling practices. Therefore, it is clear that GTEC's motion to be dismissed as a party must also be granted.

Further, while we would be much happier if Sprint had offered to forego backbilling for presubscribed directly dialed service older than three months in light of the direction this Commission was considering in R.85-09-088, the most that can be said about Sprint's behavior based on the evidence presented in this proceeding is that some witnesses experienced aggravating problems and errors in Sprint's billing procedures. Even if the evidence presented in this hearing showed egregious behavior on Sprint's part, and we were to find an equitable basis for imputing a three-month limitation in Pacific's billing and collections tariff, we still cannot imagine what legal basis we would rely upon for finding a violation of that tariff by Sprint. Sprint's decision to backbill beyond three months did not violate any then-existing tariff or decision within the jurisdiction of this Commission. There are no allegations of wrongdoing in this complaint which apply to Sprint except to the extent of its participation in Pacific's billing and collections tariff. Since we have found Pacific's interpretation of its tariff to be accurate, there remains no separate allegation against Sprint and therefore its motion to dismiss this complaint in its entirely should be granted.

2. **TURN's Request for Finding of Eligibility for Compensation**

On October 11, 1988 TURN filed a Request for Finding of Eligibility for Compensation pursuant to Rule 76.54 of this Commission's Rules of Practice and Procedure requesting that we find that it is eligible to seek compensation in this proceeding should it prevail in this complaint. The request states that TURN

will seek compensation from the Commission's Advocates Trust Fund. It acknowledges that a request for fees from the Trust Fund is not subject to the Commission's rules for intervenor's fees and expenses (Article 18.7), but states that "for the sake of clarity and convenience, TURN will generally follow those rules in pursuit of fees for its substantial contribution to C.88-04-058."

We are sympathetic to TURN's difficulty, since there is no clear procedural direction to follow in seeking compensation from the Trust Fund. As we see it, TURN's request has merely put the parties on notice of its intention. It has no legal effect and requires no action by this Commission. The issue is furthermore moot since this decision does not find in TURN's favor.

Findings of Fact

1. TURN's Motion for Ex Parte Order to Cease and Desist was mooted by the issuance of D.88-09-061.

2. Pacific filed a motion that it be dismissed as a defendant.

3. GTEC filed a motion that it be dismissed as a defendant.

4. Sprint filed a motion to dismiss the complaint.

5. TURN has filed a Request for Finding of Eligibility for Compensation which states that it will seek compensation from the Commission's Advocates Trust Fund.

Conclusions of Law

1. Neither Pacific, GTEC, nor Sprint has violated any applicable tariffs, rules, or decisions of this Commission.

2. The motions for dismissal of Pacific, GTEC, and Sprint should be granted for complainant's failure to state a cause of action against any them.

3. TURN's Request for Finding of Eligibility for Compensation has no legal effect and requires no Commission action.

O R D E R

IT IS ORDERED that:

1. Pacific Bell's motion that it be dismissed as a defendant in this proceeding is granted.

2. GTE California Incorporated's motion that it be dismissed as a defendant in this proceeding is granted.

3. US Sprint's motion to dismiss the complaint is granted.

This order becomes effective 30 days from today.

Dated _____, at San Francisco, California.